JUDGMENT : His Honour Judge Thornton Q.C. TCC 2nd May 2002.

1. ***Introduction***

1. This judgment is concerned with four preliminary issues arising in an action brought by the claimant, who was the main contractor who constructed a large hotel at Great Queen Street, London, WC2, the Kingsway Hall Hotel ("Impresa") and the defendant employer who is the proprietor of that hotel ("Cola"). The main contract was dated 24 June 1997 and it provided for possession of the site on 7 July 1997 and for a contract period of 19 months from the date of possession. The contract incorporated the 1981 edition of the JCT With Contractor's Design Standard Form of Building Contract. The Contract Sum was £10.35m.

2. The parties have been in dispute from an early stage of the contract. The principal areas of dispute initially concerned the extensive delays that occurred in achieving practical completion and the date or dates on which practical completion was achieved. Cola has always maintained that the delays that have occurred were largely because of extensive problems with the air conditioning system and other defects. Other areas of major dispute include the causes of delayed completion and Impresa's claims for additional loss and expense, Cola's claimed entitlement to liquidated damages for delayed completion, the meaning and effect of three agreements entered into on different days towards the end of the working period of the contract which varied the principal contract and the operation of the complex contractual adjudication provisions of the contract in relation to the disputes about defects and their inter-relationship with the arbitration or litigation of these disputes.

3. The parties appointed a legally qualified adjudicator to adjudicate at least some of the disputes in early 2000. Although several decisions have been issued, a residue, as at March 2002, remain for final decision. Meanwhile, Impresa instituted proceedings in August 2001, initially with the purpose of preventing a proposed call on the performance bond that Cola had threatened. I heard Impresa's application to restrain that call but dismissed it. However, the proceedings were then expanded by the parties to encompass all other disputes and, on 16 November 2001, I ordered that four preliminary issues should be tried over 2 days in March 2002. The significance of these four issues is that, if Cola succeeds on the third issue, Impresa's claims for loss and expense will be dismissed without the need to consider their merits and if Cola succeeds on the other issues, Cola's claims for liquidated damages and for some of the major defects will similarly be dismissed.

2. ***The Background to Issues 1 – 4***

4. The original contractual date for completion of the hotel was 7 February 1997. For reasons which are still in dispute, this date was obviously not going to be met. A meeting was held on 19 January 1999 between Mr B. Cola, the Managing Director of Cola, and Mr Ceruti, a senior executive of Impresa. The meeting was concerned with a possible extension of time for the completion of the work, the possible calling of the bond by Cola and the level of liquidated damages that could be imposed by Cola if Impresa was late in completing the work. This led to the first of the variation agreements, the February agreement, which was enshrined in an agreement dated 19 February 1999. The effect of this agreement was to provide for a new date for completion of 20 May 1999 save that the bedrooms would be made available to Cola on 20 March 1999. A new liquidated damages provision of £10,000 per day, instead of the original rate of £5,000 per day, was also provided for.

5. Of particular concern to Cola was the, to Cola, apparent difficulties with the air condition system, which did not appear to be functioning properly, the lack of fully heated towel rails and completed shower units in the bedrooms and the non-functioning of televisions and radios. Building works continued and the bedrooms were not available on 20 March 1999. Cola blamed the inadequate workforce and Impresa blamed the receipt of late instructions and variations. The 20 May 1999 completion date was also not met but, as Cola saw the situation and in reliance on its belief that Impresa had assured Cola that the hotel would be ready by 25 August, Cola announced that the hotel would be opening from 1 September 1999 and started to accept bookings accordingly.

6. In August 1999, it became clear that the hotel would not be ready to enable the 1 September 1999 opening date to be met. Thus, on 25 August 1999, Mr Cola and Mr Ceruti met again, accompanied by the parties' respective solicitors. This led to the second variation agreement, the September agreement,

dated 1 September 1999. This was a more complex agreement but, essentially, it provided for stage provision of parts of the hotel so that, by 12 September 1999 access would be allowed to the hotel to enable it to be fully operated as a hotel. Certain essential work, including the commissioning of the air conditioning system would not be complete by that date and Impresa was to use its best endeavours to complete the development as soon as possible. Significantly, the agreement provided in terms that nothing in it was to be deemed to amount to practical completion for the purposes of the original agreement, the enhanced rate for liquidated damages remained and the revised date for completion of 20 May 1999 was not altered.

7. Various parts of the hotel were handed over to Cola on various dates in September 1999 but no area handed over was, on hand over, as Cola saw the position, complete. This was particularly the case so far as the air conditioning was concerned. However, although Impresa regarded itself as having completed sufficient of the work to enable Cola to operate the hotel as a 4-Star Hotel by the end of September 1999, Cola did not agree. Furthermore, Impresa regarded the continuing slow progress towards final completion as being down to the continuing issuing of late and variation instructions to it be Cola.

8. This led to the third meeting between the parties. The meeting was preceded by Impresa giving details of its variation account dealing with the cost of all variations which had been ordered. The third meeting was concerned with whether practical completion had occurred, with the value of the works and of the final account and liquidated damages. The meeting was held on 12 October 1999 and was attended by Mr Cola on behalf of Cola and Mr Amadio and Mr Ceruti on behalf of Impresa. Both sides were accompanied by teams of technically qualified personnel and legal teams. The meeting led to the third and final variation agreement, the October agreement, dated 22 October 1999 which provided for a new and deemed date for practical completion, that no liquidated damages would be recoverable until 30 November 1999 by when all work was to be finished and a new rate for liquidated damages of £5,000 per day was agreed. The parties agreed a complex formula for the date on which practical completion was to occur being a date mid-way between the date the hotel first opened for business, 12 September 1999, and the date it was now agreed that it would be finished, 30 November 1999 or such later date that completion actually occurred. The agreement also covered the final value of the works and provided that the unpaid balance would be paid in two instalments. It is the complexities of the wording and the underlying provisions of this third agreement which found the disputed issues of construction with which I am now concerned.

3. ***Issue 1 - The Obligation to Pay Liquidated and Ascertained Damages***

3.1. ***Introduction***

9. The issue is phrased in this way:
"Whether, in the light of the terms of the September and October Agreement, clause 17.4 of the Construction Contract (which effects a reduction in the recoverable LADs in the event of partial possession) remain in full force and effect so as to reduce Cola's entitlement, if any, to LADs."

10. This issue requires elaboration before it can be answered. It arises out of Impresa's defence to Cola's claim for £1.17m liquidated damages for the alleged failure by Impresa to achieve practical completion by 30 November 1999. Instead, according to Cola, Impresa abandoned the contract before practical completion had been achieved with effect from 30 May 2001. Moreover, despite the September and October agreements, no partial possession had taken place. Therefore, liquidated damages at the full rate of £5,000 per day are now recoverable for the whole of the period between 30 November 1999 and 30 May 2001 using the complex formula for calculating liquated damages provided for in the October agreement. Alternatively, if, partial completion took place following either the September or October agreements, liquidated damages are still recoverable at the full rate since the effect of the October agreement was to delete clause 17.1.4 which reduces the liquidated damages rate where partial completion takes place.

11. Impresa's response is that partial possession of the greater part of the works had occurred as a result of either or both of the September and October agreements and that, in consequence" only a very much reduced rate of liquidated damages per day is now recoverable. If no partial possession occurred or if clause 17.1.4 has been deleted from the conditions, with the result that the full daily rate of liquidated

damages is still recoverable whether or not partial possession occurred, Impresa contends that the full rate for liquidated damages is a penalty and unenforceable.

12. The following issues therefore arise which are to be taken to be included within the more compressed wording of issue 1:
    1. Was the effect of the September agreement, and in particular the access it afforded to Cola, to give Cola partial possession of any part of the Works?
    2. Did Cola take partial possession of any part of the Works after the September agreement had taken effect?
    3. Was the effect of the October agreement to give Cola partial possession of any part of the Works that were not previously subject to partial possession?
    4. Did the October agreement delete or render inoperative clause 17.1.4 of the contract conditions?

3.2. ***Practical Completion, Partial Possession, Use and occupy and Handed Over***

13. The conditions of contract contain an elaborate code relating to the occupation, possession and handing over of the site. These provisions are linked to the practical completion of the works, the completion date of the Works and the obligation to pay liquidated damages. In summary, the contract provides that the contractor shall be given possession of the site on the date for possession (clause 23.1.1), that that possession is to be exclusive to the contractor during the currency of the works (clause 23.3.1) and that the contractor is to complete the works on or before the completion date (clause 23.1.1). The completion date may be extended if any of the contractually defined events giving rise to such an extension have occurred and have caused delay to completion (clause 25). Liquidated damages are payable if the completion date or the extended completion date is not met (clause 24). The relevant period for such payment is the period between the completion date and the date for practical completion (clause 24.2.1).

14. Completion is taken to be the date on which the works achieve practical completion (clauses 16.1 and 24.2.1). When this occurs, several significant events occur. The defects liability period starts (clause 16.2), half the retention fund becomes payable (clause 30.4.1.3), the liability to pay liquidated damages ceases (clause 24.2.1), the contractor's obligation to maintain joint names insurance and to reinstate the works if these are damaged by any but the excepted risks ceases (clauses 22B, 1 and 22B.3.3) and the period within which the Final Account must be submitted by the contractor starts to run (clause 30.5.1).

15. The employer is entitled to take partial possession of part of the works whether or not that part has been completed. This can only occur with the consent of the contractor which must not be unreasonably withheld (clause 17.1). If this happens, the contractor gives up possession and the employer takes exclusive possession of the part taken into partial possession (clauses 23.3.1), practical completion of the part of the works taken into possession is deemed to have occurred (clauses 17.1 and 17.1.1). When partial possession is taken, a mini defects liability period starts to run, a partial payment of retention and a reduction of the liability to pay liquidated damages result and the obligation to maintain joint names insurance and to reinstate the works if these are damaged all occur in relation to the part of the works taken into partial possession (clauses 17.1.1 - 17.1.3).

16. By a further provision (clause 23.3.2), the employer is entitled to use and occupy part or all of the works with the consent of the contractor which shall not be unreasonably withheld. Such use or occupation does not constitute partial possession or practical completion (clause 23.3.2).

17. In summary, therefore, the contractor is granted exclusive possession of the site and of the works and retains exclusive possession until practical completion occurs unless parts of the works are handed back to the employer and are taken into the employer's exclusive possession at an earlier stage. That can occur whether or not those parts of the works have been completed and, if this happens, the contractor's obligation to continue with the works in that portion ceases and is replaced by a defects liability obligation. It is the return of exclusive possession by the contractor to the employer which brings the working period of the contract to an end. Although the works and each part of them are in the exclusive possession of either the contractor or the employer, a lesser form of physical presence on or within the works that is defined as the use or occupation of the incomplete works by the employer is allowed notwithstanding the exclusive possession of the works by the contractor. This presence by the employer has no effect on the contractor's exclusive possession of the works nor on the contractor's obligations

and entitlements with regard to liquidated damages, retention, defects liability, insurance, reinstatement or the preparation of a Final Account. The employer is, in effect a sub licensee to the contractor who, otherwise, retains exclusive possession of the works.

18. Thus, there are three relevant and separate types of possession and occupation to consider. The first is where the contractor, whilst carrying out the works, has exclusive possession of those works. The second, following partial possession, is where the employer takes back exclusive possession from the contractor for that part of the works. The third is where the contractor retains exclusive possession but allows the employer to use or occupy part or all of the site or the works. When this occurs, the exclusive possession of the contractor is modified by the presence of the employer to the extent and in the manner that that use or occupation has been agreed to by the contractor.

3.3. ***Was the effect of the September agreement, and in particular the access it afforded to Cola, to give Cola partial possession of any part of the Works?***

3.3.1. ***Introduction***

19. Until the September agreement took effect on 1 September 1999, Impresa was in full and exclusive possession of the whole site and of the entirety of the works. It is first necessary to see whether the September agreement altered that position. The September agreement provided, by the second recital, that:

    "In breach of the terms of the original agreement the contractor has failed to complete the development by the agreed date."

    "The development" was defined in the September agreement as *"the design and construction of an hotel at Great Queen Street, London, WC2"* which was the same definition as that given for the Works in the conditions. Thus, the effect of the second recital was that the parties were unequivocally agreeing that the works as a whole had not been completed by the date of the September agreement and that Cola had not taken into possession any part of the hotel had by that date.

20. By the September agreement, Impresa was required, by 12 September 1999, to

    "3. ... complete the development and allow access to all areas of the same so as to enable the hotel to fully operate therefrom."

    Notwithstanding this requirement, clause 4 of the September agreement provided a list of works, including the snagging of the entire development, the commissioning of the air conditioning system, and the completion of both the gymnasium and the subbasement which were not yet complete. These works, particularly the air conditioning, were located throughout the hotel. They "would be likely to remain outstanding" by 12 September 1999" but, by clause 6, Impresa was to use its best endeavours to complete the development as soon as reasonably possible.

21. However, notwithstanding the incomplete state of the works:

    "6. Nothing contained herein shall in any way be deemed to prejudice the contractor's continuing obligation to use its best endeavours to complete the development as soon as reasonably possible."

    and:

    "8. No access to the building by the employer as provided hereunder shall be deemed to amount to Practical Completion for the purposes of the original agreement."

22. These provisions give rise to the question of whether Impresa's obligation to give Cola access to large parts of the works for the purposes allowing Cola to fully operate the hotel constituted the taking by Cola of partial possession of those parts of the hotel or was merely the granting by Cola to Impresa of the right to use and occupy the works for that purpose.

3.3.2. ***"Possession" and "Use and Occupation"***

23. As a starting point, it is helpful to consider the nature of the three different states of "possession of the site", "partial possession of the works" and "use and occupy the site or the works" that are provided for in the conditions. It is clear that the nature of the possession and partial possession that are provided for is one of exclusive possession by the contractor or, once partial possession is taken, by the employer. The contractor, following its giving up possession or partial possession, has no further right to enter the part of the works taken possession of save for the express purpose of making good work as part of its obligation to make good defects in the work.

24. On the other hand, the use and occupation of the works by the employer that is referred to can encompass a wide range of situations since, as provided for in clause 23.3.1, this can be for the purposes of the storage of the employer's goods or for any other purpose defined by the employer when requesting this facility from the contractor. This wide range of circumstances is provided for by the word "or otherwise" in clause 23.3.2. In all of these situations, the contractor retains exclusive possession of the parts of the works affected by such use and occupation but, by way of what is in effect a sub-licence, the contractor allows the employer to use or occupy the land to the extent necessary for the particular purposes that the employer has in mind

3.3.3. ***Relevant Factual Background***

25. The factual background to the September agreement was that Cola was in great despair because, as it saw the situation, the hotel remained incomplete in significant respects yet the advertised opening date was nearly upon it. Cola desperately needed sufficient access to the hotel to enable it to open as an hotel before completion was likely to occur. However, it also needed the air conditioning system to be made to work and to be completed to its satisfaction prior to the completion of the works. The air conditioning system is not a discrete physical object but permeates the entire hotel. One of the deficiencies suggested by Cola was that the system required balancing and that the malfunctioning being experienced might be the result of a significant design deficiency causing an inadequate air flow through the hotel - Cola was suggesting that this had resulted from Impresa's faulty design work under its contractual design and build obligations.

26. It followed that extensive work might be needed to adapt or correct the system as a whole, an operation which might need to be undertaken in or from every room and open area that the system serviced. Moreover, the defect or deficiency was a serious one and appeared, certainly to Cola, as being one that prevented the hotel as a whole from being completed.

27. Had Cola intended to take back exclusive possession of most of the hotel pursuant to clause 17.1, despite the fact that the air conditioning system and other work had not been completed, it would have been simple for the September agreement to have stated that partial possession was being taken. However, such exclusive possession would not have been possible if the air conditioning system was to remain incomplete and subject to completion without being treated as having achieved practical completion. In such circumstances, it would be more natural to construe the work "access" in the September agreement as meaning "use and occupation" rather than "partial possession" since Cola's objectives could be achieved if Impresa remained in possession of the entire hotel but granted Cola the means of operating the hotel around Impresa in the meantime but could not be achieved if it took partial possession of the bulk of the works.

28. Thus, there would be good reason for the September agreement to avoid using the phrase "partial possession" since that would pass exclusive possession of almost the entire hotel back to Cola, would start the defects liability period running, would cause the joint names insurance to lapse for the same areas of the hotel and would lead to a significant diminution in Impresa’s liability to pay liquidated damages despite the hotel, in Cola's view, not being complete given the perceived wide-ranging and significant defect in its air conditioning, a serious problem for a newly opening four-star hotel in central London. It would also be problematic if not both impossible and somewhat metaphysical to determine what parts of the hotel and the Works remained out of Cola’s possession and with Impresa if the working areas of the hotel, but not the air-conditioning, had been subject to partial possession and if there had been a start of the defects liability period that related to them but not to the air conditioning system.

29. In order to run the hotel with Impresa retaining full possession, the nature of Cola's needs and use of the works would not be readily capable of clear definition. Thus, it would make sense for the parties to adopt a definition of what was being provided to Cola which was flexible and which allowed Impresa to retain possession of the entire works but with Cola being granted a wide ranging entitlement to use the hotel site with that entitlement superimposed onto Impresa's possession of the entire works.

30. Against this background, it can be seen that the language of the September agreement is more naturally directed, in relation to Cola's entitlement to obtain access, to the type of use and occupation

contemplated by clause 23.3.2 of the conditions than to the exclusive partial possession provided for by clause 17.1. It follows that the more natural meaning of access, as used in the context of the conditions and the associated September agreement, is the use and occupation of the relevant parts of the hotel by Cola rather than in its taking partial possession of the hotel.

3.3.4. ***Construction of the September Agreement***

31. This approach to the construction of the September agreement is supported and reinforced if the other detailed provisions of the September agreement are also considered. The relevant provisions are these:
"23.3.2. ... the Employer may, with the consent in writing of the Contractor, use or occupy the site or the Works or part thereof whether for the purposes of storage of his goods or otherwise before the date of issue of the statement by the Employer setting out the date of Practical Completion."

Partial possession is provided for by clause 17.1 which is defined as being where:
"… the Employer wishes to take possession of any part or parts of the Works ... the Employer may take possession thereof. ... For the purposes of clauses 16.2, 16.3 and 30.4.1.2 Practical Completion of the relevant part shall be deemed to have occurred."

32. A detailed consideration of these contractual provisions identifies several further reasons why the completion of the development that is referred to in the September agreement and the consequent access to all areas of the hotel that that agreement afforded to Cola did not constitute partial possession of the Works.

33. Firstly, clause 8 of the September agreement states in terms that no access it provided was to be deemed to amount to practical completion. This is a clear statement that the access being provided to Cola of the greater part of the hotel was not to constitute practical completion of the whole of the Works under clause 15 of the conditions nor of any part of the Works under clause 17.1. Thus, clause 8 provided a clear indication that neither full nor partial possession of the Works was brought about by the September agreement.

34. Moreover, it is clear that the parties intended that the defects liability provisions of the conditions were not to be brought into operation by the access being provided to Cola. This is clear because the September agreement provided that the works were to be completed in the period following that access and because of the operation of clause 8 which effectively negated the partial defects liability provisions that would otherwise have followed on from partial possession. Since one of the incidents of partial possession is that the defects liability period for the relevant parts should start as soon as partial possession is taken, the access that was provided appears to be of a kind that was not intended to amount to partial possession.

35. Finally, reference should be made to the third recital of the September agreement which provided that, notwithstanding Impresa's breaches of the original agreement in failing to complete by the agreed completion date, a portion of the retention would nonetheless be released. The obvious reason for this recital was that, without it, no part of the retention would have been released by the September agreement. However, had partial possession been granted by the access provisions of the September agreement, an immediate release of part of the retention fund would have occurred without the need for the September agreement to provide for its release. The third recital of the September agreement is, therefore, a further clear pointer to the parties' intentions that the access provisions of that agreement were granting Cola use and occupation but not partial possession of the hotel.

3.3.5. ***The Parties' Approach***

36. Neither party relied on the construction of the word "access" that I have favoured in relation to the provision of access to Cola by Impresa. Both parties contended that the access afforded to Cola amounted to its having been granted partial possession of the affected parts of the Works.

37. Impresa submitted that the September agreement amounted to a direct application of clause 17.1 of the conditions or, alternatively, that Cola was in fact given partial possession following the September agreement. In consequence, the LAD rate was reduced from £10,000 per day to a tiny fraction of that rate once access had been provided.

38. Impresa also submitted that clause 8 of the September agreement overrode clause 17.1.1 to a limited extent because it provided that the start of the defects liability period for the parts of the Works taken into possession was to be deferred until practical completion of all the works occurred. However, Impresa continued, clause 8 did not affect clause 17.1.4 so that the rate for LADs was reduced to the level that took account of the value of the parts of the works that had been taken into possession.

39. Impresa's submissions are based on what, on analysis, is a somewhat strained interpretation of clause 17 of the conditions and clause 8 of the September agreement. The submissions presuppose that partial possession of the works had been taken by Cola, that joint names insurance cover and Impresa's reinstatement obligations had ceased for the relevant parts of the Works and that the rate for LADs had been reduced accordingly but that the start of the defects liability period and the release of half the relevant retention had been postponed until full practical completion had occurred.

40. Such a diffuse amendment of clause 17 is unlikely to have been intended by the parties in entering into the September agreement. It would have created these difficulties:

    1. Impresa would have had no legal basis for entering or working in the parts of the hotel taken into possession since it would have relinquished exclusive possession of them to Cola without any clearly expressed licence being granted back to it to enable it to undertake the remaining work. All that would be left would be a contractual obligation to complete the Works without any clearcut basis upon which it could have fulfilled that obligation.
    2. No part of the Works would have achieved practical completion yet most of the Works would be treated as having been complete and in the employer's possession. This arrangement would run counter to the basis upon which the detailed provisions of the contract had been constructed which are based on the contractor having exclusive possession and control of the entire site save for the terms of any sub-licence granted to the employer.
    3. Most of the Works would be in an ill-defined state of limbo in the period between partial possession being granted and practical completion occurring. This is because the defects liability period would not have started but the works were complete. Impresa's obligation in the defects liability period is to make good defects which “shall appear within" that period. There would be no clearcut obligation to make good defects which were not apparent on partial possession being taken but became apparent before practical completion.
    4. There would be unresolved difficulties as to the joint names insurance which provides for the costs of reinstatement of any damage to the Works (save for the excepted risks) to be covered by the joint names policy up to the date of practical completion and an obligation imposed on the contractor to reinstate any loss covered by the insurance forthwith, at no additional cost to the employer but for such remuneration as is recovered from the insurer. If partial possession of the major part of the Works had been handed over to the employer but no practical completion had occurred, it is doubtful whether the joint names policy would remain in force since the insurer would have been covering a different risk to that now in place. Furthermore, it is doubtful if Impresa could have been held to its reinstatement obligation in relation to, say, fire damage to the parts of the hotel repossessed if the damage occurred in the period of limbo prior to practical completion since it would not have been in control of the Works at the time of the fire.

41. However, although these considerations support the conclusion that partial possession was not granted to Cola by the September agreement, the principal objection to Impresa's submissions is that they involve equating Impresa's having allowed access to Cola of parts of the hotel with its having taken partial possession of those same parts of the hotel as opposed to Cola's access being equated with it having been given Impresa's consent for the use and occupation of those same parts. For the reasons already given, this construction of the September agreement is not the one that the parties objectively intended.

42. Cola did not submit that it had been granted partial possession by the September agreement but it did submit that the implied effect of the agreement was to delete clause 17.1.4 of the conditions since that clause could not stand alongside clause 8 of the September agreement. Thus, LADs at the full unabated

rate would be recoverable for the period between the date partial possession was obtained and the subsequent date for practical completion.

43. The difficulty with Cola's submission is that it fails to give full effect to the wording of clause 8 of the September agreement. That clause only states that deemed practical completion will not take place. However, the reduction of LADs on partial possession is not dependent on deemed practical completion but on the occurrence of the "relevant date" being the date partial possession was taken. Thus, a workable, albeit unusual, contractual scheme could have operated on partial possession as has been seen when Impresa's submissions were being considered. There is no obvious necessity to imply a repeal or deletion of clause 17.1.4.

44. The objection to Cola's submissions is the same as the objection to Impresa's submissions. They involve an impermissible alignment of the meaning of the word "access" with the words "partial possession" as opposed to the more obvious and contractually intended alignment of its meaning with the words "use or occupation".

3.3.6. ***Conclusion - September Agreement***

45. It follows that the relevant access referred to in the September agreement was a grant by Impresa to Cola of the use or occupation of parts of the hotel of the use and occupation of the hotel as provided for in clause 23.3.2 of the conditions and was not the granting of partial possession of any part of the hotel. Until the incomplete works referred to in clause 4 of the September agreement had been completed, Impresa remained at risk of having to pay liquidated damages at the full rate even though access to the hotel was being provided to Cola pursuant to the September agreement. In other words, Impresa's obligation to complete the entirety of the works by 20 May 1999, or by any other extended Date for Completion, remained in full as did its obligation to pay £10,000 per day for any period of non-completion.

3.4. ***Did Cola take partial possession of any part of the Works after the September agreement had taken effect and did the October agreement delete or render inoperative clause 17.1.4 of the contract conditions?***

46. It is now necessary to consider Impresa's subsequent notification served on Cola since, on Impresa's case, that notification evidenced or gave rise to Cola taking partial possession of most of the Works following the September agreement taking effect. On 20 September 1999, Impresa sent Cola a letter whose salient parts read as follows:

    "We would like to confirm our verbal conversation that the following areas have been handed over to yourself:

    1) Ground floor, mezzanine and First floor public areas by 12th September 1999. ...

    We confirm that commissioning and balancing of air conditioning in all areas is in progress but is not fully operational and reprise (sic) few more weeks of setting."

47. If this document constituted or evidenced the granting of partial possession to Cola pursuant to clause 17 of the conditions, it would have had to have been a document of the kind defined in clause 17.1 of the conditions which provides:

    "The Contractor shall [on the employer taking partial possession] thereupon issue to the Employer a written statement identifying the part or parts of the Works taken into possession and giving the date when the Employer took possession."

    No document identifying parts of the Works "taken into possession" was ever served by Impresa. As has been seen, the letter Impresa sent to Cola dated 20 September 1999 was one that only referred to the granting of access to parts of the hotel. This is because the letter referred to various areas of the hotel that had been "handed over to" Cola. In context, that hand over could only have been a reference to, and could only have borne the same meaning as, the words in the September agreement that Impresa would *"allow the employer access such as to enable it to occupy and to operate its business of the hotel and trade from the same"*. The letter was not, therefore, evidencing the taking of partial possession by Cola nor was it a statement by Impresa issued under clause 17.1 of the conditions of contract. It amounted to no more than an acknowledgement that Cola's access to, or its use and occupation of, the relevant parts of the hotel had been provided in accordance with the terms of the September agreement.

48. It follows that there is no evidence that Cola changed the basis upon which it was being granted access following the September agreement from that of use and occupation to that of partial possession or that

partial possession was in fact taken of any part of the hotel in the period between the making of the two variation agreements. This is because the only evidence relied on as possibly giving rise to that change was the terms of Impresa's letter dated 20 September 1999 but that letter does no more than evidence the granting to Cola of use and occupation rights to the greater part of the hotel.

3.5. ***Was the effect of the October agreement to give Cola partial possession of any part of the Works that were not previously subject to partial possession?***

3.5.1. ***The Meaning and Effect of the October Agreement***

49. The relevant terms of the October agreement that must be considered in the context of a potential partial possession of the Works being taken by Cola are these:

"4. The Contractor agrees as follows:

4.2 by 30 November 1999 to complete all mechanical and electrical works so that they are fully functioning and operational as specified in the Contract to a standard reasonably to be expected of a four star hotel.

4.3. by 30 November 1999 to complete all works specified in the Construction Contract and all works instructed prior to 13 October 1999 which, for the avoidance of doubt, include the works listed in Schedule 1 in accordance with the Construction Contract other than snagging items which are not in Schedule 1 and the fitness centre and associated works.

5. The parties agree that the date of practical completion of the works will be deemed to be the median date between 13 September 1999 and the date that the contractor complies with its obligations under paragraph 4 hereof.

6. The rate of liquidated and ascertained damages stated in Appendix 1 of the Construction Contract shall henceforth be read and construed as being £5,000 per day with reference to a completion date of 30 November 1999.

8. All other terms and provisions contained in the Construction Contract shall remain in full force and effect save as specifically varied herein."

50. It is first necessary to determine the extent to which these provisions varied and affected the conditions of contract as varied by the February and September agreements. The effect of these provisions was to vary the combined effect of the conditions and those two agreements in three respects:

1. The date for practical completion would no longer coincide with the Date for Completion but would be a different date, namely the mid-date between 13 September 1999 and the date on which completion was actually and finally achieved.
2. The Date for Completion would now be 30 November 1999, having been 20 May 1999 following the February 1999
3. The daily rate for LADS would be changed from £10,000 to £5,000 per day, the original contract rate.

Apart from these 3 changes, all other terms and provisions contained in the Construction Contract were to remain in full force and effect.

51. There is no difficulty in reading the conditions with these three changes incorporated into them. The effect would be, firstly, that the two handwritten entries concerned with the Date for Completion and liquidated and ascertained damages in Appendix 1 were changed to, respectively, 30 November 1999 and £5,000 per day and, secondly that the words that define the phrase practical completion in clause 1.3 of the conditions: "see clause 16.1" were replaced with these words: "will be deemed to be the median date between 13 September 1999 and the date that the contractor complies with its obligations under paragraph 4 of the October agreement."

3.5.2. ***The Parties, Submissions***

52. Impresa's submission was that these provisions did not affect the basis upon which Cola's access had been granted. In so far as it had taken partial possession of the Works and in so far as the payment obligation in relation to LADS had been varied by the operation of clauses 17.1.4 and 24 of the conditions when access was granted, the position brought about by the September agreement remained unchanged by the October agreement. It is a natural corollary of that argument that if the granting of

access by the September agreement amounted to the grant of use and occupation rights under clause 22 of the conditions, that position also remained unchanged by the October agreement.

53. I accept this submission of Impresa. Its basis was that clause 8 of the October agreement unequivocally states that all other terms and provisions contained in the Construction Contract were to remain in full force and effect save as specifically varied by the October agreement. In context, the reference to the Construction Contract must be taken to include a reference to any variation of that contract brought into being by the February and September agreements. Thus, save for the changed Completion Date, LAD rate and changed date on which practical completion was to occur, no other relevant provision of the Construction Contract, including the conditions it incorporated, had been deleted, varied or otherwise altered.

54. Cola's submission was to the effect that the October agreement, by necessary implication, gave rise to the deletion of clause 17.1.4 of the conditions. The basis of this submission was that partial possession of the Works had already been taken prior to the October agreement so that clause 17.1.4 had already operated to reduce the then rate for LADs from £10,000 to a fraction of that sum. Thus, by a somewhat strained process of construction of clause 8 of the October agreement and clause 17.1.4 of the conditions, the rate of £5,000 is to be taken as being applicable to that part of the works remaining in Impresa's possession or to the entire Works notwithstanding much of the Works was now in Cola's possession. This argument was premised on partial possession having occurred to much of the Works without there having been practical completion or deemed practical completion occurring for any part of the Works.

55. I reject Cola's submission principally because it flies in the face of clause 8 of the October agreement which states that all provisions of the Construction Contract remain in full force. Moreover, it is not necessary to give the provisions of the varied contract the somewhat strained meaning contended for in order to give business efficacy to the varied contract.

56. It follows that the October agreement did not alter the basis upon which Cola was using and occupying the entire Works and any part of the Works by virtue of the access that it had been afforded under the September agreement. Furthermore, the only alteration made to the provisions for the payment of LADs was to vary the full rate from £10,000 per day to £5,000 per day. The October agreement did not vary or delete clause 17.1.4 of the conditions, whether expressly or by implication. At the date of the October agreement no part of the Works had been taken into possession so that, at that date, the prevailing rate was £5,000 albeit that the date from which that rate could first be payable was postponed by the variation contained in the October agreement to the effect that the Completion Date became 30 November 1999. It is a question of fact whether, after the October agreement took effect, Cola took any part of the Works into partial possession and as to when practical completion or deemed practical completion of the works or any part of them occurred. Any partial possession occurring after the date of the October agreement would need to be founded on events or agreements occurring after that date and could not be founded exclusively on the terms of either or both of the September and October variation agreements.

4. ***Issue 2 - Was the Rate of £5,000 a Penalty and Unenforceable?***

57. Impresa maintained that the rate agreed as part of the October agreement for liquidated and ascertained damages of £5,000 per day constituted a penalty even though this rate was a reduced rate by way of comparison with the previous rate of £10,000 per day, the rate inserted into the conditions by the February agreement in replacement of the original £5,000 per day. The basis of Impresa's argument was that, if clause 17.1.4 had been excluded from the conditions by either the September or the October agreement, the effect would be that there would be no reduction from the contractual rate if and to the extent that the Works were taken into partial possession. Therefore, the agreed rate would be payable whether the whole of the Works were delayed in being completed or whether only a small part of the Works was left incomplete beyond the Date for Completion with most of the Works having been taken into possession by Cola.

58. As I have already determined, clause 17.1.4 was not excluded from the conditions by either of these two agreements. However, contrary to Impresa's submission, I have found that the whole of the Works remained in possession but with most of the Works being used and occupied at the same time by

Impresa. This state of affairs was known about to the parties when they negotiated the October agreement and Impresa's argument would survive that finding. The argument would be to the effect that the rate of £5,000 per day, being the same rate as had been agreed at the outset as being applicable to delay where Cola had no use or possession of the Works would be inapplicable to a situation where Cola had the effective use of the Hotel, albeit with Impresa technically in possession of the whole Works. In that later situation, the rate cannot be said to amount to a genuine pre-estimate of loss.

59. There was no evidence as to what influenced the decision to reduce the rate from £10,000 per day to £5,000 per day or why that revised rate was the rate chosen at a time when Cola was able to use and was using most of the Works. Cola adduced a lengthy witness statement from Mr Cola which explained that, at the date of the negotiation leading to the October agreement, he had in mind that the conditions within the hotel when it was first opened with its air conditioning system malfunctioning, could result in a loss of up to £2,645 per day. There could be additional losses resulting from a loss of reputation amongst possible clientele from such malfunctioning, increased maintenance costs and a possible risk of total or partial closure whilst the remaining works were being finished off. These risks were all such that the potential loss to Cola of delayed completion, even though the hotel had opened and Cola was using most of the Works, greatly exceeded the rate of £5,000 per day. This evidence was neither cross examined nor challenged by Impresa and I accept it.

60. It follows that there was evidence that the rate of £5,000 per day amounted to a genuine pre-estimate of loss if that loss is considered as the possible loss within the parties, contemplation at the date of the October agreement and taking into account that the hotel had opened already and that Cola was in use and occupation of most of the Works. The stipulated loss is such as to be recoverable and not to be characterised as a penalty if the test that is usually applied which is set out in the speech of Lord Dunedin in Dunlop, Pneumatic Tyre Co Ltd v New Garage & Motor Co [1915] AC 79 at page 86 and which was adopted and applied by the Privy Council in the opinion of the Board delivered by Lord Woolf in Philips Hong Kong v AG of Hong Kong (1993) 61 BLR 41 at page 56. The rate in question in this case, when considered by reference to the state of the parties' intentions at the date they agreed to the October agreement, was one which was: "a genuine covenanted pre-estimate of damage" and was not one which was "greater than the sum which ought to be paid". Furthermore, the "consequences of the breach [were] such as to make precise pre-estimation almost an impossibility [thereby creating] ... just the situation when it is probable that pre-estimated damage was the true bargain between the parties."

61. I conclude that the rate of £5,000 per day was both enforceable and a genuine pre-estimate of the loss at the date of the October agreement and notwithstanding the use and occupation by then being made of the Hotel by Cola.

5. ***Issue 3 - Was Impresa's Current Claim for Loss and Expense Compromised by the October Agreement?***

5.1. ***Introduction***

62. This issue arises out of the provisions in the October agreement which clearly settled and compromised certain disputes between the parties. Impresa now maintains a substantial claim for loss and expense arising out of disruption it said that it was caused by Cola and which led to the delayed completion of the Works. Cola's riposte is to the effect that these claims and the dispute as to whether Cola was liable to pay any part of them were embraced by and compromised by the October agreement.

63. The first reference to, or intimation of, a possible claim for loss and expense is to be found in a letter written by Impresa to Cola dated 29 September 1999 which read:

"Please find enclosed our assessment of the valuation account for the external works to the above.

We are still preparing our valuation account for the various areas outstanding but would advise you that on the basis of measurements and assessments taken the overall variation account, excluding mechanical and electrical installation will be in, without prejudice, the region of £1,500,000.

The above is based purely on measured rates in our tender offer, or pro-rata there to, and does not take into account any disruption caused, resultant acceleration, by for example the issue of the late party wall awards

Furthermore, the project has been fundamentally delayed by the issue of late and lad hock, (sic) information, which again has caused additional costs to ourselves in acceleration and preliminaries in our attempts to complete the contract."

64. The October agreement was negotiated on 12 October 1999 by representatives including legal representatives of both parties and was entered into on 22 October 1999. The relevant claim was submitted to Cola by Impresa in March 2000. The claim was stated to be made under clause 26 of the conditions for direct loss and expense arising from the prolongation of the Works. The claim totals £2,893,513.61 and is for prolongation and additional management costs, overtime premium rates, increased costs, subcontractors, delay claims, loss of productivity and loss of overheads and profit all allegedly resulting from the various delaying events causing the Works to be prolonged, all of which if proved would give rise to additional payments under clause 26 of the Works of the kind being claimed.

5.2. ***The Terms of the October Agreement***

65. The relevant terms of the October agreement were as follows:

"Whereas:

(i) This Agreement is made pursuant to ... the Construction Contract ... which is deemed to be incorporated herein (save as varied below) as if set out in full with regard to the design and construction of an hotel ...

(ii) The parties hereto have agreed to settle outstanding claims pursuant to the Construction Contract and have agreed a sum of money to be paid for the works carried out by the Contractor.

(iii) Save where provided otherwise in this Agreement words and terms herein shall have the same definitions as have been assigned to them in the Construction Contract.

1. The parties agree that the final value in respect of works carried out by the Contractor in accordance with the Bills of Quantities and the issued drawings, and in respect of the Works to be carried out under the Construction Contract, including for the avoidance of doubt the Fitness Centre is £11,450,000 plus VAT. For the avoidance of doubt the cost of any extras specified after 12 October 1999 will be in addition to this amount.

2. The said sum shall be paid and accepted in full and final mutual settlement of both parties existing claims pursuant to or connected with the Construction Contract or the works to which it relates, excluding the Employer's right to claim for any defective works which may become apparent after the date hereof.…

8. The other terms and provisions contained in the Construction Contract shall remain in full force and effect save as specifically varied herein."

66. Impresa's case was that the settlement embraced its entitlement for payment for the work carried out but did not extend to any entitlement to loss and expense which is not a payment for the value of the work but represents payment for additional sums due once the value of the work has been ascertained. moreover, the loss and expense claim had not been formulated at the date of the October agreement and was not, in consequence an "outstanding claim" or an "existing claim" covered by that agreement.

67. Cola's case was that the October agreement should be construed as a commercial agreement entered into by business men. It should not be subjected to a minute textual analysis undertaken by reference to the minutiae of the valuation provisions of the conditions. On that basis, the agreement clearly intended to wrap up all disputes and claims other than those expressly held over by the wording of the agreement. The claim for loss and expense was an outstanding claim at the date of the agreement since, even if the details had not been advanced, it was one which was known about at that time and involved payment for events already known about at the date of the agreement.

5.3. ***The Correct Approach to the Construction of the Agreement***

68. The October agreement clearly states that the conditions were incorporated into it, that the words and terms of the conditions of the October agreement were to have the same definitions as had been assigned to them in the conditions and that all other terms and provisions of those conditions remained in full force and effect save as specifically varied in the October agreement.

69. The matters settled by the October agreement were "outstanding claims pursuant to the Construction Contract". Moreover, the parties had agreed a sum of money to be paid for the works carried out by the Contractor". Finally, the parties had agreed "that the final value in respect of works carried out by the Contractor in accordance with the Bills of Quantities and the issued drawings and in respect of the

works to be carried out under the Construction Contract". The said sum, being the final value in respect of the works, was to be paid "in full and final mutual settlement of both parties existing claims pursuant to or connected with the Construction Contract or the works to which it relates". It followed that what had been settled were all outstanding claims and existing claims in respect of works carried out under the Construction Contract and of the final value of those works.

70. It is necessary to identify how the Construction Contract valued the works carried out under it, given that the October agreement made it clear that there was a close inter-relationship between the two. The conditions provided that the sum to be paid to the Contractor was the Contract Sum. This lump sum was made up by the sum total of all sums provided for in the Bills Of Quantities. Within 3 months of Practical Completion this sum was to be adjusted by deducting defined sums from it and by then adding to it all adjustments provided for in the conditions, payments made and costs incurred by the Contractor also as provided for by the conditions, the amount of any valuation of any change and omission, the amount of the valuation of provisional sum work and any amount "ascertained under clause 26.1.1 or for antiquities under clause 34.3. These adjustments were to be set out in a Final Account and Final Statement to be submitted by the Contractor for agreement by the Employer and the Contractor within the 3 month period following Practical Completion.

71. Clause 26 provided for the payment of direct loss and/or expense incurred by the Contractor in the execution of the Contract for which he would not otherwise be reimbursed by a payment under any other provision of the contract because the regular progress of the Works has been materially affected by one or more of the matters referred to in clause 26 such as a variation or the receipt in due time of necessary instructions. The Contractor was to apply stating that he had incurred or was likely to incur direct loss and/or expense as soon as it reasonably became apparent that the regular progress of the Works had been or was likely to be affected. The application was to be supported with such information and details as the Employer might reasonably require. Any amount ascertained under clause 26 was to be added to the Contract Sum.

5.4. ***The Construction of the October Agreement***

72. The conditions undoubtedly distinguish between the valuation of works, particularly variations and provisional sum work, and the ascertainment of direct loss and expense not otherwise recoverable under any other condition of the contract. The October agreement was defined as covering the final value of works carried out in accordance with the contract Bills and drawings. The October agreement, particularly when construed against the factual background that I have summarised, therefore, appears to distinguish between sums for work which have been arrived at by a process of valuation from other sums, particularly those that have been ascertained. Moreover, given the contractual requirement that the contractor had to make a written application for payment of loss and expense, sums due under clause 26 had to be preceded by a such an application with its supporting details of the direct loss and expense in question and, until such an application had been made, no sum recoverable under clause 26 was either due or could be said to have been claimed. Thus, until the necessary application had been made by Impresa, Cola's obligation to pay loss and expense had not crystallised and, in consequence, no claim for payment or dispute as to the payment of loss and expense could have arisen.

73. In this case, Practical Completion had not occurred at the date of the agreement and no clause 26 particulars or application had yet been served by Impresa. The best that had been provided was an intimation, in the letter dated 29 September 1999, that additional costs had been incurred as a result of fundamental delays caused to Impresa. This was in clear contrast to the details of the claimed valuation for all variations included with the same letter and which were used in the discussions leading to the October agreement a few days later. These details expressly excluded any disruption or acceleration.

74. Thus, on a strict reading of the October agreement, it would appear to be settling all valuation claims and any additional existing or outstanding claims. In the case of the relevant loss and expense claims now in issue, these were not valuation claims nor were they claims in relation to the "final value in respect of works carried out in accordance with the contract" since the claims embraced by this October agreement wording do not include claims based upon an ascertainment of direct loss and expense. Moreover, they were not claims that were either outstanding or existing at the date of the agreement. They were not

outstanding claims since they had not been the subject of any application, made previously and prior to the October agreement, as required by the conditions. They were not existing claims since they had not been notified to Cola nor made the subject of a claim on Cola prior to the October agreement. Indeed, the only relevant possible notification of relevant claims, being Impresa's letter to Cola dated 29 September 1999 already referred to, made it clear that loss had been caused to Impresa but that that loss was not included in the claims then being advanced in the letter.

75. There are two possible reasons why it could be an unduly narrow interpretation of the October agreement why the current loss and expense claims are excluded from, and not included within, the settlement.

76. Firstly, clause 2 of the October agreement refers to the sum to be paid and accepted following that agreement as being in full and final settlement of both parties, existing claims pursuant to or connected with the Construction Contract. This formulation is wide enough, taken in isolation, to embrace additional claims as well as valuation claims and to include claims based on the ascertainment of direct loss and expense. The wording is very wide. However, even if the narrow construction of valuation claims which precedes these words in clause 1 does not limit the scope of the subsequent words in clause 2 to valuation claims, no claim for sums payable under clause 26 had been made by the date of the agreement. These claims were only first made in March 2000. Thus, clause 2 is inapplicable to these claims.

77. Secondly, the October agreement could be taken to cover all claims if it is read in a broad and commonsense way. If that approach is adopted, it would readily read as a so-called wrap up agreement. However, this broad approach is one which the parties have themselves legislated against. As already set out, the October agreement requires the words and terms in it to have the same meaning as that assigned to those words in the Construction Contract including the conditions incorporated into that Contract. The words "final value" in the October agreement must, by that standard, have the same meaning as the same or similar words bear in the clause concerned with the Final Account and Final Statement and with the valuation of the Works. In particular, the meaning of the word "final" should be the same and should be read consistently with the word "Final" where this appears in the phrases "Final Account and Final Statement" and the word "value" should equally be read so as to bear a consistent meaning with “valuation" and "value of other work" in clause 30. These words, in clause 30, are concerned with the final valuation of adjustments to the Contract Sum for variations that precede an ascertainment of loss and expense. Those initial adjustments involve a distinct and separate exercise to that involving an ascertainment of loss and expense under clause 26. It was these valuation adjustments to account for variations that were the subject matter of concern at the pre-agreement discussions held by the parties when the final value of the works was discussed.

78. The words "final value", when read in the context, and against the background, of a final valuation of the Works undertaken in accordance with clause 30 of the Conditions, are a reference to the necessary adjustments to the Contract Sum resulting from a valuation of both the original works and the variations, but are not a reference to the further adjustments resulting from the separate and distinct ascertainment exercise of direct loss and expense. This second exercise involves the ascertainment of direct loss and expense not otherwise reimbursable under any other provision of the Contract which presupposes that the valuation exercises have been carried out and concluded before that final ascertainment exercise is undertaken. The "valuation" of the Works is, therefore, a separate and discrete exercise that must be concluded before the exercise concerning the "ascertainment of the amounts incurred as direct loss and expense" is concluded. Those further adjustments, therefore, result from an ascertainment exercise and not a valuation exercise and can only be undertaken once the valuation exercises, have been concluded and the necessary valuation adjustments to the Contract Sum have been made. The conclusion to be drawn is that loss and expense and their ascertainment are not comprehended by the phrase "final value" in clause 1 of the October agreement.

5.5. ***Conclusion***

79. I conclude that the October agreement does not cover any part of the claim for loss and expense advanced under clause 26 by Impresa.

6. Issue 4 - ***Does the Court have Jurisdiction to Determine Some of the Claims for Defects*****?**

6.1. ***Introduction***

80. The fourth issue is stated in these terms:
"Whether the Court has substantive jurisdiction to determine Cola's counterclaim for loss and damage in respect of the disputed breaches of contract alleged against Impresa in respect of defective workmanship and materials."

81. This issue arises as a result of the complex dispute resolution procedure provided for in the contract. This requires many disputes that arise before Practical Completion of the Works to be referred to adjudication for decision by an adjudicator. That decision becomes a term of the contract which, if referred to arbitration, may be reviewed by the arbitrator. However, that arbitration may not be opened up prior to Practical Completion. It is Impresa's contention that the relevant claims put forward by Cola, which are based on alleged breaches of contract by Impresa that gave rise to defective or incomplete work, were covered by the adjudication provisions of the contract, that the relevant disputes arose prior to Practical Completion of the Works, that they should have been, but were not, referred to adjudication and that, in consequence, they may not now be litigated or arbitrated since an adjudicator's decision is a precondition to any subsequent pursuit of those claims in arbitration or litigation. Impresa does, however, contend that if Cola now initiated adjudication proceedings and obtained a decision about these disputes from an adjudicator, it could then initiate fresh proceedings and pursue those claims in arbitration or litigation.

6.2. ***Factual Background***

82. It will be recalled that the October agreement provided for a new and deemed date for practical completion at a mid-point between 13 September 1999 and the date that Impresa complied with its obligations under paragraph 4 that related to work that was still incomplete as at the 22 October 1999. The proposed date by which this work would be completed was 30 November 1999. The October agreement also listed a series of items of incomplete or defective work and finally stated that there were other snagging items which were to be completed and which were not listed in the agreement.

83. In the weeks that followed the October agreement, Cola complained about the non-completion of the works and Impresa responded with complaints about additional works being added to their obligation which amounted to variations and also about a lack of appropriate access to the site for it to undertake allegedly outstanding work. Furthermore, Cola began to draw to Impresa's attention defects which had not been the subject of the October agreement which it contended had been caused by Impresa's breaches of contract and which had to be remedied before Practical Completion. This led to Cola serving a list of outstanding items that it would require to be completed before it would accept that Practical Completion had occurred. The list was dated 23 February 2000. A meeting was then held at the hotel on 23 March 2000. The parties produced a long and detailed set of Minutes of that meeting which contained a long list of defects contended for by Cola, the majority of which Impresa disputed. The relevance of the existence or otherwise of these defects and incomplete work was whether Practical Completion had occurred or not.

84. On 19 April 2000, Impresa served on Cola a Notice of Intention to Refer certain disputes to adjudication. The disputes concerned Impresa's entitlement to claim loss and expense and an extension of time and Cola's entitlement to deduct liquidated damages. on 26 April 2000, Cola responded with a Notice of Intention to Refer certain further disputes to adjudication. These included the following:
"Whether and if so when [Impresa] has completed the Works required to be done by it?
Has Practical Completion (as defined by the October Agreement) taken place and if so what is the date thereof?
What defects exist in the works and in this regard what are the costs and time to put the same right?"

In consequence, Cola informed Impresa that it was applying to the President of the RICS for the nomination of a person to act as Adjudicator and that the Adjudicator be requested to consider the issues raised by both Notices of Intention to Refer disputes to adjudication. Impresa's Notice had also stated that it had applied to the President of the RICS for the nomination of a person to act as Adjudicator.

85. The parties agreed to appoint Mr Darling QC as adjudicator rather than obtaining an appointment from the nominated appointing body, the President of the Royal Institute of Chartered Surveyors. This

appointment followed an agreement by the parties that Mr Darling should be appointed. The terms of that agreement were evidenced in two letters written to the adjudicator. The first, written on behalf of Cola, stated that:

"[Cola] would like to appoint Mr Darling as adjudicator in respect of the matters set out in both [Notices to Refer] …" (Cola's solicitors, letter dated 2 May 2000).

This was followed by a statement by Impresa made in writing to both the adjudicator and Cola that:

"[Impresa] unconditionally agree to the appointment of Mr Paul Darling QC to adjudicate in respect of the matters set out in both notices." (Impresa's solicitors, letter dated 2 May 2000)

86. From the outset, Impresa put forward a jurisdiction defence to the suggested dispute contended for by Cola as to the existence of defects. This was in these terms:

"[The Question] does not deal with an Adjudication Matter. The question relates to alleged defects. Defects are dealt with under the Defects Liability Provisions of Clause 16. Disputes about defects are not Adjudication Matters within any part [of the adjudication provisions of the contract]. It is to be noted that [the adjudication provisions] is directed towards the manner of execution of the works (e.g. compliance with a method statement) not whether the works contain defects."

87. By a decision dated 27 June 2000, the adjudicator decided that he had jurisdiction to act as adjudicator in relation to the matters set out in Cola's Notice, save for the questions as to the costs and time that would be involved in putting the defects right. Thus, he accepted jurisdiction as to the identification of what defects existed in the works.

88. Meanwhile, each side's expert then produced a report which was served on the other. Mr Arnold, acting on behalf of Cola, served a report dated 21 June 2000 which contained an appendix containing a schedule of defects. This appendix was commented upon in detail by Impresa's expert, Mr Cleaver, in an appendix to his report served soon afterwards. The adjudicator then appointed an assessor who inspected the works and, in the light of that inspection and subsequent report to the adjudicator, the adjudicator issued a further decision dated 4 August 2000 which stated:

"The Employer's contention that the works contained defects is properly arguable."

89. On 14 August 2000, the solicitors acting for Impresa informed the adjudicator that the outstanding issues for him to resolve included the following:

"(ii) The extent which the works were defective.

(iii) The extent to which any such defects are matters subject to the Defects Liability Regime rather than matters affecting completion."

90. To resolve these disputes, the adjudicator then adopted the following procedure. He had, initially, been supplied with the two reports on the defects from the parties' experts which have already been referred to and he then, as also referred to, appointed an expert assessor who had conducted an informal inspection of the works and advised the adjudicator that there were "triable issues" with regard to the existence of defects contended for by Cola. This led to a formal joint inspection of the works by the assessor and the two party experts on 12 September 2000 and the production by the assessor of a Note of his views which indicated where he and the experts were agreed and where there was a divergence of views. Finally, on 20 November 2000, Impresa produced a List of Defects that it proposed to remedy. This led to the adjudicator deciding, in a decision dated 22 December 2000, that enough of the defects discussed by the three experts were patent as at November 1999 to prevent Practical Completion from having occurred. In consequence, the Defects Liability Period had not started. The adjudicator then decided that he would not make any specific determination as to the nature or existence of specific defects but would issue directions as to how to resolve that issue.

91. The adjudicator directed that Cola should issue its list of alleged defects. This was done when Cola's solicitors sent to the adjudicator and to Impresa a schedule of defects sub-divided into mechanical and electrical items and items reported by the hotel. This list was served on 12 January 2001 and it contained some defects which had not been discussed at the meeting on 23 March 2000, had not been referred to in the reports of the experts served in June 2000 and had not been discussed by the three experts or referred to in the assessor's subsequent Note in September 2000.

92. Following the receipt of submissions by both parties, the adjudicator decided in a decision dated 30 May 2001 that:

"The course I therefore propose to take is to regard my jurisdiction as limited to the defects remaining outstanding as at the end of the meeting of 23 March 2000 unless [Cola] identifies any other defects in respect of which they contend were identified and in respect of which a dispute arose prior to the reference ..."

Thus, the adjudicator in effect decided that only those defects which had been identified to Impresa and had given rise to a dispute that had arisen prior to his appointment in April 2000 fell within his jurisdiction. In effect, this decision confined his jurisdiction to a consideration of those defects or alleged defects minuted at the meeting held on 23 March 2000.

93. The parties then accepted that the contract had been brought to an end on 30 June 2001, albeit that each party contended that it was the other that repudiated the contract so as to bring it to an end on that date. In Cola's case, it contended that Impresa's continued failure to achieve Practical Completion amounted to a repudiation of the contract which it had accepted with effect from 30 June 2001 or that it had successfully terminated Impresa's employment pursuant to clause 27 of the conditions of contract.

94. Subsequently, these proceedings were started by Impresa and Cola's counterclaim, including a schedule of defects substantially in the same form as that served on 12 January 2001, was served in October 2001. These defects allegedly arose because Impresa was in breach of the implied term that it was to complete the works in a good and workmanlike manner using suitable materials. In consequence, Cola had suffered loss and damage being the cost it had and would incur in arranging for these defects to be remedied by others. Meanwhile, the adjudicator continued to consider the issues that had been referred to him which he accepted jurisdiction in relation to and published a series of decisions in relation to these issues including decisions as to the existence of such those defects that had been contended for by Cola which had been notified to Impresa prior to his appointment.

95. No further Notice to Refer was served by Cola in relation to those defects contained in its January 2001 list which the adjudicator had declined to consider. However, the parties did agree on two significant procedural matters:

1. ***Extension of the time within which to dispute the decisions of the adjudicator***

96. The parties agreed to extend the time within which a notice referring to arbitration any decision of the adjudicator from the contractually defined period of 14 days. The agreement was confirmed by Cola's solicitors to Impresa's solicitors in a letter dated 31 January 2001 and provided that no notice referring any decision need be served until after the final decision of the adjudicator.

2. ***Litigation in substitution to arbitration***

97. The parties also agreed that they would waive their respective entitlement to rely on the arbitration clause contained in the contract conditions as follows:

"It seems to [Impresa] that [Cola] wishes to introduce further alleged defects in addition to those raised previously ... [Impresa] would be prepared to agree to litigate the matters in the Technology and Construction Court." (Impresa's solicitors, letter to Cola's solicitors dated 24 January 2001)

"If ... [Impresa is] intent upon proceeding immediately by way of arbitration or else litigation in the Technology and Construction Court then so be it. Under those circumstances [Cola] would tend to agree that the Technology and Construction Court may well prove to be a more appropriate and suitable venue for the parties. ... Therefore, if [Impresa is to] commence proceedings in the TCC, [Cola] would not apply for a stay under section 9 of the Arbitration Act 1996." (Cola's solicitors, letter in reply to Impresa's solicitors dated 31 January 2001).

"It seems to [Impresa] that [Cola] wishes to introduce further alleged defects in addition to those raised previously ... [Impresa] would be prepared to agree to litigate the matters in the Technology and Construction Court." (Impresa's solicitors, letter to Cola's solicitors dated 24 January 2001)

"If ... [Impresa is] intent upon proceeding immediately by way of arbitration or else litigation in the Technology and Construction Court then so be it. Under those circumstances [Cola] would tend to agree that the Technology and Construction Court may well prove to be a more appropriate and suitable venue for the parties. ... Therefore, if [Impresa is to] commence proceedings in the TCC, [Cola] would not apply for a stay under section 9 of the Arbitration Act 1996." (Cola's solicitors, letter in reply to Impresa's solicitors dated 31 January 2001).

98. In consequence, these proceedings were started by a claim form dated 18 August 2001 by Impresa and were met by a defence and counterclaim from Cola served in October 2001. No application for a stay to arbitration has been made by Cola in relation to the claim or by Impresa in relation to the counterclaims.

99. The counterclaims concerned with defects which it is contended by Impresa may not be tried by the court unless and until they have first been referred to an adjudicator and adjudicated upon consist of a large number of discrete alleged defects. By way of example, the following from the list of such defects are listed in the schedule to the counterclaim in this form:

    1. Mechanical and electrical items. *"1. Inadequate depth for fan coil units in bathroom ceilings."*

    2. Building items. *"1. Vanity basins to bedrooms are dropping."*

    The form of the allegations concerning those defects that it is accepted by Impresa fall within the present jurisdiction of the court to determine is similar to the form of the allegations concerning these other additional defects.

6.3. ***The Conditions of Contract***

100. The conditions of contract contain an elaborate code for the adjudication and arbitration of disputes. The relevant provisions, in summary, provide that all disputes between the parties shall be referred to arbitration to be appointed, in default of agreement, by the President or vice-President of the RICS. However, no reference may be opened until after Practical Completion save for a number of limited types of dispute, particularly those concerned with whether a payment has been improperly withheld or is not in accordance with the conditions.

101. However, for certain disputes arising prior to Practical Completion or alleged Practical Completion of the Works or termination or alleged termination of the Contractor's employment, it is provided that these "shall not be referred to arbitration under clause 39 but shall be referred to the Adjudicator" named in Appendix I or, if no-one is named, appointed by the appointor named as the appointer of an arbitrator (ie the President or Vice-President of the RICS). The relevant category of dispute that is subject to such an adjudication are:
    "whether the Works are being executed in accordance with the Conditions and the Supplementary Provisions."

102. Once the adjudicator has given his decision, that decision shall "be deemed to be a provision of this Contract" and shall "be final and binding on the parties unless referred to arbitration" but only if either party has previously informed the other in writing that the decision is not acceptable within 14 days of the receipt of the decision. The resulting dispute may not be opened in the arbitrations until after Practical Completion of the Works.

103. These provisions contain a clearly defined code for the resolution of disputes. If a dispute arises before Practical Completion of a kind defined as being an Adjudication matter (such as a dispute of the kind that I have just set out), that dispute cannot be referred to arbitration but must be referred to an adjudicator. However, following a decision from the adjudicator and once Practical Completion has occurred, that dispute and the resulting adjudicator's decision can then be arbitrated.

104. Given these provisions, it seems clear that an Adjudication Matter, which, by definition, can only arise prior to Practical Completion, cannot be arbitrated at all unless it has first been adjudicated upon. Furthermore, the notice referring the adjudication of a dispute of an Adjudication Matter to an adjudicator must be made promptly once the dispute has arisen and the consequent adjudication must then be started and concluded promptly. No adjudication notice can be given, nor can an adjudication be started, once Practical Completion has occurred. Thus, if, after Practical Completion, a dispute about an Adjudication matter has not already been referred to adjudication prior to Practical Completion, alleged completion, termination or alleged termination, it cannot then be arbitrated upon at all since there would not have been a prior adjudication and no valid reference to adjudication could any longer be made. For these reasons, the adjudication provisions must be carefully applied since they have the potential for shutting out from being resolved at all disputes about Adjudication Matters.

6.4. ***Were the Relevant Disputes Adjudication Matters At All?***

105. It can be seen that the relevant disputes have been included in the counterclaim as part of Cola's alleged claim for damages following the repudiation of the contract by Impresa or following Cola's contractual

termination of Impresa's employment under clause 27 of the contract conditions. The nature of the claim, in either case, is that at the date of termination or repudiation, the works were incomplete by virtue of the defects and that it has cost, or will cost, Cola loss to rectify these defects. This cost, given that Impresa had an overriding obligation to complete the Works, is now claimed as damages for breach of contract or as part of the cost of completing the Works which Cola may recover from Impresa pursuant to the termination provisions of clause 27 of the contract conditions.

106. In the light of this analysis, there are two reasons why the relevant disputes are not Adjudication matters. Firstly, the relevant disputes as to the existence and effect of those defects could only first have come to light after termination or abandonment of the Works and not before. The dispute is as to the damages recoverable as a result of Impresa's repudiation or the costs recoverable as a result of the termination of Cola's employment. Secondly, the disputes were not about whether or not the Works "are being executed in accordance with the Conditions" but were, instead, about whether they had been executed in accordance with the conditions. In other words, an Adjudication matter is concerned with works whilst they are still on-going and is not concerned with the allegedly defective state of the works once that work has, for better or for worse, been completed or terminated.

107. It is ironic that Impresa, when first objecting to the defects disputes being referred to adjudication at all, took the same objection as I have just summarised. That objection has been set out in paragraph 86 above and is, in summary, that all the disputes about defects, whether these had arisen before or after 23 March 2001, are not Adjudication Matters at all since they all relate to alleged defects which are to be dealt with under the Defects Liability Provisions of Clause 16. Adjudication Matters are, by way of contrast, directed towards the manner of execution of the works (e.g. compliance with a method statement) and are not directed to whether or not the works contain defects.

108. For these reasons, Impresa's jurisdiction objection fails.

6.5. ***Where the Disputes Referred to Adjudication?***

109. It is worth considering whether the disputes, assuming that they were Adjudication Matters, were validly referred to adjudication. This involves considering the terms of appointment of Mr Darling QC.

110. Clause S1.1 of the contract conditions provided that an Adjudication Matter should be referred to the Adjudicator named in Appendix 1 or appointed under the arbitration appointment provisions. Appendix 1 was filled out in an unusual way as follows:
"Clause S1.1 Name of Adjudicator 'To be appointed by President of RICS'" (underlined words were filled in manuscript)

111. The question that arises is, therefore, whether the parties, in agreeing to Mr Darling QC's appointment, were agreeing to appoint Mr Darling under clause S1.1 or were they, instead, appointing him under the default provisions for appointment, namely the provisions for the appointment of an arbitrator. Given the way the parties had filled in the Appendix as it related to S1.1, both appointing provisions involved nomination by the President of the RICS. In any case, even if the default appointment powers were being used (ie if the appointment involved the recourse to the arbitrator appointment machinery under clause 39), the appointment once made constituted an appointment for all Adjudication Matters including those arising after appointment. This arises because of the wording of S1.1 which refers to "an Adjudicator appointed" under clause 39. This wording presupposes that there will only ever be one appointment of an adjudicator under clause 39 who, once appointed under that clause, remains the standing adjudicator for all subsequent disputes.

112. It is clear that the parties were intending to appoint Mr Darling QC under S1.1. The language of appointment is unequivocal and fits in more obviously with an appointment under S1.1 rather than under clause 39. However, for the reasons already given, the appointment was still referable to all Adjudication Matters, whether or not in existence when he was first appointed, even if he was appointed under clause 39.

113. Finally, it must be remembered that the dispute referred to Adjudication was as to what defects the works contained. This dispute involved the adjudicator in being asked to define all defects in the context of determining whether Practical Completion had occurred. There is no good reason for

confining that appointment to such defects as had already been notified to Impresa by the date of appointment.

114. It follows that disputes about the relevant defects were validly referred to the adjudicator for three overlapping reasons. Firstly, they were referred to the Adjudicator that the parties had agreed to appoint under S1.1. Secondly, they were referred to the Adjudicator appointed under clause 39, assuming he had not been appointed under S1.1. Thirdly, the relevant disputes were embraced within the dispute that was expressly referred, namely an ascertainment of what defects existed in the works.

115. The contract does not involve the necessity of obtaining a decision but merely impose on the claiming party an obligation to refer the requisite disputes to an adjudicator. Cola complied with that obligation when serving its January 2001 schedule of defects on both the adjudicator and Impresa. Moreover, a decision was obtained from the adjudicator about the relevant disputes, namely that he had no jurisdiction to determine them. That decision is one that is sufficient to enable Cola to serve a notice of unacceptability and to proceed to arbitrate or litigate the disputes. It served the requisite notice by initiating these proceedings. That step, given the agreements to extend time for serving a notice and for waiving reliance on the arbitration clause, constituted the giving of the requisite notice.

116. It follows that, even if the disputes were Adjudication Matters, they were validly referred to adjudication. Moreover, an appropriate adjudicator's decision was issued which enables the disputes now to be litigated. Thus, the requirements of the conditions of contract concerned with the precondition of a reference to adjudication of the relevant disputes was complied with.

6.6. Waiver

117. There is a final reason why these disputes are within the jurisdiction of the court. This flows from the parties agreement in January 2001, referred to in paragraph 97 above, that all disputes then in existence, including those flowing from the defects schedule served a few days earlier than that agreement and which founds the present counterclaim, could be litigated in the TCC and that Impresa would take no objection to that course being taken. Having reached that agreement in January 2001, Impresa is now estopped from taking its jurisdictional objection or, alternatively, is to be taken to have waived that objection.

6.7. Conclusion – Jurisdiction

118. The court has jurisdiction to determine all defects disputes including those first arising after 23 March 2000 and Impresa's arguments to the contrary fail.