Gennario Maurizio Picardi (t/a Picardi Architects) **v Paolo & Aud Cuniberti** [2002] Adj.L.R. 12/19

JUDGMENT : His Honour Judge Toulmin CMG, Q.C: 19th December 2002. TCC.

1. This action arises out of a claim by a firm of architects, Picardi Architects against Mr. and Mrs. Cuniberti for fees for the refurbishment of their private dwelling house at 10 Stanley Crescent, London W11.

2. Mr. Picardi claims:
   (1) A declaration that the contract between the parties incorporated (a) Mr. Picardi's letter of appointment dated 9th March 2000; (b) the completed copy of the RIBA conditions of engagement – CE/99 – sent with the letter of 9th March 2000; and (c) the "model adjudication procedure", published by the Construction Industry Council.
   (2) Enforcement of the adjudicator, Mr. Rowlinson's decision, made on 10th September 2002, that Mr. and Mrs. Cuniberti pay the sum outstanding of £42,862.19, plus £7,500.88 VAT, together with the adjudicator's fees of £5,760 plus VAT and interest.

3. It is agreed between the parties that the declaration is a necessary first step, since, if there is no contract incorporating provisions relating to adjudication, the right to adjudication does not, in the case of a dispute relating to a dwelling house, arise automatically under Section 196 of the Housing Grants Construction Regeneration Act 1996 ("the Act").

4. In these circumstances, absent any contractual agreement to refer to adjudication, there is no decision of the adjudicator within the meaning of the Act to be enforced by the Court.

5. The facts must be considered against the background that the Defendants raise three defences:
   (1) No contract was concluded between Mr. Picardi and Mr. and Mrs. Cuniberti which incorporated the RIBA conditions of engagement. In particular, Mr. and Mrs. Cuniberti never accepted the offer contained in Mr. Picardi's letter of appointment.
   (2) If there was a contract between the parties which incorporated the RIBA conditions of engagement, then, given the very specific and onerous obligations within clause 9.2 relating to adjudication, insufficient notice of the conditions was given to Mr. and Mrs. Cuniberti and the provision is, therefore, unenforceable.
   (3) Even if clause 9.2 was incorporated into the contract between the parties, the clause should be declared to be of no effect by reason of the Unfair Terms in Consumer Contracts Regulations 1999 and, in particular, schedule 2(i)(q). Schedule 2(i)(q) provides that terms which have the object or effect of
   "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."

6. The Claimants' case at the start of the hearing was that, although the Defendants did not sign the draft contract which they admit they received with the letter of 9th March 2000, they made payments thereafter in respect of monthly invoices which were submitted to them. The Claimants contend that the Defendants did not raise any queries in relation to the invoices, which stated specifically that they related to an agreement dated 9th March 2000, to be signed by the Defendants, and that the invoices were served pursuant to that agreement and in accordance with RIBA work stages. In these circumstances, the Defendants were taken to have assented to the contract, including the RIBA terms. In the course of the hearing, the Claimants put forward the claim that the Defendants had agreed in advance to the terms of the draft contract, which the Claimants sent with their letter of 9th March 2000.

7. As to the contention that Mr. and Mrs. Cuniberti were not given specific notice that adjudication provisions were incorporated in their contract, the Claimants say that the relevant provision of law only relates to a particularly onerous or unusual term, and that the term relating to adjudication was neither onerous nor unusual.

8. With regard to the Regulations, the Claimants accept that Mr. and Mrs. Cuniberti come within the definition of "consumer" and that Mr. Picardi is a "seller", and that, therefore, the Regulations apply to the contract. The Claimants say that the process of referring a dispute to adjudication does not hinder

the right of either party to take legal action in court, or refer a matter to arbitration. Furthermore, they say that it does not act to the detriment of the consumer, since either party may refer the matter to adjudication.

9. Finally, the adjudication procedure does not exclude the right of set-off, one of the Defendants' allegations of unfairness. In this case, the claim of Mr. and Mrs. Cuniberti to set-off was not dealt with in the adjudication, because their solicitors, Masons, specifically excluded it from the matters referred to the adjudicator.

The facts

10. Mr. Picardi is a well-established architect, practising from Lichfield Studios, 119 Oxford Gardens, London W10. Mr. Cuniberti is the Managing Director of the financial house J.P.Morgans' London office. His wife is a high-level trained economist. She played a significant part in the history. For much of the time she was the direct link between the Cunibertis and Mr. Picardi.

11. The cost of refurbishment of the Cuniberti's house at 10 Stanley Crescent, London W11, had amounted by February 2001 to well over £2.4 million. A summary of monthly invoices from Mr. Picardi shows that from 2nd February 2000 to March 2002 Mr. and Mrs. Cuniberti paid Mr. Picardi something in the region of £270,000, including VAT, in fees relating to the project. The relevance of those payments is disputed by the parties. The Claimants say that they are referable to and affirm the contract. The Defendants deny this.

12. In December 1999, Mr. and Mrs. Cuniberti asked the Royal Institute of British Architects (RIBA) to recommend an architect to undertake extensive restoration and internal alterations to their house in Notting Hill. Mr. Picardi was notified by the RIBA, by a letter dated 20th December 1999, that he was being recommended, along with others, for this project (although he was not given the name of the prospective client or the precise location of the property).

13. The parties had a preliminary meeting on 14th January 2000. Mr. Picardi said that, in general, it was not his normal practice to retain notes of meetings, but that he would write immediately to the client after important meetings, to record what had taken place and what had been agreed.

14. On 19th January 2000, Mr. Bottomley, of Sampson Associates, wrote to Mrs. Cuniberti with his proposal for the appointment of his own firm as quantity surveyors for the project. He set out the roles of the various parties, acknowledging to Mrs. Cuniberti that "You have considerable experience in these matters, so please forgive me if you find that I am stating the obvious." (I heard in evidence that Mr. and Mrs. Cuniberti had had a bad experience a few years before in refurbishing another property.) The letter from Mr. Bottomley recommended another firm, Sturgis & Co, as the appointed architects, and set out the responsibilities which it was expected to undertake. The letter also set out the proposed role of the quantity surveyors and the contractors, and explained that the contract was designed to be fair to both parties, and that the architect and quantity surveyor would have a quasi judicial role in administering the contract impartially.

15. The Cunibertis met Mr. Picardi and, after the meeting on 20th January 2000, Mr. Picardi wrote to Mrs. Cuniberti on 21st January 2000, with a preliminary proposal for the redesign of the lower ground floor at 10 Stanley Crescent. The letter said:
"We have also discussed your design requirements for the rest of the house, but for the time being we shall limit our involvement to the following scope of work."

16. Under the heading "Fees" the letter stated that the fees would be on a time-charge basis, and the letter provided an estimate of the number of hours which Mr. Picardi estimated would be required to complete the initial stage of the work. The letter went on:
"In the event that the project continues beyond the limited appointment, the above fees will rank as payments on account."

17. There was a further meeting on site on 27th January 2000, which was reflected in Mr. Picardi's letter of 28th January 2000. It referred to a first conceptual proposal for work on the lower ground floor, planning and pre-planning permission. Under the heading "Detailed Design Stage and Tender", it said

that once in receipt of planning permission, the following could be started – detailed drawings (with relevant input from structural and services engineer), a specification, and a tender document.

18. Mr. Picardi said:
"To save time, some of the above could be commenced prior to planning, but please note that there may be a risk of carrying out abortive work."

19. Mr. Picardi noted that Mrs. Cuniberti was making separate appointments with other consultants, and told Mrs. Cuniberti that his associate was an expert in mechanical and electrical services, whose services could be used. It appears that it was at this meeting that the Cunibertis and Mr. Picardi discussed further the possibility of Mr. Picardi being involved in the renovation of the whole house.

20. On 2nd February 2000, Mr. Picardi sent an invoice to Mrs. Cuniberti in respect of time-charged services. The job is said to be "As per letter of 20th January 2000", although I was told that this was a mistake and the reference was to the letter of 21st January 2000. There is a specific reference under "Stage" to "RIBA work stage A-B – in section and feasibility". There is no suggestion that Mr. Picardi explained this or went through the RIBA form at this stage. The hourly rate quoted on 21st January 2000 was £75 an hour plus VAT (plus expenses). Mr. Picardi's 16 hours were in fact charged out in the invoice at £85 per hour plus VAT, and his associate Mr. Gosney's time was charged at 25 hours at £65 an hour plus VAT.

21. In a letter dated 3rd February 2000, after a meeting on the previous evening, Mr. Picardi raised the question of his fees for the next stage. He said:
"You will recall in my letter of 21st January I set an initial amount of 40 hours for this initial stage. This amount has now been exceeded. May I take this opportunity to suggest that at our next meeting we discuss your detailed requirements and my terms of appointment. I look forward to meeting you on site, Monday 7th February at 1.30 p.m."

22. There were meetings between the parties on 7th and 10th February 2000. At the meeting on 10th February 2000, Mrs. Cuniberti and Mr. Bottomley met first, and were later joined by Mr. Picardi.

23. After the meetings on 10th February 2000, both Mr. Picardi and Mr. Bottomley wrote to the Defendants. Mr. Picardi's letter, dated 11th February 2000, reviewed the design progress and said that he was happy to receive instructions to proceed with the scheme. The letter referred to planning issues. The letter ended under the heading "Account":
"Please find enclosed our fee and expense accounts for the month of January 2000. We shall continue to work on time/charge basis until our terms of appointment are agreed, and would like to advise that typically this is a rather intense stage as we are moving from feasibility to the completion of the scheme design work stage. Correspondingly, the number of hours spent on the job could be substantial. Of course I will be happy to explain this further if you so require."

24. In his oral evidence, Mr. Picardi said that at the 10th February 2000 meeting there was no discussion about a percentage fee for the work. He said later that there was discussion about the terms of agreement, but no agreement was reached. He seemed to suggest that percentages around 12½% for new work and 9% for refurbishment were discussed. He said that RIBA conditions would have been discussed, but he agreed that there was no reference to them in the 11th February 2000 letter. Later, he said that he did not remember percentages being discussed in February.

25. Mr. Bottomley wrote on the same day to thank Mr. Cuniberti for appointing him as quantity surveyor on the project. He said in oral evidence that until 10th February Mr. Picardi was carrying out a one-off feasibility study on the glass roof conservatory. It was on that date that the remit was extended to the whole project.

26. Mr. Picardi wrote after the meeting with Mrs. Cuniberti on 18th February 2000, to confirm the main points of the meeting on that date. The meeting related to the conservatory. Under the heading "Fees" he wrote:
"Our accounts for the month of January were sent last week (refer to my letter of 11th February). It was agreed that the account for the month of February will also be on time-charge basis, and that our terms of appointment will be discussed when we are all back at the beginning of March."

27. The invoice for the work in February 2000, sent with the letter of 9th March 2000, was for 128 chargeable hours, split between four members of Picardi Architects, although the majority of hours were charged by Mr. Picardi, 35, and Mr. Gosney, 86. So far, none of the correspondence mentioned contracting on the basis of RIBA terms. This accords with Mrs. Cuniberti's recollection.

28. There were meetings between Mr. Picardi and Mr. Bottomley and Mrs. Cuniberti on 7th and 8th March 2000. Mr. Picardi said in evidence that he had the RIBA documents in his briefcase and offered to go through the RIBA conditions. He said that Mrs. Cuniberti said that she did not need to look at the RIBA conditions, because she had appointed an architect before. Mr. Bottomley did not take any notes of the meeting, but he said in oral evidence that the percentage split was openly discussed at the meeting, and that on his recommendation Mrs. Cuniberti agreed the percentages of 12½% and 9% on a project which would be in the range of £1 million to £1.5 million. Mrs. Cuniberti said that the agreement on figures came much later.

29. On 9th March 2000, Mr. Picardi wrote two crucial letters to Mrs. Cuniberti. In the first letter he wrote:
"Appointment. Please find enclosed the letter of appointment for your examination and signature. Should you have any query I will be happy to discuss it further."

30. The letter then discussed "design – rear and conservatory and design – rest of house." Under "Fees and Account" the letter said:
"As you would appreciate, until such time as the scheme design is frozen, we would be carrying out appraisal and studies of alternative and construction approaches which are outside the work stages under a percentage fee. My proposal for this is as follows (subject to the appointment being agreed.)"

    It then refers separately to the hours recorded for January and February 2000.

31. The annexed document included a two-page covering letter, dated 9th March 2000. On the second page, under the heading, "Agreement", the document declared that:
"The client wishes to appoint the architect to the project, and the architect has agreed to accept such appointment upon and subject to the terms set out in this letter of appointment and the attached copy of the RIBA form conditions of engagement for the appointment of an architect (CE/99) as completed."

    The draft agreement was signed by Mr. Picardi as architect, and dated 9th March 2000. It is common ground that it was never signed by the Defendants.

32. In evidence, Mr. Picardi agreed that the draft followed the RIBA model letter of appointment for architects. The first paragraph of Mr. Picardi's letter is adapted from the RIBA pro forma. It reads:
"Thank you for inviting us to act as your architect in connection with the above project. As agreed during the recent meeting, I confirm our terms and other matters as set out in this letter."

    The pro forma is shorter.
"Thank you for inviting us to act as your architect in connection with the above project. We confirm our terms in this letter."

33. The next paragraph in the letter, referring to the conditions of employment and the basis of fee calculation, as described in the RIBA form, is identical with the RIBA pro forma. The third paragraph is also identical:
"I confirm that the enclosed copy of the form includes the schedules, completed as agreed, and shows the conditions individually negotiated at the time. Please let me know if you require any other amendment."

34. It is common ground that this representation was untrue. The schedule had not been individually negotiated. The words, "Please let me know if you require any other amendment", make it clear that the contract terms had not previously been agreed.

35. Schedule 4, dealing with professional indemnity insurance cover, was also in identical terms to the pro forma. It said:
"We confirm that we maintain professional indemnity insurance cover of £500,000 [figure added], and this will be the maximum limit of our liability to you arising out of this agreement, except to the extent that this is incompatible with statute. Any such liability will expire after six years from the date of practical completion for the construction of the project."

36. This insurance cover was substantially less than the expected cost of refurbishment. There was no discussion as to whether further insurance was necessary and who was going to pay for it.

37. Mr. Picardi had to agree that there was no question of specific agreement to this clause, since he had not previously raised it. Without explanation, it is also difficult to expect a lay person (and even a professional) to know what "except to the extent that it was incompatible with statute" might mean.

38. There followed a clause, again in identical terms to the pro forma, saying that, without prejudice to the right of adjudication, any dispute or difference should be referred to an arbitrator nominated by the Claimants' own professional body, the President of RIBA. Again Mr. Picardi had to concede that this clause had not previously been discussed with the clients. The right of adjudication was also not specifically raised.

39. The letter enclosed the RIBA Conditions of Engagement. At the foot of the page headed "Schedule 1", Mr. Picardi had initialled and dated the panel which said, "As referred to in the letter of appointment dated 9th March 2000." The space for the client to initial had been left blank, and remained blank.

40. The conditions of engagement, which were annexed, included paragraphs 5.10 and 5.11, relating to payments due to the architect and the inability of the client to withhold payment; paragraph 5.12, payment notices; paragraph 7.3, architect's liability limiting liability to the sum set out in the letter of appointment; and paragraph 7.5, third party agreements. None of these clauses was drawn to the attention of Mr. and Mrs. Cuniberti, let alone specifically negotiated.

41. The same position applied to Paragraph 9, which dealt with dispute resolution. Paragraph 9.1 dealt with negotiation in accordance with the RIBA conciliation procedure. Paragraph 9.2 dealt with adjudication in England and Wales and read as follows:
"Where the law of England and Wales is the applicable law, any dispute or difference arising out of this agreement may be referred to adjudication by the client, or the architect, at any time. The adjudication procedure and the agreement for appointment of an adjudicator shall be as set out in the 'Model Adjudication Procedures' published by the Construction Industry Council, current at the date of the reference."

42. After dealing with adjudication in Scotland, the conditions of engagement continued:
"The adjudicator shall act impartially and shall be entitled to take the initiative in ascertaining the facts on the law relating to the dispute. The decision of the adjudicator shall be binding on both parties until the dispute is finally determined by arbitration pursuant to clause 9.5 hereof."

43. Clause 9.4 provides that:
"Where no adjudicator is named in the agreement, and the parties are unable to agree on a person to act as adjudicator, the adjudicator shall be a person to be nominated at the request of either party by the nominator identified in the letter of appointment."

The nominator is, again, to be the President of the RIBA, Mr. Picardi's professional body.

44. Clause 9.5 sets out provisions for arbitration and clause 9.6 deals with costs. None of this section was negotiated or drawn to the specific attention of Mr. and Mrs. Cuniberti.

45. There is no evidence that Mr. and Mrs. Cuniberti received copies of it, but the RIBA has produced a commentary on the standard form of agreement. It includes notes for architects in preparing and completing the documents to be sent for signature. The notes contain much invaluable information, relevant to a consumer's understanding of the contract. In relation to earlier clauses, to which I have already referred, the guidance points out, in relation to 5.11, that:
"Notwithstanding the requirement of the client to give notice of any intention to withhold payment of any part of an account (5.12.2), the right of the client to withhold payment or to set off has been excluded unless the amount to be withheld has been agreed or awarded in adjudication, arbitration or litigation."

46. Clauses 7.2, 7.3 and 7.4 – Architect's Liability – contain important guidance:
"These clauses provide for the architect's liabilities to be defined, rather than left to the general law and/or to be based on a fair contribution depending on responsibility. The period of time, the maximum amount of damages payable equivalent to the amount of PI insurance cover, are agreed by the parties and recorded in the appendix to the conditions.

The parties decide the amount of insurance for the project – it is not necessarily the amount of cover carried by the architect."

As I have said, Mr. Picardi did not follow this guidance.

47. The section dealing with dispute resolution gives a helpful account of adjudication and the advantages and disadvantages of arbitration as against litigation, although the practice and procedure of the Technology and Construction Court is rather cursorily dealt with.

48. Under the section headed "Preparing and Completing the Form", there are some important notes for architects. The guidance refers specifically to the Unfair Contract Terms in Consumer Contracts Regulations 1994 (SI 1994 No 3159). (In fact these regulations had been replaced by the Unfair Terms in Consumer Contracts Regulations 1999 (1999 No 2083), in force from 1st October 1999.) The guidance says that the regulations:
"…are designed to protect consumers from inappropriate provisions imposed by a supplier. An architect who has a consumer as a client may therefore need to consider the effects of the Regulations on the agreement with the client… To comply with the Regulations the terms in an Agreement and/or a Letter of Appointment with a consumer client should be individually negotiated in good faith. Architects will know that the requirements of both RIBA and ARB codes of conduct mirror the requirement for good faith in the regulations. Although the terms of the RIBA Forms of Appointment are intended to be equitable in the context of consumer legislation, it would obviously be beneficial if the architect offers to explain to a consumer client the scope of the proposed agreement. In particular, clauses relating to payment regimes or to any limitation of liability, or to limitation of monetary loss set at the maximum Professional Indemnity Insurance, or limitation of loss set at the maximum Professional Indemnity Insurance Cover available for the project, should be explained to the client."

49. It says that the architect should ask the consumer client
"To consider these matters carefully and to discuss any problems, subsequently record the discussions in correspondence, and, in an additional Article 7, as recommended below, to provide evidence that the negotiations were carried out in good faith. Even so, obtaining agreement may not prevent some term becoming void in a dispute."

50. Under "Disputes – Consumers and Residential Occupiers", it suggests that the effect of the Unfair Contract Terms Regulations is that a consumer has the right to decide whether or not to include the arbitration clause. If the clause is omitted, disputes will be settled by conciliation, adjudication if applicable, or litigation. The guidance recommends that a new article is inserted where, as in this case, the client is a consumer. It emphasises that:
"The article should not refer to any clause that client and architect agree shall not apply; such clauses should be crossed through in the conditions and initialled by the parties."

51. The draft clause is as follows:
"The client who deals as a consumer, and the architect, hereby confirm that the conditions of this agreement, including the entries in the Appendix, have been individually negotiated, and it is agreed that Article 5 and clauses 5.11, 5.12, 7.3, 7.5, 9.2 and 9.4 (Adjudication), 9.5 Arbitration (Legal Proceedings) and 9.6 shall apply."

52. There was no such additional clause in the draft contract offered to Mr. and Mrs. Cuniberti. On Mr. Picardi's own evidence, although he says he made a general offer to take Mrs. Cuniberti through the RIBA contract, he did not attempt to follow the specific guidance of the RIBA to go through the specific clauses which they identify, or to raise the particular points in writing.

53. There was clearly a further meeting, attended by Mr. and Mrs. Cuniberti and Mr. Picardi, on 14th March 2000. The letter of 16th March 2000, which followed, was copied to Mr. Bottomley. After dealing with ongoing matters relating to design and planning, Mr. Picardi dealt with "Fees and Account". He said that he hoped the letter of appointment sent on 9th March 2000 was clear, but, should there be any query, Mr. and Mrs. Cuniberti should let him know. He then went on to discuss the apportionment of the hours for February. He said that he had arranged a meeting with Kevin Bottomley on 23rd March 2000 to go through the design and to agree a reasonable apportionment of

the account. Mr. Picardi ended: *"The relevant apportionment will rank on account of the percentage-based fee."*

The letter makes no reference to Mr. Picardi having offered to go through the proposed contract with Mrs. Cuniberti, and her saying that it was not necessary.

54. On Mr. Bottomley's copy of the letter is endorsed, "New build 12½%. Refurb 9%. Main Cont + A + B Time Clause." At the side, with the 12½% and 9% bracketed together, are the words "RIBA C-L."

55. In his letter of 14th August 2002, Mr. Bottomley says that this was a contemporaneous note of an agreement reached on 23rd March 2000, in which the parties agreed that the RIBA work stages C to L would be charged as a percentage: 12.5% of new building elements, 9% of refurbishment elements, plus RIBA stages A + B would be on a time-charge basis. In the letter, he said that his account of the discussions was in the context of the framework of the RIBA agreement. No objection was raised by the Cunibertis in relation to this form of agreement. Mr. Bottomley said that Mr. and Mrs. Cuniberti gave the impression that they knew the terms of the RIBA contract, but he denied that they ever said that they had had a previous bad experience in relation to it, or that they refused to be bound by the RIBA terms.

56. In oral evidence, Mr. Picardi said that Mr. and Mrs. Cuniberti told him at the meeting on 14th March 2000 that there was no problem with the letter and that it would be signed in due course. This was denied by Mr. and Mrs. Cuniberti. It is also not reflected in Mr. Picardi's letter of 16th March 2000, to which I have already referred, or in the subsequent letter of 10th April 2000. He makes no mention of any agreement by the Cunibertis that they would sign the 9th March 2000 letter.

57. Mrs. Cuniberti gave evidence for the Defendants and said that they had had a bad experience with the RIBA standard contract in 1996, although the specific problem was caused by the flooding of their then dwelling house. Although it was not entirely clear, it appears that the case on that occasion involved a design problem. She said clearly that at the end of litigation in 1996, in which she and her husband were successful, she was advised by her solicitor never to sign an RIBA contract, because it was weighted in favour of the architect. She said that she told Mr. Picardi and Mr. Bottomley this. She said that she did not have intimate knowledge of the RIBA forms. (I note, as a matter of history, that the current edition in the year 2000 was the 1999 edition, not the earlier one.) She said that she was pretty sure that she did not discuss the RIBA terms with Mr. Picardi. Mr. Picardi does not suggest that she did discuss the RIBA contract, but merely that she said that such discussion was unnecessary.

58. Mrs. Cuniberti said that percentages were discussed for work after the preliminary stage. She had knowledge about when percentages were applied, because she had gone to the RIBA and they had told her that the normal range was 10% to 15%. She said that Mr. Picardi was very open and that they had had discussions, although she said the percentages were only agreed after Mr. Bottomley's retainer was terminated in the summer of 2000, when Mr. Picardi found 42 mistakes in the tender documents. The percentage figures were, she said, agreed to include some quantity surveying services.

59. Both Mr. and Mrs. Cuniberti deny that Mr. Picardi offered to take them through the RIBA form or that they said that there was no need for him to do so because of their previous experiences. Mr. Picardi and Mr. and Mrs. Cuniberti seemed to agree that a previous experience was mentioned, albeit in the context of there being no need to explain the RIBA form (Mr. Picardi), and a refusal to be bound by the RIBA terms because of the bad previous experience and the advice of her previous solicitor (Mrs. Cuniberti). The fact that they already had some knowledge of appointing architects is referred to in Mr. Bottomley's letter of 19th January 2000.

60. I must resolve the conflict of evidence between Mr. Picardi and Mr. Bottomley and Mr. and Mrs. Cuniberti. In general, I prefer the evidence of Mr. and Mrs. Cuniberti. If Mr. or Mrs. Cuniberti had said at the meeting on 14th March 2000 that there was no problem in signing the contract, I have no doubt that Mr. Picardi would have referred to it in the letter of 16th March 2000, or in subsequent letters. I find that Mr. and Mrs. Cuniberti did not say that they would have no problem in signing the contract. I accept that Mrs. Cuniberti, when mentioning her previous bad experience with an architect,

would have explained, at least in outline, the circumstances, and been anxious that it would not be repeated. I accept that Mr. or Mrs. Cuniberti told Mr. Picardi that they had been advised by their solicitors at the end of the previous litigation not to contract on RIBA terms.

61. I am satisfied that they did not say that they would contract on RIBA terms. I find that Mr. Picardi did not, as he said he did, offer generally to go through the RIBA terms with Mr. and Mrs. Cuniberti, and was told that it was not necessary. It was significant that when I asked him in the course of his oral evidence whether he offered to go through the specific terms recommended by the RIBA guidance, he said that he had not offered to do so. He may have formed the impression, from the explanation given by Mrs. Cuniberti of her previous bad experience, that she was, in general, conversant with the RIBA terms. This also may have come from the consultation which she had with the RIBA before Mr. Picardi was appointed. None of this was sufficient to relieve Mr. Picardi of the requirement to explain the matters in the RIBA guidance, and to go through the individual clauses in accordance with the RIBA guidance.

62. From 1st April 2000.

Mr. Picardi wrote to Mr. and Mrs. Cuniberti on 10th April 2000, enclosing the fee note for March 2000. The last paragraph of the letter is as follows:

"Agreement and fees. I have noticed our proposed agreement has not been advanced or signed as yet, and at this stage I would naturally wish to have already agreed this important issue. May I ask you to give this some attention? As per this office policy, please find enclosed our account of expenses for the month of March, together with a fee invoice which will rank on account for the percentage fee."

This letter is clearly inconsistent with the Cunibertis having already signified agreement with the RIBA terms and having expressed willingness to sign the draft contract. As far as I know, the Cunibertis did not reply to this letter, although they did pay the fee note.

63. The invoice for Mr. Picardi's professional services, which accompanied the letter, was in fact paid on 13th April 2000. This is heavily relied on by the Claimant as indicating agreement by performance. The invoice refers specifically to the relevant agreement as, "Agreement dated 9th March 2000 (to be signed by the client)." The type of fee is described as "Percentage as per agreement on 9th March 2000." The invoice is expressed to be "On account". The stage is expressed to be "RIBA work stage D, scheme design". The sum invoiced on account was £5,000. It was not referable to specific percentages. The words, "To be signed by the client" qualified, and would be taken by the Cunibertis to have qualified, the assertion that there was a concluded written agreement dated 9th March 2000. The position on the face of the document was that there was a written document to be signed by the client. This, of course, leaves open the question of whether it was an agreement that had yet to be concluded, or an agreement which had been concluded but which, as a formality, required the Cunibertis' signature.

64. This invoice must be read with the covering letter. The letter acknowledges that the terms of the letter dated 9th March 2000 had not been agreed by Mr. and Mrs. Cuniberti but that, for the purposes of invoicing, Mr. Picardi is proceeding on the basis that they will be agreed. This remains the position in relation to subsequent invoices, again simply taking invoices in isolation but reading them in the context of the letter of 10th April 2000.

65. The invoice for 1st May 2000 follows the same format. The agreement is still "To be signed by the client". The invoice is now 30% of the total fee. The stage is described as "RIBA Stage D/E. Scheme/detail design." The notes indicate that the initial cost plan, prepared by Mr. Bottomley on 2nd May 2000, shows a total estimated cost of refurbishment of £1,400,000. The fixed percentage fee for the conservatory is shown as 12.5%, and for refurbishment work to the house at 9%. Total cost assumed is £1,200,000, and out of a total bill (plus expenses) of £118,500. Mr. and Mrs. Cuniberti are asked to pay £30,550 plus VAT. The succeeding invoices follow a similar pattern.

66. It is not disputed that Mr. and Mrs. Cuniberti dispensed with Mr. Bottomley's services in the summer of 2000. Mr. Bottomley gives the date as the week commencing 10th July (see letter of 14th August 2002). It is also not disputed that Mr. Picardi took over Mr. Bottomley's quantity

surveying duties. It is at this stage that Mrs. Cuniberti says that she agreed to the proposed fixed percentage of 9% and 12½ %. There is no written evidence of this.

67. On 1st August 2000, Mr. Picardi sent an e-mail enclosing his fee account for July 2000:
"Please find enclosed my fee account for the month of July '00. It must be noted that during this month we have undertaken work which is additional to our agreement (like amending and reissuing tender documents, etc), or outside the scope of the contract…and look forward to discussing these additional services with you."

68. This is the start of a further dispute as to whether Mr. Picardi is entitled to additional remuneration for providing some quantity surveying services.

69. In the September 2000 invoice the contractor's tender value of £1,246,671 is substituted for Mr. Bottomley's estimated figure. A figure is included for activities outside the contract, and items within the remit of a quantity surveyor: "Review and redraft tender document" and "analyse tender and appoint Robin Ellis are to be agreed" along with "interior design".

70. On 14th November 2000, following a meeting on 8th November 2000, Mr. Picardi wrote to Mrs. Cuniberti. He confirmed their instruction to prepare the contract documents for the contractor in accordance with the standard CT form, and to have it signed by the contractor as soon as possible. He sent his account for the month of October and said that he had invoiced 50% of the total fee. Under the heading "Services", he wrote:
"At your convenience, I wish to discuss the (QS) services in connection with price monitoring valuations, etc. In the meantime, we are working under the current agreement, dated 9th March '00, copy of which should be signed and returned to us. With many thanks. Should you have any query on the above, please telephone me. See you soon."

71. Mr. Picardi enclosed the invoice for professional services. The contractor's tender value was expressed to be £1,574,097. The additional QS services "to be agreed" amounted to 65 hours. A similar invoice for January 2001 is marked as "Paid" on 15th January 2001. The number of hours "to be agreed" is 83 charged at £85 an hour, and 10 charged at £65 per hour.

72. On 29th March 2001, at a time when relations between the parties, were, so I was told, deteriorating, Mr. Picardi wrote to Mr. and Mrs. Cuniberti as follows:
"I have noticed that the agreement handed to you on 9th March '00 has not been returned signed and dated to us. Please note that our services to you are regulated by the agreement, but should you have any comment or query, please let me know. As you know, since then it has become necessary to vary the services. Hence I enclose for your attention 2 no. pages of the agreement, which have now been revised where marked and highlighted. These pages should be appended to the previous document and returned signed to us with the whole document."

73. There followed in the invoice a charge for QS service based on a fixed percentage of total construction costs of 2%. Picardi Architects are listed as the appointed QS. A new name, R. Daubney & Co, is listed as M & E sub-contractor.

74. The parties met on 30th March 2001. Mr. Picardi confirmed receipt of various instructions given at the meeting. Under Point 9 he said:
"*Finally, I handed you for your information a current query list, a set of latest floor plans and an update addendum to our current Agreement. Should you have any comment, please let me know."*

75. The April 2001 invoice reflected the cost assumed, for the purpose of fees, at £1,850,000 and quoted a fixed figure of 2%, amounting to £37,000. As before, the contract went unsigned.

76. The correspondence before me is incomplete at this point, because an e-mail from Mr. Picardi on 9th April 2001 refers to two e-mails of the 8th. No-one has suggested that anything material is missing. After dealing with other matters, Mr. Picardi says in his e-mail:
"6 Agreement: I pointed out to Aud (Mrs. Cuniberti) that my agreement has not been signed and returned since March '00, but we are working to it. She then mentioned that you have some concern with the Agreement. If this is the case, may I suggest we discuss it asap."

77. On 27th April 2001, Mr. Cuniberti sent Mr. Picardi an e-mail to confirm that they were appointing someone else to provide quantity surveying and project management services for the project. The e-

mail from Mr. Picardi, in response, suggests that there had been a stormy meeting on the previous day. Mr. and Mrs. Cuniberti had said that they would not pay the outstanding accounts.

78. There was a meeting on 3rd May 2001 between the parties and the new QS. Mr. Picardi recorded his version of events in an e-mail sent on the same day. He said that Mr. and Mrs. Cuniberti wished to terminate the relationship as soon as possible, but not so that it would cause damage to the contract. He noted that his fees had not been paid since February 2001. He said that the termination of the contract would have important repercussions and that liability, design and contract responsibility as arising from the agreement would have to be clearly redefined.

79. Mr. Cuniberti replied on 4th May 2001, saying that the fees claimed were based on two variables. (1) Value of the works. (2) Percentage of design works and QS duties completed. He offered to pay £20,000 on account, provided that Mr. Picardi would complete the outstanding design as quickly as possible and cooperate in resolving other matters. Mr. Picardi responded with a detailed e-mail, setting out the basis of the sums claimed.

80. There was a meeting on 11th May 2001 between Mr. Picardi and various others, but not Mr. and Mrs. Cuniberti. Mr. Picardi asked for Mr. and Mrs. Cuniberti to make decisions, and said that, until his contract was formally terminated:
"Our commitment to the project is full, and our duties will be discharged as required by the contract and as regulated under our agreement (refer to my letter of 9th March 2000 with the enclosed conditions of engagement.)"

81. He went on:
I would reiterate that the current form of contract is widely recognised thro' the industry, providing a well-experimented framework within which the obligation and duties of all involved parties are clearly understood and defined."

82. He ended by saying that the agreement provides for disputes to be resolved by adjudication.

83. It appears that Mr. and Mrs. Cuniberti paid some outstanding fees, but that arrears again built up. The contract dispute does not appear to have been addressed.

84. Matters flared up again in February 2002. On 7th February 2002 Mr. Picardi wrote a letter of complaint to Mr. and Mrs. Cuniberti, which arose from what he described as "The delicate contractual and financial situation". He said that his account of fees and expenses, based on a contract cost of £2,450,000, had been outstanding since September 2001. The letter referred to fees and expenses being regulated under the agreement dated 9th March 2000.

85. Mr. Cuniberti's letter of 15th February 2002 dealt with other matters in Mr. Picardi's letter of 7th February 2002, but said that the points which he raised in respect of the contract would be dealt with in due course. He said that they had been unhappy for a long time with Mr. Picardi's performance on the project.

86. On 7th March 2002 Mr. Picardi served Mr. Cuniberti with a notice of arbitration. He referred to a specific breach of condition 5.10 of the RIBA contract (relating to payments becoming due on the issue of architect's accounts). On 15th March 2002, Mr. Cuniberti said that there was a significant degree of uncertainty over the fee payable to the contractor and the calculation of the contractor's sum. He sent £10,000 on account.

87. On 27th March 2002, Mr. Picardi said that he was proceeding to request the President of the RIBA to appoint an arbitrator. On receipt of the cheque for £10,000, Mr. Picardi e-mailed Mr. Cuniberti, to say that he was placing the request for arbitration on hold for the moment.

88. By June 2002, the parties were openly consulting solicitors. In the course of the correspondence on 18th June 2002, Mr. and Mrs. Cuniberti, in a letter by their solicitors, Masons, wrote to Mr. Picardi:
"8. We do not accept that we have ever entered into a formal contract with you. However, we note that under the RIBA conditions of engagement, which you believe apply, the final date for payments of the amounts which you have invoiced this month will be 30th June 2002, i.e. 30 days from the date of your invoice."

89. This line of defence was amplified in Masons' letter of 3rd July 2002 to Mr. Picardi, which said:

"As we understand you are very well aware, Mr. and Mrs. Cuniberti made clear to you that their relations with you would not be governed by the RIBA conditions of engagement that you sent under cover of your letter of 9th March 2000… In discussions that took place in the early part of 2000, we are instructed that Mr. and Mrs. Cuniberti clearly explained to your Mr. Picardi that they had experienced problems through the use of a RIBA standard form in the past and that they were, therefore, not prepared to appoint you, or any other architect, on these terms in relation to the project at 10 Stanley Crescent. It was for this reason that these terms were not accepted and why the document you sent was not signed."

90. The letter said later:
"Crucially, at no stage did Mr. and Mrs. Cuniberti agree a level of percentage fee that your firm could charge for its involvement in the project."

91. This was contradicted by Mrs. Cuniberti, who said clearly that the 12½% and 9% rates were agreed in the summer of 2000. The letter noted that Mr. Picardi had not properly completed two parts of the conditions of engagement. The letter went on to detail alleged breaches of contract by Picardi Architects.

92. The Law.
Issue 1. The Claimant says that in relation to the engagement letter, the issue for the Court is: what was the purpose of the words referring to the signature of the documents? Were they an expression of desire, or did they signify a condition for the conclusion of the contract? They submit that I should find the first alternative.

93. In support of their contention on the law, the Claimant cites **Okura v. Navana** [1982] 2 Lloyds Rep 537 at 540, where Lord Denning, M.R, quotes from **Hatzfeldt-Wildenberg v. Alexander** [1982] 1Ch 284 at 288. The Defendants also pray **Okura v. Navana** in support. They note that in **Okura**, where the parties intended to conclude an agreement by a formal document, this was to be respected, even though all essential terms had in fact been agreed – see May L.J at 542.

94. The Claimant says that, in any event, the RIBA terms were incorporated into the contract by conduct, namely by the Defendants paying 15 invoices between April 2000 and October 2001, without saying or doing anything to indicate that they were unhappy with the terms. The Defendants say that the Claimant must show that the invoices were paid with the intention (actual or apparent) of accepting the offer – see **Chitty on Contracts** 28th Ed. Para 2-029 – and that they have failed to do so. It is clear that it is for the Claimant to prove that the alleged conduct is referable to an affirmation of the conduct, i.e. with an intention to accept or affirm acceptance of its terms.

95. The Defendants raise two separate defences if I hold that the RIBA contract was agreed.

96. First, (**Issue 2**), they say that, as a matter of common law, they are not bound by terms which were not sufficiently brought to their notice and, secondly (**Issue 3**), that, as a matter of statute emanating from a European directive, they are not bound by the terms.

97. **Issue 2 :** In relation to Issue 2, in **Spurling v. Bradshaw** [1956] 1WLR 461 at 466, Denning L.J in a very well known passage set out the position at common law:
"I quite agree that the more unreasonable a clause is, the greater the notice which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it, before the notice could be held to be sufficient. The clause in this case, however, in my judgment, does not call for such exceptional treatment, especially when it was construed, as it should be, subject to the proviso that it only applies when the warehouseman is carrying out his contract – not when he is deviating from it…"

98. In many cases, the tender of a contract with conditions will be sufficient to give reasonable notice of those conditions, but where the condition that is relied on is particularly onerous or unusual, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been properly and fairly drawn to the other's attention. As we shall see, this provides wider protection for the consumer than the legislation based on the European Directive, which only provides a remedy where the terms of the contract cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

99. Adjudication was introduced into English law by the Housing Grants Construction and Regeneration Act 1996, which stemmed from a report by Sir Michael Latham M.P in July 1994, entitled "Constructing the Team", reviewing procurement and contractual arrangements in the UK construction industry. Under Section 106, the Act, following the Latham Report, does not apply to a construction contract with a residential occupier. This could, therefore, properly be said to be an unusual contractual provision, which, if it is to be applied with the RIBA standard form, should be specifically negotiated with the consumer. The RIBA guidance refers to the UCTA Regulations 1994, but the common law provides a remedy in relation to those clauses in a contract which are particularly onerous or unusual and which are not brought to the attention of the consumer. The RIBA guidance itself identifies other clauses set out in a new Article 7, which should be individually negotiated. This clearly involves bringing these clauses to the specific notice of the other party. They include the clauses relating to adjudication and arbitration/legal proceedings, i.e. clauses 9.2, 9.4, 9.5 and 9.6.

100. **Unfair Terms in Consumer Contracts Regulations**
The statutory basis, which must be considered separately, is set out in the Unfair Terms in Consumer Contracts Regulations 1999 (1999 No. 2083). The legal basis for the English regulations is Directive 93/13EEC of 5th April 1993 on Unfair Terms in Consumer Contracts (OJ 1993 L95p29) ("the Directive").

101. The European Court of Justice gave guidance on its interpretation on 27th June 2000 in **Oceano Groupo Editorial SA v. Rocio Musciano Quantiro (Joint cases)** C240/98 to 244/98. Article 3(i) of the Directive provides that:
"A contractual term which has not been individually negotiated should 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."

102. The Court of Justice in **Oceano** pointed out that the annex to the Directive contains an "indicative and non-exhaustive list of the terms which may be regarded as unfair". Paragraph 1 of the annex refers to terms which have the object or effect of "(q) Excluding or hindering the consumer's right to take legal action or exercise any other legal remedy." In **Oceano** the term of the contract alleged to be in breach of the directive was a term conferring exclusive jurisdiction on the courts in Barcelona, where the plaintiff in the proceedings had their principal place of business but where none of the defendants were domiciled. The court had no difficulty in regarding such a term as unfair within the meaning of Article 3 of the Directive, insofar as it causes significant imbalance in the parties' rights and obligations arising under the contract to the detriment of the consumer.

103. The provisions of the Directive are transposed into the Unfair Terms in Consumer Contracts Regulations. Regulations 3 to 9 of the 1999 Regulations enact Regulations 2 to 7 of the 1994 regulations, with modifications to reflect more closely the wording of the Directive. Regulation 4 exempts mandatory, statutory or regulatory provisions. Regulation 5(i) reproduces the wording of Article 3(i) of the Directive. Article 5(ii) says:
"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."

104. Article 5 points to Schedule 2 of the Regulations, which contains an indicative and non-exhaustive list of the terms which may be regarded as unfair. I have already referred to Schedule 2(q). Article 6 is very wide. It sets out the means of assessment of unfair terms, requiring the Court to take into account the nature of the goods or services for which the contact was concluded, and by referring at the time of the conclusion of the contract to all the circumstances attending the conclusion of the contract and to all the other terms of the contract, or of another contract on which it is a defendant.

105. In **Director General of Fair Trading v. First National Bank plc** [2002] 1AC 481, the House of Lords had reason to consider the meaning of "significant imbalance" under the 1994 Regulation. At paragraph 17 of his speech (page 494), with which all the other Law Lords agreed, Lord Bingham of Cornhill described the test of significant imbalance under the Directive and the 1994 Regulations as follows:

"A term falling within the scope of the Regulations is unfair if it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer in a manner or to an extent which is contrary to the requirement of good faith. The requirement of significant imbalance is met if a term is so weighted in favour of the supplier as to tilt the parties' rights and obligations under the contract significantly in his favour. This may be by the granting to the supplier of a beneficial option or discretion or power, or by the imposing on the consumer of a disadvantageous burden or risk or duty. The illustrative terms set out in Schedule 3 to the regulations provide very good examples of terms which may be regarded as unfair; whether a given term is or is not to be so regarded depends on whether it causes a significant imbalance in the parties' rights and obligations under the contract. This involves looking at the contract as a whole. But the imbalance must be to the detriment of the consumer."

106. Lord Bingham goes on to emphasise that the requirement of good faith is one of fair and open dealing. *"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 other factor listed in or analogous to those listed in Schedule 2 of the regulations."*

107. Lord Steyn, at paragraph 36, said:
"The twin requirements of good faith and significant imbalance will in practice be determinative. Schedule 2 to the Regulations, which explains the concept of good faith, provides that regard must be had, amongst other things, to the extent to which the seller or supplier has dealt fairly and equitably with the consumer."

108. At paragraph 54 Lord Millett sets out a practical approach to the assessment of unfairness to the detriment of the consumer. He says:
"There can be no one single test of this. It is obviously useful to assess the impact of an impugned term on the parties' rights… by comparing the effect of the contract with the term and the effect it would have without it. But the inquiry cannot stop there. It may also be necessary to consider the effect of the inclusion of the term on the substance or core of the transaction; whether if it were drawn to his attention the consumer would be likely to be surprised by it; whether the term is a standard term, not merely in similar non-negotiable consumer contracts, but in commercial contracts freely negotiated between parties acting on level terms and at arms' length; and whether, in such cases, the party adversely affected by the inclusion of the term or his lawyer might reasonably be expected to object to its inclusion and press for its deletion. The list is not necessarily exhaustive; other approaches may sometimes be more appropriate."

109. The 1994 regulations were also considered by Judge Havery, Q.C, in **Zealander v. Laing Homes Ltd**, judgment 19th March 1999, and by Steele J. in **Standard Bank v. Apostolakis** on 9th February 2001. In **Standard Bank**, Steele J. decided that a jurisdiction clause which increased the cost and inconvenience of litigation contravened the Regulations.

110. The Claimant's case is that the Regulations provide a stricter test than the common law rules on incorporation. They say that adjudication is not onerous or unusual. There is no imbalance in the parties' rights and obligations so as to satisfy clause 5(i) of the regulations. Adjudication does not exclude any legal remedy (Schedule 2(q) of the regulations). Clause 5(1)(i) is not unfair. It does not restrict the right of set-off. Set-off can be considered in adjudication proceedings. It says that the 28-day timetable for adjudication (with a possibility of a 28-day extension) is a positive benefit to all parties in the resolution of their disputes. In short, adjudication provides a reasonable and sensible compromise between detailed consideration of the facts and a method of providing a provisional resolution of the dispute without finally deciding the parties' rights. In any event, the Claimant says that there is no inequality of the bargaining position of the parties, since Mr. and Mrs. Cuniberti are experienced professional people of substantial means, Mr. Picardi is effectively a sole practitioner with no previous experience of litigation or adjudication. Finally, the Claimant says that the JCT agreement for minor building works specifically includes an agreement that either party may refer disputes to adjudication, and since this Form was intended to be used for contracts with residential occupiers, it is an acknowledgement that adjudication is of benefit to consumers. The RIBA guidance notes also view adjudication as a benefit.

111. The Defendants' case is that the Regulations provide them with a remedy. The relevant clauses were not individually negotiated. In particular, adjudication administered by the RIBA caused a significant imbalance in the parties' rights to their detriment.

112. **Conclusion**

Issue 1. There is no dispute that Mr. and Mrs. Cuniberti were, and are, intelligent and well-qualified professionals. I find they did consult the RIBA in December 1999, asking for recommendations for architects to carry out their very extensive refurbishment, whose cost eventually reached more than £2 million. There was a series of preliminary meetings. In the course of these, I find that Mrs. Cuniberti told Mr. Bottomley about their previous bad experience. This will probably have occurred before their meeting of 19th January 2000, after which Mr. Bottomley wrote to Mrs. Cuniberti with his proposal for the appointment of his firm as quantity surveyors. It will certainly have occurred before March 2000.

113. On 2nd January 2000, at the meeting with Mr. Picardi, Mrs. Cuniberti agreed that Mr. Picardi would be retained to carry out preliminaries on the conservatory. His fees were agreed to be charged on a time-charge basis. Although the rate quoted was £75 per hour, Mr. Picardi's hourly rate was charged at £85 per hour and paid at the higher sum. On 10th February 2000, it was clear that Mr. and Mrs. Cuniberti wanted Mr. Picardi to proceed with the scheme. Mr. Picardi wanted to carry out the work, and discussions took place over the terms of appointment for the next stage. No agreement was reached.

114. After the meeting of 18th February 2000, the parties agreed that the terms of appointment would be further discussed at the beginning of March 2000. Meetings took place on 7th and 8th March 2000. I reject Mr. Picardi's evidence that he offered to go through these documents, which included the RIBA form of contract, but that Mrs. Cuniberti declined the offer, on the grounds that she knew the RIBA form. I am satisfied that Mr. Picardi, as he admitted, did not attempt to follow the RIBA guidance and take Mrs. Cuniberti through the specific terms identified in the RIBA guidance.

115. On 9th March 2000, Mr. Picardi sent his letter of appointment. I am satisfied that it was required to be signed as a condition of the conclusion of the contract. This is clear from the fact that the letter said clearly that the letter of appointment was for Mr. and Mrs. Cuniberti's examination and signature, and the fact that if they had any query Mr. Picardi would be happy to discuss it further. It is also clear from the other occasions when he wrote asking Mr. and Mrs. Cuniberti to return the contract signed. At no time did he suggest that the written contract simply reflected the terms already agreed.

116. I also reject Mr. Picardi's and Mr. Bottomley's evidence that at the meeting on 14th March 2000 Mr. and Mrs. Cuniberti said they had no problems with the contract, i.e. agreed its terms and said it would be signed in due course. The invoices, which were sent by Mr. Picardi and which were paid promptly, were said to be in respect of an agreement to be signed by Mr. and Mrs. Cuniberti, and were expressed to be payments on account.

117. I have no doubt that the percentages for stage payments were discussed and that at an early stage the percentages of 12.5% and 9% were put forward by Mr. Picardi and Mr. Bottomley. Payments on account were referable to these percentages from May 2000. The April invoice refers to percentages but does not state them.

118. I conclude that the Cunibertis' failure to sign the 9th March 2000 draft contract was entirely deliberate. It was a condition for the conclusion of the contract incorporating the RIBA terms that the Cunibertis would sign, and they did not do so. There was no contract between the parties made on or about 9th March 2000.

119. The next question is: were the RIBA terms incorporated in the contract by reason of the subsequent payments made by the Cunibertis? It is clear that Mr. and Mrs. Cuniberti were prepared to make substantial payments on account until October 2001. They did so from the invoice paid on 15th May 2000, on the basis of the 12½% and 9%. I make no finding whether this was based on an agreement to pay these percentages made before 15th May 2000, or an agreement reached a little later, after Mr. Bottomley had been discharged in July 2000.

120. Mr. Picardi was anxious to do the work. In order for the RIBA terms to be incorporated into the contract, payments by the Cunibertis would have had to have been referable to an assent by them to those terms. They were not. They continued to be made under the reservation that the Cunibertis, as Mr. Picardi acknowledged from time to time, were declining to sign the contract. It is clear that their payments are referable to the percentages of 9% and 12½%, which were agreed.

121. The parties could have continued on this basis until the conclusion of the work, if the relationships between the Claimant and the Defendants had not deteriorated in the autumn of 2001 and broken down in March 2002.

122. I find that the payments made by Mr. and Mrs. Cuniberti were payments on account, not referable to the draft contract of 9th March 2000, but referable to a subsequent agreement that, pending conclusion of a more detailed agreement (if one could be agreed), Mr. Picardi would charge in accordance with the agreed percentages and in accordance with the stages in the RIBA contract, which were known to Mr. and Mrs. Cuniberti.

123. I conclude, therefore, that the terms set out in the RIBA form were never agreed by Mr. and Mrs. Cuniberti, nor were incorporated into the contract by conduct. There was, therefore, no adjudication clause agreed between the parties. The adjudication was, therefore, invalid.

124. **Issue 2 – the common law**
This issue does not arise on the basis of my primary findings. It is appropriate, nevertheless, to give my findings on the two remaining issues, which I consider separately.

125. The first alternative addresses the position where the Defendants agreed to be bound by the RIBA conditions, but where they had not been drawn to their attention. The common law rule is that where there is a tender of a contract with conditions, those conditions which are particularly onerous or unusual, or ones which abrogate rights given under statute, must be brought properly and fairly to the other party's attention. This relates to basic freedom of contract and to the general proposition that it is unfair to impose on another party terms which are unusual and which they have not agreed. The question is not, as with the Regulations later, whether this clause causes a serious imbalance to the detriment of the consumer.

126. I am satisfied that the RIBA notes of guidance are correct in characterising clauses 5.10, 5.12, 7.3, 7.5, 9.2, 9.4, 9.5 and 9.6 as unusual terms which must be brought properly and fairly to the other party's attention. This means that before a party can rely on those terms, the architect must bring them properly and fairly to the attention of the other party. This did not happen. The least that Mr. Picardi would have had to have done, in accordance with the RIBA guidance, was to have drawn Mr. and Mrs. Cuniberti's attention specifically to the sections in the covering letter. The RIBA guidance refers specifically to the Unfair Terms in Consumer Contracts Regulations. In my view, its guidance should also apply equally to the common law.

127. The common law is, and always has been, concerned to promote fairness between the parties. As common form contracts in this country drafted by lawyers become ever more complicated, it is essential that both particularly onerous and unusual terms are specifically drawn to the attention of the other party. I include the requirement that either party may invoke an adjudication procedure in this. This is an unusual procedure invented for good reason, primarily to assist the construction industry to resolve its disputes. Parliament having considered the Latham recommendations, specifically excluded private dwelling houses from its application. A provision that, despite this exclusion, adjudication is to be included as a matter of contract, is clearly an unusual provision which must be brought to the specific attention of the lay party if it is later to be validly invoked.

128. **Issue 3.** It is not disputed that, for the purpose of the Regulations, Mr. Picardi is a supplier and Mr. and Mrs. Cuniberti are consumers and that the regulations apply. It is also not in dispute that the adjudication provisions were not individually negotiated. Here, the issue is whether or not the adjudication provisions caused a significant imbalance in the parties' rights and obligations arising out of the contract to the detriment of the consumer. The test, under Article 3(i) of the Directive, is: does the term cause a significant imbalance in the parties' rights and obligations arising out of the contract

to the detriment of the consumer? An instance of this is hindering the consumer's right to exercise a legal remedy. It is significant that a requirement to take a dispute to arbitration is an example of a significant imbalance.

129. Using Lord Bingham's test in **Director General of Fair Trading v. First National Bank**, is the term weighted in favour of the supplier so as to tilt the parties' rights and obligations under the contract? I also bear in mind Lord Millett's practical approach, which looks at the question of whether, had the clause been drawn to the attention of the Cunibertis, they would have accepted it. This is a useful cross-check, in that, if a party would obviously not have accepted it, this would be significant evidence that would tend to support the conclusion that it was a clause which was weighted in favour of the supplier so as to tilt the party's rights and obligations under the contract.

130. It is worth noting that, although there is a duty on the adjudicator to act impartially, the adjudication clause stipulates that, where no adjudicator is named in the agreement and the parties are unable to agree on a person to act as an adjudicator, the adjudicator shall be nominated, in this case by the architect's own professional body.

131. I conclude that a procedure which the consumer is required to follow, and which will cause irrecoverable expenditure in either prosecuting or defending it, is something which may hinder the consumer's right to take legal action. The fact that the consumer was deliberately excluded by Parliament from the statutory regime of the HCGA reinforces this view. Costs in an adjudication can be very significant. Unless it is properly explained to the consumer, the fact that the adjudicator is to be a neutral, even if nominated by the architect's own professional body, also may give the appearance of unfairness.

132. In addition, I accept the Defendants' argument that this provision must be seen in the context of other provisions in the RIBA standard contract: clauses 5.10 and 5.11 (the inability of the client to withhold payment); clause 7.3 (limitation of architect's liability); clause 7.5 (third party agreements); clause 9.6 (costs). These clauses reinforce my opinion that where clauses 9.2 and 9.4 are looked at in isolation, or with the other clauses taken as a whole, they are unfair and cause a significant imbalance in the parties' rights and obligations.

133. It is, of course, not coincidental that the RIBA guidance clearly requires their members individually to negotiate these clauses. They were right to give such guidance. Mr. Picardi did not do so and, if these clauses had been incorporated in his contract with Mr. and Mrs. Cuniberti, they would be excluded by reason of the Unfair Terms in Consumer Contracts Regulations.

134. I therefore, in summary, (1) decline to make a declaration, as requested by the Claimant, and (2) decline to enforce the adjudicator's award.

The Claimant was represented by Richard Harding, instructed by Decherts, solicitors.
The Defendants were represented by Simon Hughes, instructed by Masons, solicitors.