JUDGMENT : **HIS HONOUR JUDGE HUMPHTRY LLOYD.** TCC. 28 May 2004.

1. Alstom Signalling Ltd (Alstom) was the main contractor engaged by Railtrack plc (Railtrack) to design, manufacture and install plant for a project to extend the Tyne and Wear Metro from Pelaw to South Hylton via Sunderland (the Sunderland Direct Project). The main contract was dated 14 December 1999. Alstom (which traded as Alstom Transport Information Solutions) engaged Jarvis Facilities Limited (Jarvis), to design, supply, install, test and commissioning of signalling and telecommunications equipment for the project. (Jarvis traded as Jarvis Rail.) For the purposes of these proceedings I assume that there was a sub-contract between Alstom and Jarvis (of which more anon). The facts that I set out are drawn primarily from the documents submitted by both parties but I also had witness statements from a number of people, including from or for Jarvis: Mr Alan Robson and Mr Peter Mills; and, for Alstom, Mr A. R. Marshall and Mr Nabeel Ikram.

2. The subcontract included as Special Conditions (see schedule B) additions and amendments for use in conjunction with the I Chem E Model form for Process plants – SubContracts – Second Edition 1997. Clause 2.2 provided that in the event of conflict an order of priority was to be followed: SubContract Agreement; Schedule of Post Tender amendments – Annex B1; Schedule B – Special Conditions and Particular Conditions; Schedule A (main Contract Particulars; Schedule C – including Specification – annex C1; Schedule D, Schedule G (and thereafter the remaining Schedules followed in alphabetical order).

3. Schedule E was entitled "Prices, Rates and Changes". It contained the following:
"1.1 *The Subcontract Price shall be determined by the application of the rules in this schedule.*
1.2 The SubContract Price shall be as set out in Annex E3 - Target Cost Summary."

   The Target Cost Summary in Annex E3 comprised Preambles as extracts from the main contract and schedules of "Basic Price Summary", a "Target Cost Reconciliation" etc and a sheet with "Potential Future Variations". The total was expressed to be £10,238,432.66.

4. Schedule F contained Terms of Payment.

   *" **1.0 Payment of the subcontract price.***

   1.1 Payment of the subcontract price shall be in accordance with the procedure as defined in 2.0 below at intervals as defined in Annex F1 – Project Cut-Off Dates.

   1.2 …

   1.3 It is the intention of the Employer, the Contractor and the Subcontractor to work towards a "Neutral Cash Flow" method of financing in order to reduce any financing allowance contained within the Management Fee.

   2.0 Submission of request for payment

   2.1 The Subcontractor shall submit to the Contractor, a request for payment in the following form:

   (a) For his first application the Subcontractor shall estimate the total of expenditure he has incurred up to the end of the period preceding the period in which he is making his application, coupled to this is his estimate for the value of work anticipated to be completed by the end of the period in which he is making his application,

   (b) For his second and subsequent applications the Subcontractor shall substantiate the previous estimate of the total of expenditure he applied for in the preceding application. He shall estimate the value of works up to the end of the preceding period in which he is making his application, coupled to this is his estimate for the value of work anticipated to be completed by the end of the period in which he is making his application.

   (c) With any current application there is a requirement to forecast the expected value of the works that will be undertaken in the period following the period in which he application is being made.

   2.2 The Subcontractor's request for payment shall be supported by all relevant documentary evidence as required, including a statement showing the manner in which the total requested has been calculated.

   2.3 The Subcontractor shall provide from commencement of the Project a detailed cashflow, which he will maintain on a period by period basis as part of the Project reporting requirement.

   2.4 The Subcontractor issues an application for payment every twenty eight days. This cycle shall correspond with the Railtrack payment and reporting cycle. The application by the Subcontractor shall occur on the Wednesday of the Railtrack reporting cycle. The contractor shall in the same week of such application, put to the Subcontractor any questions or queries in relation to information provided, and failing a satisfactory response from the Subcontractor,

exclude such items from the certificate as disallowed costs. Such items may be included in a subsequent certificate when the Contractor has established their validity.

2.5 Following the receipt of the application for payment from the Subcontractor, the Contractor shall issue a certificate for the instalment to which the request for payment relates. The certificate shall show the manner in which the total certified has been calculated under the terms of the contract.

2.6 The Contractor shall pay to the Subcontractor the amount due on the certificate within seven days of the Railtrack certificate being issued in accordance with Annex F1 – the Project Cut-Off Dates (which contains the amount certified against the application aforementioned)."

Annex F1 were calendars for 2000 and 2001 with the relevant dates (cost of work done; issue of weekly report) highlighted.

5. Jarvis substantially completed its work in 2002. Thereafter a dispute or disputes arose about the amount claimed by Jarvis to be due to it as set out in its application for certificate no 31. On 15 October 2002 Alstom sent Jarvis a lengthy review. It set out why Alstom thought that the amount previously valued might be increased by some £126,000. However Alstom considered that nothing was payable because of the operation of a provision known as "pain-share" or "pain/gain". On 31 October 2002 Jarvis gave notice of adjudication. Mr Peter H.J. Chapman was the adjudicator. He gave a decision dated 18 December 2002. It read, in part:

"***Preliminary Issue***

As a Preliminary Issue in this Adjudication I was asked by the parties to decide on whether the contractual arrangements as to adjudication were compliant with the Housing Grants, Construction and Regeneration Act 1996. The reason for this preliminary determination was essentially a matter concerning my powers, as adjudicator, to award costs. If I were to find that the contractual adjudication provisions were non-compliant with the Act, the Railtrack Rules would not apply and the statutory scheme (The Scheme for Construction Contracts) would be deemed to control the adjudication procedure and thereby restrict certain powers that the contractual scheme made available to the adjudicator.

In my letter to the parties dated 19 November 2002, and after hearing oral arguments from the Parties and reading various submissions on this matter, I determined that the Railtrack Rules were not Act-compliant and therefore the current adjudication would be conducted under the statutory scheme (the Scheme).

…

Hearings

The two hearings were arranged in which the Adjudicator was given an opportunity of hearing the parties and thereby forming a better understanding the competing positions.

The first hearing took place on Friday 13 December 2002 at 46 Essex Street. In addition to the adjudicator, this hearing was attended by the following:

From Jarvis: Alan Robson Esq ; Peter Slater Esq ; Peter Mills Esq of Eversheds

From Alstom: Chris Fossey Esq ; *Phil Taylor Esq Nabeel Ikram Esq of Lovells …*

The second hearing took place on Monday 16 December 2002 at Evershed's offices in Queen Victoria Street, London at which the Parties, represented by leading Counsel argued before the Adjudicator issues concerning the terms of the unsigned contract and in particular whether this Contract contained what has become known as the pain-share/gain-share provision. Additionally, at the second hearing, other matters relating to the law pertaining to the parties' entitlements and obligations were discussed.

At the second hearing, apart from myself, were:

For Jarvis: ' Alan Robson Esq ; Richard Ward Esq of Eversheds ; Peter Mills Esq of Eversheds ; Martin Bowdery QC of Counsel

For Alstom: Chris Fossey Esq ; Neil Irving Esq ; Tony Marshall Esq of Lovells ; Nabeel Ikram Esq of Lovells ; Roger Ter Haar QC of Counsel

The Issues

The basis of payment under the contract was that Jarvis, as Subcontractor, would be paid by Alstom, the Contractor, in accordance with Schedule E of the Conditions of Contract as a target cost. In their words Jarvis would be paid what the works cost plus a management fee to cover the work undertaken by Jarvis in managing the works.

It is the referring party's case that Alstom had not complied with the Contract requirements in this regard. Particularly, Jarvis contend that Alstom failed to serve a Notice of Intention to withhold payment from Application 31 in the time prescribed by Section 111 of the Housing Grants, Construction and Regeneration Act 1996 and the Scheme for Construction Contracts 1998.

Further, or in the alternative, Jarvis argue that Alstom failed to value properly Application 31 under the terms of the contract and alleged that a figure of £1,442,980 plus interest should be paid to Jarvis under the terms of the Contract.

The referring party also alleges that, under Paragraph 2.4 of Schedule F of the Contract, Alstom was obliged within the same week of Application 31 to put to Jarvis any questions or queries provided with the application and only upon a failure by Jarvis to provide an adequate response to such questions or queries was Alstom entitled to exclude items from the Certificate as disallowed costs. In that Alstom failed to put to Jarvis any questions or queries in relation to information with Application 31 and within the same week of that application Alstom, by deducting this sum of almost one and a half million pounds, acted in breach of the Contract.

The referring party also pleads that under the provisions of the Scheme at Section 110(3) of the scheme will determine a final date for making payment in the absence of the Contract specifying the same and that final date, in Jarvis' opinion, is seventeen days after the date that payment has become due. By Section 111 of the Act, a party to a construction contract may not withhold payment after the final date for payment unless he has given an effective notice of intention to withhold payment and, by paragraph 10 of the Scheme, an effective notice must not be given later than 7 days before the final date for payment. In that Jarvis allege that Alstom failed to serve effective notice Alstom are not entitled to withhold payment from any amounts applied for by Jarvis.

Finally, the referring party alleged that Alstom's valuation fails to take into account the true value of the works and therefore represents a substantial under-valuation of the amount of payment to which Jarvis is entitled.

Discussion

Let me first remind the parties that we are currently in an adjudication, which, as I pointed out at the close of the second hearing, is an interim and provisional method of dispute resolution. In the time that I am permitted under the Housing Grants Construction and Regeneration Act, the degree of detail that can be investigated is limited. Furthermore, the time I have available to produce this decision document is exceedingly short (about 30 hours), due mainly to the late hearings held in this case. Consequently, my reasoning is brief although I assure the parties that I have given close attention and considerable thought to the matters in issue before formulating my decisions.

Although I sincerely hope this decision will be the end of the matter between the parties, I am conscious that the final account has not yet been prepared and further adjudication or other means of dispute resolution may follow. I am also aware that my decision in this Sub-Contract dispute may have some influence 'up the contractual chain' even though adjudication decisions do not necessarily have to be followed by parties different from those contesting this reference.

I will attempt to address each of the issues in turn, starting with what has become termed the pain/gain issue. [The adjudicator then dealt with the "Pain/Gain Issue" and the Burden of Proof Issue"]

Housing Grants Construction and Regeneration Act Issues

I was urged by Mr Bowdery to construe the HGCR Act 1996 in the spirit contemplated by the drafters – that is a statutory device that unlocks cash-flow (the construction industry's life-blood) to a contractor/subcontractor. I can assure both parties that I am fully aware of the industry practices and the commercial mischief that existed prior to the Act.

Let me begin this section by addressing the matter of the 'amount or sum due'. Mr ter Haar tried most ably to convince me that the amount or sum due was the amount or sum that was certified and, as the provisions of the Act as to withholding notices applied to the sum due, if Alstom had actually paid the amount shown on the certificates there was withholding and thus no need for a withholding notice.

He is correct in as far as he goes but his analysis stops short of what I consider to be a crucial element of this issue. In my view, and after reading Clause 2.4 and 2.6 of Schedule F to distraction, the amount due is the amount of the application minus only those items for which questions and queries have been raised within the stipulated period and for which no satisfactory response has been received. In other words, the amount due (on the certificate) is not necessarily what the certifier has stated on the bottom line if that certifier had acted in breach of contract. I believe this is the intent of the Act and I find support for my views when I read Section 111.

Section 111(b) requires the paying party to state why monies are being withheld. The Act does not provide for such statements elsewhere. The applicant needs to know why its application is reduced by the certifier and therefore I believe the intent of the Act is that the withholding notice must reflect the difference between application and certificate – not between certificate and payment to be made. Reasons for this latter difference may be simply that the payer is impecunious and this is of small interest to the applicant albeit of consequence. The applicant cannot take steps to rectify the payer's position.

Whilst I admit the Act could be clearer, as Adjudicator I must construe the Act in a manner that gives business efficacy to the provisions and reflects what I consider to be the intent of the legislature.

As alluded to above, I consider that questions and queries pursuant to Clause 2.4 should be specific. I do not consider that Clause 2.4 is satisfied simply because questions and queries on matters have been raised in connection with previous applications. Mr Bowdery's point is well taken in that questions and queries raised on an earlier application may be partially answered (in the mind of the applicant) and thus would no longer be appropriate for later applications.

*I agree to an extent with Alstom in that it would not be necessary for a verbatim repetition of earlier questions and queries raised by not responded to. What I do consider necessary is for clear cross referencing to be made to those unanswered questions and queries raised earlier, for example, words such as: "**Question 1: Please refer to page x of Alstom's letter dated xx.xx.xx, in which paragraphs x and xx remain unanswered**" would be adequate so long as paragraphs x and xx gave specific and focused questions and queries.*

In the present case and in response to Application 31 I find that the provisions of Clause 2.4 were not satisfied. No specific and focused questions and queries were raised with the same week as receipt of the application. Alstom should not, therefore, have reduced the sum applied for in producing Certificate 30 and having done so was in breach of the Contract.

Certificate 30 was erroneous and should have reflected the exact sum that Jarvis had applied for. Clearly the retention as specified under the Contract (at this stage 1.5%) must be applied.

This finding, harsh as it may appear to Alstom, is what I consider to be the effect of Clause 2.4 when properly and purposively construed. As a consequence, the analysis of the various reductions made to Application 312 (ie the discussions held on Friday 13th December) do not fall to be decided at this stage. As I mentioned in my recent letter to the parties, it would perhaps have been better for me to have determined matters in principle before embarking on the quantification arguments in detail, but being adjudication, time did not permit. As generally expressed above, I do hope that Messrs Taylor and Slater were able to acquire a valuable insight and better understanding of the opposing party's position from the discussions and my questioning at that hearing.

A further issue brought to my attention was the date for final payment. It was argued that the final payment provision was linked to the main contract and that this was insufficiently certain (in that it could be changed without reference to Jarvis) to satisfy Section 110(1)(b). The matter is important because withholding notices must be issued no later than 7 days before the final date for payment and the suspension provisions under S112 do not engage until the final date for payment has passed.

Mr Bowdery urged me towards the default provisions under the Scheme at Paragraph 8(2) ie 17 days from the date that payment becomes due.

Mr ter Haar took the view that the link to the provisions in the main contract was sufficiently determinate to be Act-compliant. The fact that the final date could be changed without reference to Jarvis was not fatal as to compliance.

I have again attempted to construe the statute in a purposive manner and with my understanding of the intent of the Act in mind. I believe S110(1)(b) requires that the final date shall be a date that is embedded in the contract between the parties and is incapable of being changed absent consent of both contracting parties. Consequently, I am persuaded by Mr Bowdery's submissions. I do not believe the draftsman meant that such final date could be changed unilaterally (possibly necessitating an action in damages from Jarvis under third party rights legislation).

Accordingly, I do not consider that the Contract does satisfy S110(1)(b) and thus the parties have failed to provide a final date for payment. The default provisions of the Scheme thus apply and the final date for payment is 17 days from the date that payment becomes due. The last date for issue of a S111 withholding notice is thus 10 days after the date payment becomes due. [The adjudicator then dealt with "Interest" and "Extension of Time"]

Summary of decisions

Having considered all the evidence put before me and having listened to the parties in person and their legal representatives and based on the reasons set out in the discussion section above, I decide as follows.

The Contract governing the contractual relationship between Alstom and Jarvis was a Sub-Contract, unsigned, excluding any provision for a pain share/gain share agreement. Upon receipt of Application 31, Alstom failed to provide questions and queries in accordance with Clause 2.4 of Schedule E5 and thus were in breach of the Contract by certifying a sum in respect of Application 31 less than that contained in the application (including retention). As a result of this breach I decide that Alstom should pay Jarvis the net sum of one million, four hundred and forty two thousand, nine hundred and eighty pounds (£1,442,980) plus interest calculated in accordance with this decision. Due account shall be taken by the parties of contractual retention. In addition to this sum, Alstom are to pay interest at 9% pa calculated in accordance with this decision.

I decide that all payments calculated under this decision shall be paid within 21 days of the publication of this decision, namely by or before Wednesday 8th January (I have made due allowance for the Christmas break). After Wednesday 8th January, the interest on all payments outstanding at that time will be increased to 18% per annum, calculated daily and compounded quarterly.

I find that the Contract did not contain or provide for an effective final date for payment and thus I decide the final date for payment shall be 17 days after the date that payments become due.

Because of my findings associated with the HGCR Act, there is no need for me to discuss each and every item in the list of matters or alleged under-valuation as set out in Jarvis' Scott Schedule. I am aware that Application 31 is not the final application under this Contract and thus the matters that were discussed at the meeting on 13th December may have to be reconsidered in detail in the future. If I am to understand that I have been selected as adjudicator for any further disputes concerning this Contract, the same matters may come to me for determination in the future and I will thus retain my notes and papers on the individual issues of alleged under-valuation pending further references. I hope, however, that my comments earlier in this decision document (as to how the parties could narrow their differences by proper dialogue) will be heeded and thereby minimise the need for further adjudication, etc. ……."

6. Thereafter there was correspondence. Alstom complied with the decision. On 8 January 2003 it paid Jarvis £1,695,501.50 and interest of £32,733.90. However it expected that there would then be further discussions about, effectively, the final account. It is clear from the correspondence that Jarvis took the position that, notwithstanding the adjudicator's view that there might a "proper dialogue", as it had got a decision in its favour it would only talk on its own terms, even though the decision was necessarily provisional. It cancelled meetings; it took the view that there was nothing to discuss, when quite clearly there was much to clarify and to discuss; it declined to permit Alstom to carry out an audit which it had sought under the provisions of the contract, on the specious grounds that it was not seeking a further payment on account or that an audit could only happen after final settlement. Mr ter Haar QC for Alstom rightly described Jarvis' attitude as offensive.

7. On 16 May 2003 Alstom asked Jarvis to "ensure that all future correspondence is sent to our Borehamwood offices, marked for the attention of Mr John Baron, acting Project Manager". On 27 May 2003, 278 days after application 31, Jarvis submitted its application for payment 32. The application was for £1,328,350 (a remarkable increase, especially as regards cost, given that the works had been completed some time ago). It was sent to an office that Alstom had in Birmingham. Alstom also had its registered office in Birmingham (at a PO Box). The covering letter was sent by courier and read :
"We enclose for your attention, a copy of our Application for Payment No 32 dated 24 May 2003, for costs incurred up to 17 May 2003.

We have enclosed three lever arch files of supporting documentation, together with a copy of our application on CD.

File 1 includes the summary of our Application in the sum of £1,328,350. Would you please note that our application includes for the release of retention, currently being held in the sum of £190,773.00. We have not included for projected costs as we considered this to be inappropriate in this instance. File 1 includes substantiating documentation for all heads of cost other than subcontract costs which are included in Files 2 and 3.

File 2 includes Team Telecom Final Account, Jackson Eve application 23, a Rhode and Schwarz summary and Internal Trading costs. With regard to Rhode and Schwarz we would confirm that all invoices have been included in previous applications. Should you require further copies, please ask. With regard to Jackson Eve account, please note that we have included the sum claimed by Jackson Eve in respect of its loss and expense in the sum of £569,019.00.

File 3 includes the Final Account and supporting documentation in respect of Wrights.

We trust that the above meets with your approval and look forward to receiving your certificate and subsequent payment in due course.

The application was supported by three lever arch files of documentation. Amongst the attachments to the letter were two summaries relating to Jarvis' sub-subcontractors:

"SUBCONTRACTORS' SUMMARY

Summary of Subcontracts for Application 32

Subcontractor			Comments
Final Account	Final Account	Final Account	Final Account
1. Team Telecom (Operational Telecom)		£667,950.96	As agreed Final account and as attached
2. Rhode & Schwarz		£505,069.00	As Summary
3. Vital Resources		£605,168.79	As attached summary for VITAL
4. Leda		£26,446.70	As Jarvis Application 30
5. MDA Rail		£7,946.00	As Jarvis Application 27
6. Racal Services		£8,696.00	As Jarvis Application 27
7. EVE Rail		£2,928,734.50	As attached build up
8. Wrights Civil Engineering		£363,901.75	As Agreed Final Account for Wrights
9. MG Telecommunications		£15,275.00	As Jarvis application 22
10. Traffic Management Services		£565.00	As Jarvis application 22
11. Peek Traffic Ltd – Level Crossing Works, Camera mods		£6,050.00	As Jarvis application 24
12. Internal Trading		£148,398.25	As attached breakdown
Subcontractors Total to Final Summary		£5,284,201.95	

SUMMARY OF APPLICATION FOR JACKSON EVE RAIL

	Eve Val 23	Comment
Summary		
Troughing works	£590,722.52	As Eve account Application 23
Location stages and base	£140,481.10	As Eve account Application 23
Signal Bases	£570,278.13	As Eve account Application 23
Cable Pulling	£352,008.37	As Eve account Application 23
Provision of installers	£269,188.50	As Eve account Application 23
Site Instructions	£423,871.32	As Eve account Application 23
Allowance for coner gauge cracking	£13,165.56	As Eve account Application 23
Loss and expense	£569,019.00	
Interest	£0.00	
Total	£2,928,734.50	

8. Alstom acknowledged receipt in a letter of 29 May:

"Dear Alan

REF: SUNDERLAND DIRECT – SIGNALLING INSTALLATION, TEST & COMMISSIONING & TELECOMMUNICATION

Application for Payment No 32

We refer to your letter reference JAR/81362/ALSTOM/pls/05A07 dated the 27th May enclosing your Interim Application for Payment No 32.

Unfortunately, despite our specific instruction, reference our letter Proj/CMF/CMF568/saw dated the 16th May 2003, requiring all correspondence to be forwarded to our offices at Borehamwood, the document was delivered to our Birmingham office.

We have arranged that the document is forwarded onto the specific department at our Borehamwood offices, the anticipated delivery date is Monday 2nd June 2003.

Pursuant to paragraph 2.4 of Schedule F of the Contract all applications shall occur on the Wednesday of the Railtrack reporting cycle, therefore with respect to the current application for payment, it will be registered from Wednesday 18th June 2003.

In accordance with the aforementioned paragraph, we advise it is ALSTOM's intention that all questions and queries in relation to the information provided will be presented to you during the week commencing 18th June 2003.

In the mean time we attach herewith a copy of a letter we recently received from the Employer, the letter is self-explanatory and we invite you to comment upon the content."

Jarvis replied on 2 June:

"Dear Chris

RE: SUNDERLAND DIRECT

I acknowledge receipt of your letter dated 29th May 2003 and comment as follows.

Our Application for Payment dated 27th May 2003

Your letter suggests you will not be given consideration to our application for payment this month relying upon your letter dated 16th May which was not received in our office until the 22nd May and made no mention to the fact that your accounts office had moved. We delivered by recorded delivery our application for payment to your Birmingham Office on Tuesday 27th May, there is no acceptable reason why you should not consider this application. To suggest it would take you until Monday 2nd June to transfer this application to your Borehamwood Office is unacceptable and I am confident would be viewed as delaying tactics on your behalf.

I will be away on holiday until Monday 9th June 2003, upon my return I will contact you with a view to agreeing either a further interim valuation or a final account, looking forward to speaking with you to avoid further adjudication on this contract."

9. The correspondence (to which Jarvis drew attention) continued with four letters from Alstom:

First, on 4 June 2003:

"Dear Alan

REF: SUNDERLAND DIRECT – SIGNALLING INSTALLATION, TEST & COMMISSIONING & TELECOMMUNICATION

Application for Payment No 32

We refer to your letter reference hl/ar/ALSTOM/CF/Sn'lnd/020603 dated the 2nd June 2003 responding to our letter dated 29th May 2003.

With respect to your applications we assure you that ALSTOM are giving this subject all due consideration, we will be forwarding to you over the forthcoming period our questions and/or queries for clarification and or substantiation in order that we are able to validate the amounts in accordance with the terms of the Contract.

With regard to the processing of your application we reiterate that pursuant to Clause 2.4 Schedule F of the Subcontract Agreement, the application of the Subcontractor shall occur on the Wednesday of the Railtrack reporting cycle. Thus in accordance with the aforementioned requirement the first Wednesday in the Railtrack cycle for the current application to be registered is the 18th June 2003.

We set out below our questions and queries raised so far, this list is not conclusive since we are in the process of evaluating all the information presented it is not unreasonable to assume that further questions and queries will follow, in the mean time we await your response/ information in respect of the following.

Section:- General

1. *Pursuant to Clause C3.1.2.4 we are required to reconcile the costs against the works carried out at this moment, there is no cost value reconciliation, clearly this exercise is warranted before ALSTOM are able to certify the application.*
2. *Pursuant to Clause 62.6 'Applications for Payment' of the Main Conditions of Contract under Schedule A of the Subcontract Agreement ALSTOM are required to verify each application based upon evidence of the following:-*
   Clause 62.6.2.1 Labour submitted on a weekly basis showing a daily summary to the Employer's representative for approval. The weekly sheet is to indicate the task/s allocation throughout each day.
   Clause 62.6.2.3 Summary of invoices and authenticated receipts for payment for all sub-contract costs.
   Clause 62.6.2.4 Summary of invoices and authenticated receipts for payment received for all bought in items.
3. *In accordance with Clause 1.7 of Schedule J of the Subcontract Agreement we request a copy of the Contract plan and Procurement Schedule for all Sub-contractors along with all relevant method statements and possession applications and approval notices for all works within the current application.*
4. *Pursuant to Clause 18.4 & 5 of the Subcontract Agreement and in order that ALSTOM are able to validate the value of all variations kindly furnish us with the following:- a register of all variations ordered (and confirmed by ALSTOM) copies of the resource schedule per variation order and details of the costs applicable to each variation order.*
5. *Where ever day work sheets form the basis of your evidence of costs, pursuant to clause 2.2 of Schedule G of the Subcontract Agreement kindly furnish ALSTOM with a copy of the applicable weekly 'Real-time' possession report.*
6. *Where ever day work sheets form the basis of your evidence of costs kindly make reference to/ reconcile the day work hours to eg original scope of work; variation or change orders or other.*

Design

7. *Application No 32 includes time sheet for Mr R Berridge week ending 6/09/02, contract rate is £44.30 but the payment schedule uses £44.60 please clarify. The sheet did not record the work activities carried out nor did it record the particular change order / variation order, or the item of the original scope of works, as applicable.*

Project Management

8. *In Application No 32 Ann Breen is recorded in the contract as the Safety Adviser at the rate of £21.14/hr however in the day work sheet summary she is recorded as the planner as grade at the rate of £27.83. Kindly clarify.*

Sub-Subcontractors

9. *Jarvis Rail is reported as a sub-subcontractor in order that ALSTOM are able to validate in accordance clause C3.1.6.9 of RT/24 Schedule 2 of Schedule A of the Subcontract Agreement, kindly furnish us with all relevant substantiation as required under the aforementioned clause. Furthermore in the process of evaluating the Jarvis Rail account we note the following anomalies and request your assistance to clarify them:-*

   The application is supported by a summary of the Jarvis Rail account, kindly forward a copy of the authenticated invoice complete with all supporting documentation.

   There are references to a number of variations, kindly forward a copy of the Variation instruction and/or ALSTOM confirmation for each variation recorded.

10. *The Jackson Eve Rail account is presented in summary sheet form, in order that ALSTOM can validate the application pursuant to Clause 62.6 'Applications for Payment' of the Main Conditions of Contract under Schedule A of the Subcontract Agreement, kindly forward a copy of the authentic invoice complete with all supporting documentation.*

11. Day work Sheets

We are currently in the process of reviewing all day work sheets submitted and anticipate that a schedule of detailed specific questions will be forwarded to you by no later than 11th June 2003.

In the event that you believe the aforementioned information has already been forwarded to ALSTOM, if you can kindly refer to the particular submission eg Application No etc this will enable us to expedite our task more efficiently and thus reduce the overall time to validate your application.

Finally with regard to the Network Rail's letter dated 23rd May 2003 we note you have instructed a staff member to investigate the matter we trust that you will advise us in due course of your proposals regarding this matter."

Secondly, on 6 June:

"Further to the letter of 4th June 2003, ALSTOM records that the questions and queries relating to Application 31, which were detailed within ALSTOM's response to the Adjudication Notice, remain unanswered by Jarvis.

For the avoidance of doubt, to the extent that these questions and queries have not subsequently been addressed in our letter of 4th June, we are still expecting Jarvis to provide satisfactory responses and Jarvis should consider this letter as the appropriate reminder of the outstanding action."

This letter therefore reiterates earlier questions and queries which had been included in what came to be known as the "lilac file".

Thirdly, on 13 June:

"Further to our letter reference Proj/CMF/CMF/570/SAW dated the 4th June 2003 regarding the above subject matter.

Since receiving your letter reference hl/ar/Alstom/CF/Sn'lnd/020603 dated the 2nd June 2003 we have not received any form of communication from your good self and/or your staff regarding this subject. Whilst we appreciate that you have been on a short vacation we had expected that some one in your organisation would have been dealing with this matter in your absence.

We reiterate ALSTOM's intent to resolve all outstanding issues in order to achieve an amicable settlement of the application as efficiently as is possible.

Pursuant to the conditions of Contract ALSTOM are required to validate the content of your application and certify for payment within fourteen days of receipt. In accordance with the conditions of Contract if ALSTOM are unable to validate the content of the application due to a lack of relevant documentary evidence, those invoice values, which cannot be satisfactorily substantiated will be deducted from the application.

To this end we request your confirmation that the information requested will be forthcoming. Whilst we appreciate such an exercise may place demands upon your staff we would nevertheless request that you notify us of the anticipated date when the substantiating information will be available in order that we can organise for the necessary staff to carry out the validation exercise.

It was considered prudent to point out to you, at this time, Clause 38.4 of the Subcontract Special Conditions which states:-

"No payment by the Contractor, Final Certificate or other certificate, or valuation under the Subcontract shall be evidence that the Subcontractor has performed his obligations under the Subcontract, or shall prejudice or affect any right to remedy of the Contractor".

In accordance with the terms of the Contract ALSTOM are obligated to validate that all the costs presented are due under the terms and conditions of Contract. In order to satisfy this requirement, we reiterate that the costs need to be reconciled to the Subcontract scope of works.

We conclude with a proposal that should you consider that a meeting is beneficial for the purpose of clarifying our requirements, we are able to attend if it will promote an efficient resolution."

Fourthly, on 16 June:

"Further to our letter reference Proj/CMF/CMF/570/SAW dated the 4th June 2003 regarding the above subject matter.

In the course of carrying out the exercise to validate your current Application for Payment No 32 we note that there are a number of reference numbers, used in the Daywork sheet, for the description of works. We understand these reference numbers are an internal description adopted by your company. Kindly forward a schedule of the works reference numbers in order that we are able to allocate the time claimed against the relevant work activity.

We also note that your sub-subcontractor has added a figure of 15% mark-up to his subcontractor's price. Kindly confirm if this was acknowledged and agreed by Alstom and/or Employer and if not how this figure is arrived at?"

10. On 18 June 2003 Jarvis wrote by way of reply:

"We refer to the recent correspondence regarding our Application for Payment number 32 submitted to you on 27 May 2003.

In order that you may clearly understand our position we would confirm the following:

1. We have already set out our position regarding service of our application for payment, receipt of which, under any circumstances should be regarded as 28 May 2003. In the adjudication concerning Application 31, you may recall that Mr Chapman considered that the Contract did not satisfy s110(1)(b) of the Act and that as such, the Scheme applied.

2. Under the Scheme, the final date for payment is 17 days from the date that payment becomes due. We consider that our payment became due on 15 June 2003.

3. You may also recall that Mr Chapman also found that No specific and focused questions and queries were raised with(in) the same week as receipt of the application. Alstom should not therefore have reduced the sum applied for ….

4. With regard to your letter dated 4 June, we note that you have quoted extracts from the Contract under the heading of <u>General</u> items 1 to 6. We do not accept that your queries are specific or focused. For example with regard to authenticated receipts, you have not taken into account the fact that these receipts have already been provided to you. This has been the subject of considerable correspondence leading up to the adjudication, which you have chosen to ignore.

5. With regard to Item 7, please reduce the rate for Mr Berridge from £44.60 to £44.30 for the purposes of Application 31.

6. With regard to Item 8, Ann Breen should be charged at the Contract rate of £21.14 for the purposes of Application 32.

7. With regard your items 9 to 11, again these queries are general with the exception of the authenticated receipt for Eve Rail. We are currently processing Eve's application number 23 and a further authenticated receipt will be provided.

8. With reference to Mr Chapman's comments quoted in 3 above, we do not consider that the comments included in your letter dated 6 June 2003 constitute an adequate reason for non payment. You may recall that we constantly complained during, the administration of Applications 28, 29, 30 and 31, that the questions you raised were not specific and in many instances impossible to answer. It is with regret that you are still following the same path.

9. We consider that again, you have not looked carefully at our application and, with the exception of items 5 and 6 above, you have not identified individual queries to which we can respond. This is typified in your letter dated 13 June which again refers to "information" in the general sense.

10. In your letter dated 16 June 2003, you have again made a general reference to a number of reference numbers, used on Daywork sheet(s). You have neither identified the Daywork sheets in question nor the Subcontractor. If, as we suspect this is in respect of Eve Rail, please be advised that this Subcontract account was audited by yourselves and Railtrack in January 2002. At that time, specific and detailed queries were answered and are on file.

To conclude, we share your view that a meeting would be beneficial in an attempt to resolve the final account and we propose that we meet on either the 25th or 27th June, time and venue to be agreed. You no doubt appreciate failure to agree will result in a further Adjudication.

Looking forward to your call to confirm the arrangements."

A letter from Alstom also of 18 June probably crossed with that letter:

"Further to our letter reference Proj/CMF/CMF/570/SAW dated the 4th June 2003 regarding the above subject matter.
In the course of carrying out the exercise to validate your current Application for Payment No 32 we have noted the following information is required before we are able to progress the exercise.
To this end we have attached herewith the following schedules each provides a detailed commentary with reference to the information omitted from your application which is required before ALSTOM are able to complete the validation exercise.

Appendix A:- Materials Schedule
Appendix B:- Plant Schedule
Appendix C:- Daywork sheets
Appendix D:- Jarvis Subcontractor accounts

In accordance with Clause 2.4 Schedule F of the Conditions of Contract it is incumbent upon Jarvis to provide sufficient information to ALSTOM in order that the application can be certified. The information provided is to enable Alstom to be reasonably certain that the works to which payment is sought have been properly and correctly valued. The information provided to ALSTOM in order to enable ALSTOM to be reasonably satisfied that the values within the application are true costs in accordance with the terms and conditions of contract.

We note that since the receipt of your letter dated 2nd June 2003 there has been no response from you and/or your staff in respect of any of the matters raised in connection with the certification process of your application number 32. It is of course Jarvis's prerogative whether to provide the information requested, thus allowing ALSTOM to carry out its obligations under the Conditions of Contract, or not and in which case ALSTOM would have no other option but to certify the application as nil value."

Alstom wrote again on the next day, 19 June:
"We refer to your letter reference hl/ar/Alstom/Sn'lnd/180603 dated the 18th June 2003 regarding the above subject matter. It is a little unfortunate that your letter has crossed with our latest request for information, whereby we have provided a number of questionnaire schedules, which raise specific questions regarding individual costs.
We note your comments and set out below our response to each point raised. We reiterate ALSTOM'S commitment to settle this account as efficiently as possible. We believe that through constructive dialogue all matters can be resolved.
Whilst we do not wish to enter into protracted correspondence, deluged by perpetual reiterations, it is important that we endeavour to eradicate misunderstandings and/or disagreements in order to settle all pending issues.

Point 1: - Date of Application
We do not concur with your opinion, for the following reasons:- firstly we had explained that your application had unfortunately been incorrectly address and thus was sent to the wrong address. The application was received at the correct address on Monday 2nd June 2003. Secondly, the Contract is most explicit in respect of the submission of Subcontract payment applications. We reiterate pursuant to clause 2.4 of Schedule F of the Subcontract agreement, applications for payment "shall occur on the Wednesday of the Railtrack payment reporting cycle" according to the payment cycle, set down in the Contract and which is incorporated into the Subcontract agreement, it had been established that, the next date for receipt of a payment application was the 18th June 2003.

Furthermore notwithstanding ALSTOM's contractual obligation in a bid to progress the validation process we have forwarded a number of requests for information and/or clarification on matters of your application and received only your letter in response.

Point 2
We did not concur with your opinion that payment was due on the 15th June 2003. We reiterate that payment will be implemented in accordance with the conditions of Contract, at this moment ALSTOM are endeavouring to carry out the validation exercise as required under the terms of the Contract, we have requested information and or clarification and explained why such information is required.

Point 3
We have no comment upon the abstract of the adjudicator's commentary you have cited, however we believe it is pertinent to point out another of the adjudicator's remarks, in the paragraph entitled "Burden of Proof Issue" it states:-

Clearly it is for the applicant, in this case Jarvis, to provide sufficient information to the certifier, Alstom, to enable Alstom to be reasonably certain that the work for which payment is sought has been properly and correctly valued".

We trust you concur with the adjudicator's remarks.

Point 4
With regard to the general items 1 to 6 of our letter dated 4th June 2003, the remarks are not meant to be specific or focussed since they are 'general remarks' which in fact apply to every section of your application, needless to say our subsequent questions have been specific and focused. However, we believe, the general remark remains valid until such time as the requisite information is provided it is difficult to see how ALSTOM are able to validate the application in

accordance with the conditions of Contract. We acknowledge there has been a considerable amount of correspondence exchanged but again there is no evidence on our files that the general level of supporting documentation raised in our letter was provided. If however your staff can refer to specific submissions whereby the information requested was presented kindly advise in order that we can progress the validation exercise.

Point 5
We acknowledge your agreement to the amendment to this application number 32.

Point 6
Again we acknowledge your agreement to the amendment to application number 32.

Point 7
With regard to items 9 & 10 of our letter namely Subcontractors we note that you are currently processing your subcontractor, Eve, account and await the further authenticated receipts in due course. We have already prepared a schedule of questions in respect of the Eve account and Messrs Wright account the schedule was forwarded under cover of our letter dated the 17th June 2003. We reiterate there were no references, in the application linking the costs to either the variation account and/or other works this exercise will be required in order to conclude the validation exercise.

With regard to item 11 in our letter namely Daywork Sheets a detailed schedule of questions has been prepared, a number of questions have already been forwarded to you and further questions and/or clarification are being raised and will be forwarded in due course.

Point 8
We do not concur with your comments we, believe, we have already demonstrated out intent to resolve all outstanding issues in connection with this account. We have, since receiving your application, issued a number of questionnaires for further information and clarification as and when this information is provided we shall validate the costs presented in the application, as efficiently as possible, but of course this exercise is subject to the proviso that the necessary information is provided.

Point 9
We note your concerns and reiterate that it is ALSTOM's intention that this account will be settled by mutual agreement, cognisant of the terms and conditions of Contract, and that the process will take no longer than is necessary.

Point 10
We have forwarded to you a schedule of the queries and questions raised in connection with the Daywork sheets. There is little doubt that further questions will develop over the forthcoming days. Whilst we acknowledge a considerable amount of information had been provided, unfortunately it would appear the information we have requested is not included.

It is reassuring to note your agreement to our proposal to meet, we trust you also are committed to settling this account as swiftly as possible. With both parties working towards an amicable settlement hopefully there will be no need for third party interventions."

11. The hope expressed in the last paragraph of the letter of 19 June 2003 was not realised (although Jarvis before me professed itself still "ready, willing and able to embark upon a negotiation and if necessary adjudication to resolve the final account"), even though on 2 July Alstom had sent Jarvis its evaluation of the Jarvis application. It concluded Jarvis owed Alstom money. I refer to it later. First, on 29 July 2003, Alstom commenced an action in this court (HT 03 260) in which it sought a declaration that the subcontract contained an agreement to share "pain and gain" or alternatively (since the first declaration subsumed a question about the existence of a subcontract) that the price to be paid to Jarvis for its work was to be calculated taking into account a share by Jarvis of the "pain" suffered by Alstom under its main contract with Railtrack. (I shall call it action 260.) In its particulars of claim Alstom said that as between itself and Railtrack it calculated that it had borne "pain" of £1.5 million and that Jarvis owed it £839,175 (for payment of which it also made a claim) based on a "forecast cost of completion" by Jarvis of £14,108,559, i.e. about £4 million more than the contract price. By that time Alstom had settled with Railtrack.

12. Secondly, two further notices requiring adjudication were served: by Jarvis on 28 January 2004 and by Alstom on 11 February 2004. In its notice Jarvis said:
"Jarvis seeks a decision from the adjudicator that ALSTOM is obliged to certify and pay and must certify and pay the sum of £1,328,250 plus interest on such sum as the adjudicator decides, for the following reasons:

(a) ALSTOM failed to put to Jarvis any sufficiently focussed questions or queries within the same week as application 32; alternatively if and insofar questions were put to Jarvis and if and insofar these questions were sufficiently focused, Jarvis satisfactorily answered any such questions or queries such that the sum applied for should be certified and paid to Jarvis.

(b) Further or in the alternative, ALSTOM failed to serve a notice of intention to withhold payment for application 32 in the time prescribed by the Act and the scheme.

(c) Further or in the alternative, ALSTOM failed to value properly application 32 under the terms of the contract."

The adjudication initiated by Alstom was a riposte: "This adjudication is brought to enable ALSTOM to obtain relief which they cannot or may not be able to obtain in the second adjudication", i.e. it was to recover money paid. Mr Chapman gave a decision in these adjudications on 15 March 2004. (On 23 February 2004 the trial of issues of liability in action 260 had started before Mr Recorder Reese QC, issues of quantum having been deferred; judgment was reserved.) Mr Chapman's decision read (in part):

"Introduction [Having recited the history much as set out in his first decision, Mr Chapman continued]

Two further disputes have been referred to adjudication before me. These are referred to as the second and the third adjudications. The second adjudication was notified by Jarvis on the 28th January 2004 with the referral served on 4th February 2004. The third referral was notified by Alstom on 17th February 2004 and the referral served on 4th March.

The issues in both the second and third adjudications concern the payments due or purportedly due to Jarvis – Alstom's position being that payments made already exceed the final amounts due to Jarvis and Jarvis claiming that additional monies are due and as yet unpaid.

The parties agreed to refer to me preliminary issues which have conveniently been called the 'gateway issues' and this decision is in connection with those issues alone.

On 5th March 2004 a hearing was held in my chambers at which the parties' competing contentions on the gateway issues were presented to me. Those present, apart from myself, were:

For Jarvis: Alan Robson Esq ; Peter Mills Esq of Eversheds ; James Benedick Esq of Eversheds ; Martin Bowdery QC of Counsel

For Alstom: Chris Fossey Esq ; Nabeel Ikram Esq of Lovells ; Roger ter Haar QC of Counsel

The Gateway Issues

The gateway issue in connection with the second adjudication concerns withholding of payments for which Jarvis has applied and whether, under the Housing Grants, Construction and Regeneration Act 1996 (the Act) and the associated Scheme for Construction Contracts (the Scheme) (which I have previously decided controls any adjudication brought by the parties under this Contract), the sum applied for is to be paid in full.

The gateway issue in connection with the third adjudication is jurisdictional. Jarvis argues that the Scheme (at paragraph 9.2) requires an adjudicator to resign where an issue referred to adjudication is the same or substantially the same as one that has previously been referred to adjudication, and a decision has been taken in that adjudication.

Discussion

Gateway issue on the matter of withholding

On or before 30th May 2003 Alstom received Application No. 32 from Jarvis. The parties agree that the latest date for receipt is the 30th May 2003. Under the Contract at Schedule F various procedural steps are set out that govern the submission of payments applications (by Jarvis) and the processing thereof (by Alstom). At paragraph 2.4 Jarvis are required to make applications every 28 days to correspond with the Railtrack payment ad reporting cycle. The application is supposed to be submitted on the Wednesday of the Railtrack reporting cycle. Alstom are to put to Jarvis, with the same week of such application, questions and queries in connection with the information provided by Jarvis and shall (only) disallow payments for which Jarvis has failed to provide satisfactory answers to such questions and queries.

The reference to 'within the same week of such application' appears to be accepted by the parties to mean within a week of the application and I would certainly concur with this interpretation.

On 4th June 2003, Alstom did write to Jarvis setting out some questions and queries in connection with Application No 32. Jarvis argues that with three exceptions – all of which were dealt with by Jarvis – the questions and queries were not

sufficiently focussed to enable satisfactory answers to be provided. Jarvis referred me to my earlier decision in which I made clear that any questions and queries issued pursuant to paragraph 2.4 should be focussed and specific.

I have reviewed the questions and queries in the 4th June letter in detail. I agree that Q7 and Q8 were specific and required satisfactory answers from Jarvis to allow the payment in respect of these matters to proceed. There is no issue between the parties in this connection and Jarvis readily accepted that the 'contract rates' – somewhat lower than the rates claimed – should apply.

Jarvis argues that Q1 to Q6 are 'blocking devices' aimed at preventing payment to Jarvis, that Questions 9 and 11 were too general and that Question 10 was (eventually) answered. Jarvis thus argue that with the exceptions mentioned the questions contained in the letter of the 4th June were not sufficiently specific and thus fall foul of my previous decision. My views on these matters are as follows:-

Q1: Cost Value Reconciliation: I find this a general query and not sufficiently specific to reasonably deny Jarvis payment of sums claimed.

Q2: Verification by Evidence: I find this to be insufficiently specific in the context of a review of an interim payment application.

Q3: Contract Plan and Procurement Schedule: I find this to be insufficiently specific in the context of a review of an interim payment application.

Q4: Validation of Variations: I find this to be insufficiently specific in the context of a review of an interim payment application.

Q5: Daywork Sheet: I find this to be insufficiently specific in the context of a review of an interim payment application.

Q6: Daywork Sheets: I find this to be insufficiently specific in the context of a review of an interim payment application.

Q9: Sub-Subcontractor: I find this to be insufficiently specific in the context of a review of an interim payment application.

Q10: Jackson Eve Account: I consider that this question and query is sufficiently specific to be valid under paragraph 2.4.

Q11: Daywork Sheets review: I find this to be insufficiently specific in the context of a review of an interim payment application.

Accordingly, with the exception of Questions 7 and 8, I find only Question 10 to be in the nature of a question for which paragraph 2.4 permits disallowance. This view coincides with that held by Jarvis.

Another letter, written by Alstom of 6th June 2003, purported to raise questions and queries pursuant to paragraph 2.4. This letter was brief but referred to what has become known in this reference as the lilac file – a file I was shown during the previous adjudication. For the same reasons as given in the earlier adjudication and I the paragraphs immediately above, I do not consider the matters raised in the lilac file to be sufficiently specific and focussed to fall within the ambit of paragraph 2.4.

By way of reiteration of and expansion on my previous decision, I would state that the sort of questions that I believe were contemplated by paragraph 2.4 were very much of the nature of the questions posed by Questions 7 and 8. These are the sort of questions that can be answered promptly by Jarvis so that their payment application is not jeopardised. This is not to say that Alstom should be disallowed from asking questions of a more general nature but, to my mind, these general questions should not be asked pursuant to paragraph 2.4. This may appear to be a fine distinction but, I believe, one that is important. If questions of a general nature are asked pursuant to paragraph 2.4 Jarvis could be kept out of its rightful financial entitlements indefinitely and this cannot be the intent behind the Contract.

Under this particular Contract, I envisage there being an ongoing dialogue between Alstom and Jarvis whereby the financial motivation required by Alstom is requested and hopefully provided by Jarvis separately from the specific queries – such as those posed by Questions 7 and 8 – that alone may result in disallowance (pursuant to paragraph 2.4) if not answered satisfactorily. I am not blind to the potential difficulty of the system I have described where general questions are repeatedly asked by Alstom but are not answered by Jarvis and for that reason Alstom might consider that disallowance under paragraph 2.4 is permissible. In such circumstances I remain of the belief that Alstom is required to rephrase any general questions so that they are sufficiently specific to permit prompt and final answers by Jarvis. Failure by Jarvis to respond adequately to such specific questions would then result in paragraph 2.4 disallowances. I do not maintain that the arrangements provided for payment certification under the Contract are by any means ideal, but we must make the best of what we have.

Thus, with the possible exception of the subject matter of Q10 I find no reason for Alstom to have excluded payments from Jarvis' application as being 'disallowed payment' under paragraph 2.4. I understand and have no reason to doubt that some of the requested information was provided by Jarvis some five months later albeit, argues Alstom, not in complete form.

I am not persuaded by Alstom's arguments concerning failure by Jarvis to comply with the Railtrack payment cycle. Whether or not the Act is of higher priority than the Contract misses the point that this provision is directory in nature and should not (without express authority within the Contract) be permitted to destroy a substantive entitlement of Jarvis – i.e. to receive payment pursuant to an application.

If this was all, I would be contemplating a deduction from the application of a sum equivalent to that claimed by Jarvis in respect of the Jackson-Eve sub-contract and the reduced sums due for Mr Berridge and Ms Breen. But that is not all. Under Section 111 of the Act, a party to a construction contract may not withhold payment after the final date for payment unless an effective notice of intention to withhold payment has been given. The Act specifies the requirements of the withholding notice and further imposes on the parties (at Section 110) the provisions of the Scheme where the parties have failed to specify within the Contract when payments are to become due. In such cases (and in my earlier decision I found this Contract to be such a case), interim payments are to be made within 7 days following the relevant period or after the making of the claim by the payee. Paragraph 10 of Part II of the Scheme states that any such notice of intention to withhold payment shall be given not later than 7 days before the final date for payment which in turn (and pursuant to paragraph 8 of Part II of the Scheme) is 17 days from the date the payment becomes due.

Under the Act, failure to serve an effective withholding notice within the time permitted prohibits the payer withholding (any) sums from the payee in respect of the sum due under the Contract.

Alstom did not serve a withholding notice in due form and/or in due time and thus the requirements of Section 111 were not met. Alstom is not entitled to withhold monies from the sums due under the Contract to Jarvis.

This determination raises two immediate matters. First, the interaction between paragraph 2.4 of Schedule F and the provisions of the Act and secondly whether Alstom's argument as to what is the 'sum due under the Contract'.

As to the first, I reiterate the view I formed at the previous adjudication wherein I failed to see how the provisions of paragraph 2.4 (as to the dates for payment being linked to the dates of the Railtrack certificate) provide sufficient certainty of the dates for payment under the Contract to avoid the provisions of the Scheme from applying. Consequently the last date for the issue of a withholding notice is governed by the Scheme as set out above. I see that failure by Alstom in compliance with either paragraph 2.4 or Section 11 as being fatal to Alstom's right to deduct money from the Jarvis application. Consequently, Alstom's failure to serve a withholding notice pursuant to Section 111 prevents Alstom paying Jarvis anything less than the sum due under the Contract.

The second point concerns the 'sum due' under the Contract. Alstom argues that this is the sum properly due rather than the sum applied for by Jarvis. Under the Scheme at paragraph 2 of Part II the 'amount due' is to be determined by way of deducting the amount already paid from the value of work done (including materials on site if applicable) plus other sums due to the payee under the Contract. The amount due cannot exceed the difference between the contract price and the aggregate of the instalments paid to date. In the subject Contract the contract price is still to be finally determined and as I write the parties await (as far as I am aware) the decision of the TCC on the applicability of the pain/gain mechanism under the Contract. This judgment should assist the parties in knowing how the contract sum is to be calculated.

Until such time as that is determined I will follow my earlier decision in which I stated that the sum due equates to the amount claimed by Jarvis less only those deductions that are rightfully made by Alstom and which were the subject of a previously issued withholding notice.

These determinations may appear to be harsh to Alstom but the intent of the Act (in the context of Part II) was primarily to provide cash-flow and prevent the injustices resulting from arbitrary withholding of payments until the latest time possible. …

Gateway issue on the matter of jurisdiction

Under paragraph 9.2 of Part 1 of the Scheme an adjudicator must resign where the dispute that is referred to him or her is the same or substantially the same as one that has previously been referred to adjudication and a decision has been taken in that adjudication.

I am quite clear in my view that the subject matter in the second and third adjudications is substantially the same – that is the amount to be certified as being due to Jarvis in connection with Application No. 32. What is not quite so clear is whether a decision has been taken in the second adjudication that would require the adjudicator to resign in the third adjudication.

I have pondered over the wording of the paragraph in question. The Scheme refers to 'a' decision and not 'the' decision, also that the operative verb is 'taken' rather than 'made'. This wording could therefore require that a step has been taken in the adjudication rather than a final determination having been made. Although this interpretation would be a convenient means of avoiding the dilemma pointed out by Alstom (insofar as there ever being a determination by adjudication of the issues between the parties), I would struggle with adopting this interpretation as I do believe the draftsman intended to mean that a substantive decision should have been made or taken in the previous adjudication before resignation was required in the subsequent adjudication.

Although by reference to my decisions in these gateway issues the second adjudication has been dealt with in general terms – I have not made a decision on the absolute values of the various matters in issue between the parties and I do not intend to do so at this stage. Far, far better for the parties to await the outcome of the TCC and then adjudicate the matter in full and unequivocal terms, hopefully assisted by a thorough audit of Jarvis' cost and expense and in the knowledge of whether the pain/gain provisions apply.

At the hearing on the 5th March both parties expressed their desire to get the matters in issue settled once and for all and I heartily agree with these sentiments and trust that both parties were expressing their honest and considered views through their counsel. This being the case, I have decided to resign from the third adjudication at my own volition (under paragraph 9(1) of Part 1 of the Scheme and I will not charge the parties any fees for the time I have spent considering that matter. The parties are asked to treat this part of this decision as notice given by me under paragraph 9(1). By taking this unusual step I believe I have safeguarded the parties' opportunities in referring the substantive matter of the true value of the final account to me at a later date and once the pain/gain determination has been issued by the TCC. There is no need for me to make a determination of the actual value of Application 32 at this stage as Jarvis are herein found to be entitled to the full sum applied for."

13. On receiving the decision of 15 March 2004 Alstom acted promptly. On 18 March 2004 it commenced an action against Jarvis (claim no HT 04 85). (I shall call it action 85.) In its particulars of claim Alstom asked for the following:

(1) An order that Jarvis do repay to ALSTOM the sum of £1,695,501.50 and interest of £32,733.90 paid by ALSTOM to Jarvis on 8 January 2003 pursuant to the Adjudicator's decision of 18 December 2002 alternatively such lesser sum as this Court may find due, together with interest pursuant to the Supreme Court Act 1981;

(2) A declaration that the Adjudicator's Decision of 16th March 2004 be set aside in so far as it related to the Second Adjudication on the grounds that the Adjudicator had no jurisdiction to make the decision which he did;

(3) A declaration that the Adjudicator was wrong to decide that the ALSTOM had failed to issue a withholding notice which they were required to issue in respect of Payment Application No. 32;

(4) A declaration that upon the true construction of the Sub-Contract and in the events which had happened Jarvis were not entitled to any payment in respect of Payment Application No. 32 alternatively were not entitled to any payment in respect of the amounts included in Payment Application No. 32 relating to the Eve Rail sub-sub-contract;

(5) A declaration that upon the true construction of the Sub-contract and in the events which had happened the Sub-Contract Price does not exceed £10,238,432.66 alternatively does not exceed such larger sum as this Court may find due;

(6) An order that Jarvis do repay ALSTOM the sum of £2,461,775.69 (plus VAT) being the amount paid to Jarvis by ALSTOM in excess of the aforesaid figure of £10,238432.66 alternatively such lesser sum as this Court may find due to ALSTOM, together with interest upon any sum so ordered pursuant to the Supreme Court Act 1981;

(7) An order restraining Jarvis from enforcing or seeking to enforce the Adjudicator's Decision dated 16th March 2004;

etc.

14. Amongst other things Alstom pleaded that no withholding notice was necessary in relation to Payment Application 32 and Mr Chapman was wrong so to decide. It said:

"38. The Adjudicator was wrong in so holding:

(1) ALSTOM's obligation was to pay such sum as might be certified under the machinery of Schedule F of the Sub-Contract: they paid all sums so certified and accordingly did not withhold any sum due under the Sub-Contract within the meaning of Section 111 of the Act;

(2) Further or alternatively, by reason of the matters referred to at paragraphs 32 to 36 above Jarvis were not entitled to the sum claimed in Payment Application No 32 which accordingly was not a "sum due under the contract" within the meaning of Section 111 of the Act;

(3) Further or alternatively Jarvis was and is not entitled to more than £10,238,432.66 as the Subcontract Price under the Sub-Contract. As Jarvis had already been paid more than that sum no further "sum was due under the contract" within the meaning of Section 111 of the Act.

(4) Further or alternatively if it was necessary for ALSTOM to serve a withholding notice, they satisfied that obligation by sending a letter dated 2 July 2003 (ref proj/CMF580/CMF/saw)."

15. In addition Alstom also contended that the Adjudicator's jurisdiction was limited by the Contract Price. Its case assumed that the adjudicator was acting under the Scheme for Construction Contracts (England and Wales) Regulations 1998 (as contained in the Schedule to S.I. 1998 No. 649). I shall do the same. Nothing in this judgment should therefore be considered as an endorsement (or criticism) of Mr Chapman's view that the Railtrack procedure does not comply with section 108 of the Act (see below). However Mr Chapman's decision meant that the issues were also about the meaning and application of Part II of the Scheme. That provides (inter alia):

PART II-PAYMENT

Entitlement to and amount of stage payments

1. Where the parties to a relevant construction contract fail to agree-

(a) the amount of any instalment or stage or periodic payment for any work under the contract, or

(b) the intervals at which, or circumstances in which, such payments become due under that contract, or

(c) both of the matters mentioned in sub-paragraphs (a) and (b) above, the relevant provisions of paragraphs 2 to 4 below shall apply.

2.(1) The amount of any payment by way of instalments or stage or periodic payments in respect of a relevant period shall be the difference between the amount determined in accordance with sub-paragraph (2) and the amount determined in accordance with sub-paragraph (3).

(2) The aggregate of the following amounts

(a) an amount equal to the value of any work performed in accordance with the relevant construction contract during the period from the commencement of the contract to the end of the relevant period (excluding any amount calculated in accordance with subparagraph (b)),

(b) where the contract provides for payment for materials, an amount equal to the value of any materials manufactured on site or brought onto site for the purposes of the works during the period from the commencement of the contract to the end of the relevant period, and

(c) any other amount or sum which the contract specifies shall be payable during or in respect of the period from the commencement of the contract to the end of the relevant period.

(3) The aggregate of any sums which have been paid or are due for payment by way of instalments, stage or periodic payments during the period from the commencement of the contract to the end of the relevant period.

(4) An amount calculated in accordance with this paragraph shall not exceed the difference between-

(a) the contract price, and

(b) the aggregate of the instalments or stage or periodic payments which have become due.

Dates for payment

3. Where the parties to a construction contract fail to provide an adequate mechanism for determining either what payments become due under the contract, or when they become due for payment, or both, the relevant provisions of paragraphs 4 to 7 shall apply.

4. Any payment of a kind mentioned in paragraph 2 above shall become due on whichever of the following dates occurs later-

(a) the expiry of 7 days following the relevant period mentioned in paragraph 2(1) above, or

(b) the making of a claim by the payee.

5. The final payment payable under a relevant construction contract, namely the payment of an amount equal to the difference (if any) between

(a) the contract price, and

(b) the aggregate of any instalment or stage or periodic payments which have become due under the contract,

shall become due on the expiry of-

(a) 30 days following completion of the work, or

(b) the making of a claim by the payee,

whichever is the later.

…..

16. Any other payment under a construction contract shall become due

(a) on the expiry of 7 days following the completion of the work to which the payment relates, or

(b) the making of a claim by the payee,

whichever is the later.

Final date for payment

8. (1) Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the provisions of this paragraph shall apply.

(2) The final date for the making of any payment of a kind mentioned in paragraphs 2, 5, 6 or 7, shall be 17 days from the date that payment becomes due.

Notice specifying amount of payment

9. A party to a construction contract shall, not later than 5 days after the date on which any payment-

(a) becomes due from him, or

(b) would have become due, if-

(i) the other party had carried out his obligations under the contract, and

(ii) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,

give notice to the other party to the contract specifying the amount (if any) of the payment he has made or proposes to make, specifying to what the payment relates and the basis on which that amount is calculated.

Notice of intention to withhold payment

10. Any notice of intention to withhold payment mentioned in section 111 of the Act shall be given not later than the prescribed period, which is to say not later than 7 days before the final date for payment determined either in accordance with the construction contract, or where no such provision is made in the contract, in accordance with paragraph 8 above.

…….

Interpretation

12. In this Part of the Scheme for Construction Contracts-

"claim by the payee" means a written notice given by the party carrying out work under a construction contract to the other party specifying the amount of any payment or payments which he considers to be due and the basis on which it is, or they are calculated;

"contract price" means the entire sum payable under the construction contract in respect of the work;

"relevant construction contract" means any construction contract other than one

(a) which specifies that the duration of the work is to be less than 45 days, or

(b) in respect of which the parties agree that the duration of the work is estimated to be less than 45 days;

"relevant period" means a period which is specified in, or is calculated by reference to the construction contract or where no such period is so specified or is so calculable, a period of 28 days;

"value of work" means an amount determined in accordance with the construction contract under which the work is performed or where the contract contains no such provision, the cost of any work performed in accordance with that contract together with an amount equal to any overhead or profit included in the contract price;

"work" means any of the work or services mentioned in section 104 of the Act."

16. I here interpose certain provisions of the Housing Grants, Construction and Regeneration Act 1996 (the Act):

108 (1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.

For this purpose "dispute" includes any difference.

(2) The contract shall-

(a) enable a party to give notice at any time of his intention to refer a dispute to adjudication;

(b) provide a timetable with the object of securing the appointment of the adjudicator and referral of the dispute to him within 7 days of such notice;

(c) require the adjudicator to reach a decision within 28 days of referral or such longer period as is agreed by the parties after the dispute has been referred;

*(d) allow the adjudicator to extend the period of 28 days by up **to** 14 days, with the consent of the party by whom the dispute was referred;*

(e) impose a duty on the adjudicator to act impartially; and

(f) enable the adjudicator to take the initiative in ascertaining the facts and the law.

(3) The contract shall provide that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

The parties may agree to accept the decision of the adjudicator as finally determining the dispute.

(4) The contract shall also provide that the adjudicator is not liable for anything done or omitted in the discharge or purported discharge of his functions as adjudicator unless the act or omission is in bad faith, and that any employee or agent of the adjudicator is similarly protected from liability.

(5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply.

…..

110. (1) Every construction contract shall-

(a) provide an adequate mechanism for determining what payments become due under the contract, and when, and

(b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(2) Every construction contract shall provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if-

(a) the other party had carried out his obligations under the contract, and

(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,

specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated.

(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) or (2), the relevant provisions of the Scheme for Construction Contracts apply.

111 (1) A party to a construction contract may not withhold payment after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold payment.

The notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment if it complies with the requirements of this section.

(2) To be effective such a notice must specify-

(a) the amount proposed to be withheld and the ground for withholding payment, or

(b) if there is more than one ground, each ground and the amount attributable to it,

and must be given not later than the prescribed period before the final date for payment.

(3) The parties are free to agree what that prescribed period is to be.

In the absence of such agreement, the period shall be that provided by the Scheme for Construction Contracts.

(4) Where an effective notice of intention to withhold payment is given, but on the matter being referred to adjudication it is decided that the whole or part of the amount should be paid, the decision shall be construed as requiring payment not later than-

(a) seven days from the date of the decision, or

(b) the date which apart from the notice would have been the final date for payment,

whichever is the later."

17. A week after Alstom commenced action 85, Jarvis started its action (claim HT 04 100) to enforce Mr Chapman's decision that Jarvis was to be paid the amount claimed in Application 32, i.e. £1,328,350 plus interest. (I shall call it action 100.) On Jarvis' application the times were as usual shortened so on 8 April 2004 Jarvis issued an application under Part 24 for summary judgment for the amount claimed. On 7 April 2004 Jarvis also issued an application to strike out certain paragraphs of Alstom's particulars of claim in action 85 and for an order that action 85 should be stayed until judgment was given and the determination of action 100. Both actions (85 and 100) came to me. A Case Management Conference took place on 23 April 2004. The hearing of Jarvis' application for summary judgment had by then been fixed for 28 May 2004.

18. Having heard Mr ter Haar QC for Alstom and Mr Martin Bowdery QC for Jarvis, I acceded to Alstom's suggestion that there should be earliest possible hearing of the matters in issue between the parties. I decided that since Alstom's case in action 85 constituted effectively its answer and defence (or its principal defence) to Jarvis' action 100 and the application for summary judgment I should hear argument on it and on Jarvis' Part 24 application. In this way the ground of Jarvis' other application to strike out parts of the claim in action 85

would also be covered. The time and expense of at least two possible separate hearings might be avoided. I could see no prejudice to Jarvis: its application would be heard and determined earlier (or no later) than 28 May 2004. The cases of both parties were essentially those presented to the adjudicator by the same counsel that appeared before me. Both parties were in a position to present their cases. Alstom had started its action first and, subject to the application of the overriding objective, had an expectation that it would gain the benefit of having got in first. It should not be deprived of its advantage without good reason. Jarvis would not however lose as a result. Its application would be also heard. As I had more time available than that set for the CMC and as both counsel were able to continue Mr ter Haar therefore began his submissions. As it turned out, they took the time available on 23 April; the hearing was adjourned to enable Mr Bowdery to make his submissions; it was resumed and concluded on 4 May 2004. As by then the judgment of Mr Recorder Reese QC was expected to be given within a week I invited the parties to make written submissions if there was anything in that judgment that bore on the issues before me. A judgment in action 260 was duly given on 11 May 2004: [2004] EWHC 1232 (TCC). The assumption made of the existence of a subcontract was justified as the judge decided that there was a valid and enforceable subcontract. I therefore proceed on that basis. He also held that it contained a mechanism for sharing "pain/gain" but the details had not been agreed so it was for the court to decide what it should be. Alstom did not consider that there was anything in the judgment which was relevant to the issues before me. Mr Bowdery submitted that I should not decide anything on the operation of a target cost under this contract or its relationship to actual cost. I shall not do so. Nothing in this judgment should be read as impinging on or prejudging those subjects (beyond that necessary for the issues that I have to decide). Mr Bowdery also said that I should not determine what was the meaning of the Subcontract Price but here I must do so in order to dispose of the issues raised by both actions 85 and 100. They relate to interim applications and if there is a material difference between the meaning of Subcontract Price for that purpose and for the purpose of a final figure then I do not decide the latter. Jarvis' submissions then seized the opportunity to restate its case.

Preliminary - Right to Judgment on Adjudicator's Decision

19. On 23 April Mr Bowdery expressed astonishment at the course that I was proposing to take and did take. Before the hearing on 4 May he professed that Jarvis was flummoxed and on that day he said it had gone beyond that state. Extravagant language has its uses, but in this court only if used with reason. Happily Mr Bowdery's own submissions were not confused, although at one stage he accepted that he was walking on two tight-ropes, which occasionally were not running in parallel with each other. Nevertheless, in my view, Mr Bowdery's initial submissions were in part based on a misunderstanding. He suggested that a party such as Jarvis had an almost absolute right to be paid what an adjudicator decides. Obviously it has been clear since applications for enforcement were first made to this court that the intention of Parliament was that adjudicators' decisions should be honoured, even if the reasoning that justified the decision was erroneous in law or fact. However that policy only applies to decisions which were valid, in that they were decisions which the adjudicator was authorised to make: for example, that the adjudicator had the power to do so (sometimes termed the jurisdiction to do so) and that the decision was not vitiated by some material failure to comply with basic concepts of fairness (sometimes termed compliance with the rules of natural justice, whether in respect of independence or impartiality or in respect of procedural fairness). Accordingly, to speak of a right of enforcement of an adjudicator's decision is misleading; the right is always qualified or contingent. Moreover section 108(3) of the Act says that the decision is *"binding until the dispute is finally determined by legal proceedings…."*. Naturally the Act assumes that such a final determination is likely to follow the decision. That is consistent with the concept of adjudication whereby a dispute would be resolved during the course of a contract and only resurrected for final determination, if required, at a later stage. "*Pay now; argue later*", as some are wont to say. In my judgment there is nothing in the Act (or the Scheme, if applicable) which requires a party who wishes to challenge a decision of an adjudicator to comply with it before being able to advance its case, any more than a party is precluded from subsequently challenging a decision, having complied with it (as Mr Bowdery suggested, at least one stage). Unless a party is estopped from questioning the decision or has waived its right to do so, both of which would require clear evidence (and mere compliance is not) that party is free at any time to obtain a final determination of the dispute which has been provisionally resolved.

20. There is equally no reason why a challenge to a subsequent decision may not encompass or lead to that final determination in respect of an earlier decision, as sought by action 85. In reality such a party is rarely in a position to act as Alstom has done, unless, for example, there have been successive adjudications and it is ready before the latest. If, however, before an application to enforce an adjudicator's decision is heard, the point decided by it is finally determined adversely to the party who is relying on the decision then that application and the action will fail. That might be so if the point related to a standard form of contract and the point was determined in proceedings between other parties. Any other conclusion would be verging on the absurd: to allow the application to enforce the decision and then to set it aside (assuming the defendant had its tackle in order to do so). The decision is binding only in so far as the dispute has not been finally determined. The Act does not say when the final determination may take place. In my judgment the Act does not lead to any such technical absurdity, nor is it permissible under the Civil Procedure Rules as it is directly contrary to the overriding objective and other provisions of Part 1. Once the court is seized of the case it has to take a course which saves expense and is expeditious. To proceed first to deal with the application for summary judgment, to allow it and then to track back and to determine the dispute that gave rise to it is not consistent with the principles of Part 1 of the CPR and it is not in the interests of both parties, when they can be satisfied in an expeditious and less expensive way. Similarly it may be prudent to defer an application to enforce or to stay a judgment if the point in dispute is to be decided soon. Transferring money for a limited period of time may not be sensible. Mr Bowdery suggested that to consider the point in question would effectively destroy the efficacy of adjudication. I disagree. Most adjudications are about issues of fact. In ordinary course of events, they will not be capable of being finally determined, even in this court or in a swift arbitration, before the application for summary judgment is normally heard. It is possible that, particularly where the point is one of law or otherwise capable of being tried early, a party might move with determination and speed and get in first, as it were (as Alstom has done). I do not believe that the court's powers are so circumscribed by the Act that, in an appropriate case, it cannot order that the dispute should be determined prior to or at the same time the application for enforcement is determined. It has happened before in this court. The interests of the parties are surely best served by such a determination and not by uncertainty. Alstom has a right to a determination of the points that it has raised, just as Jarvis has a right to have its application heard and to know if the decision is enforceable. The two can be decided at the same time. I now deal with the issues raised by Alstom, although not entirely in the order presented to me.

Does Part II of the Scheme apply?

21. The adjudicator decided in the first adjudication that clause 2.4 did not comply with section 110(1)(b) of the Act. He said:

"I have again attempted to construe the statute in a purposive manner and with my understanding of the intent of the Act in mind. I believe S110(1)(b) requires that the final date shall be a date that is embedded in the contract between the parties and is incapable of being changed, absent consent of both contracting parties. Consequently, I am persuaded by Mr Bowdery's submissions. I do not believe the draftsman meant that such final date could be changed unilaterally (possibly necessitating an action in damages from Jarvis under third party rights legislation).

Accordingly, I do not consider that the Contract does satisfy S110(1)(b) and thus the parties have failed to provide a final date for payment. The default provisions of the Scheme thus apply and the final date for payment is 17 days from the date that payment becomes due. The last date for issue of a S111 withholding notice is thus 10 days after the date payment becomes due."

Alstom said that it was to be noted that the adjudicator did not decide that, for the purposes of payments other than the final date for payment, clause 2.4 and Annex F did not comply with the Act or that the date for making applications was not sufficiently clear. Alstom's case is that the adjudicator's conclusion was wrong. Once the background facts are known, its case can be seen to have been pleaded – see the case presented in paragraph 32 et seq. of the particulars of claim on action 85, although Mr ter Haar accepted that he ought to have made it explicit in, for example, paragraph 41 by starting it with words such as: *"If, contrary to paragraph 32, the Railtrack cycle does not apply, this was a case falling within paragraph (1)(a) and/or paragraph (1)(b) of the scheme. ...".* It seems to me that I ought first to deal with this point, not least because Mr ter Haar QC took exception to Mr Bowdery's statement: *"…it is common agreement between Alstom, Jarvis and the Adjudicator that that luridly coloured schedule has got absolutely nothing to do with the payment procedures for this contract."*

22. Section 110 of the Act calls for an adequate mechanism to determine the final date for payment. I find myself at somewhat of a loss to understand why Schedule F does not comply with section 110 of the Act in terms of an adequate mechanism to determine when a payment was due for the purposes of section 110(1). The subcontract was made by reference to the main contract, both formally and financially. Clause 1.3 of the Schedule F demonstrated a common approach as regards a "Neutral Cash Flow" (see also clause 2.3). The applications for payment and payments were linked to the Railtrack cycle. That was shown in Annex F1. That Annex set out the Wednesday in each month in the years 2000 and 2001 when "cost of work done" was required – see clause 2.4 of Schedule F. Clause 1.1 said that "payment of the Subcontract Price shall be … at intervals as defined in Annex F1 – Project Cut-Off Dates". The contractor is to issue certificates (see clause 2.5). That establishes when a payment is due for the purposes of the second limb of section 110(1)(a) and the requirements for the content of the certificate comply with section 110(2). (I deal later with the first limb of section 110(1)(a).) Conventionally it seems that Alstom was to issue a certificate within 14 days of the receipt of an application (see, for example, its letter of 13 June 2003). Clause 2.6 said that payment would be made within seven days of the Railtrack certificate being issued in accordance with Annex F1. There was therefore certainty as to the final date for payment – seven days of the Railtrack certificate. That satisfies section 110(1)(b). The fact that Railtrack, probably in breach of its contract with Alstom, might fail to issue its certificate in accordance with Annex F1 does not mean that for the purposes of section 110(1)(b) there was no final date. The final date for payment remains seven days after the issue of the certificate. The fact that a date is set by reference to a future event does not render it any the less a final date. Section 110(1) says, very clearly: *"The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment."*

    The event could be a stage, or milestone or completion, practical or substantial. It could be the result of action by a third party, such as a certificate under a superior contract or transaction, as is found in financing arrangements. Provided that the event is readily recognisable and will produce a date by reference to which the final date can be set, there is no reason why it cannot be used. Payment of a subcontractor by reference to the date of a main contract certificate accords with industry practice and, on this project, is not at all inconsistent with the aim of Neutral Cash Flow (taking into account clause 2.1(b) of Schedule F). No difficulty could arise after the end of 2001 as the pattern set by the two years could easily be projected beyond the end of 2001 (and, evidently, was so projected). Put another way, if Railtrack did not issue a certificate on time Alstom could hardly use it as a defence since clause 2.6 is written on the assumption of due compliance. I therefore do not understand how it could be said that the date could be changed unilaterally. Accordingly in my judgment the adjudicator was wrong in his reading of the contract and in his decision that the Scheme applies to obtain a final date for payment. However I shall also consider the issues on the assumption that the Scheme applies.

What is Due?

23. For Alstom Mr ter Haar submitted that under section 111 of the Act a withholding notice is not required where what the paying party "withholds" is a sum which is not "due under the contract" because it is a sum claimed by the receiving party which exceeds the relevant contract price - in other words, the sum claimed is not due. He argued that a withholding notice is only necessary where the paying party wishes to withhold money otherwise due relying upon a counterclaim or set off (or possibly by reliance upon abatement). It did therefore cover valuations. The adjudicator was wrong to have decided that Alstom had to serve a withholding notice in order to arrive at the amount due under the subcontract. Alstom also contended that by not resolving the issue he had acted outside his jurisdiction as he failed to resolve part of the dispute placed before him.

24. Mr Bowdery for Jarvis for submitted that since Alstom had not given a withholding notice, as provided by section 111 of the Act, Alstom had to pay Jarvis what it applied for in Application 32. The subcontract was a *"self-certifying cost reimbursable contract*". It would have been odd if a sum only became due if certified by an Employer. This procedure would be inconsistent with the Scheme and would be inconsistent with a self-certifying cost reimbursable contract.

25. I do not accept Jarvis' case. Section 111(1) of the Act precludes a party from withholding payment *"after the final date for payment of a sum due under the contract unless he has given an effective notice of intention to withhold*

payment". It says that the notice mentioned in section 110(2) may suffice as a notice of intention to withhold payment. Section 110(2) requires every construction contract to

"provide for the giving of notice by a party not later than five days after the date on which a payment becomes due from him under the contract, or would have become due if-

(a) the other party had carried out his obligations under the contract, and

(b) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts,

specifying the amount (if any) of the payment made or proposed to be made, and the basis on which that amount was calculated."

26. It is thus clear that the Act equates what is due with what would be payable if the contractor or, here, the subcontractor had carried out its obligations and there was no set-off or abatement under some other contract. What therefore would have been due under this contract? Schedule F is reasonably clear, certainly if read as a whole. Clause 2.1 says that, after the first application, the applications are to contain a mixture of "information provided" (as stated in clause 2.4) by the subcontractor:

(1) substantiation of amounts previously applied, i.e. documentary evidence (see clause 2.2) to support the cost or value of the work (in the last month or so) which had previously been estimated only;

(2) estimates of work in hand and anticipated to be completed by the end of the relevant period.

Provided that the contractor raises questions or queries "in the same week of the application" and gets no satisfactory answer then an item questioned or queried may be excluded from the certificate. Thus if the contractor questions but gets no satisfactory explanation of the substantiation provided or of an estimates of current or future cost or value the amount may be excluded, although it can be included in a future certificate once the contractor "has established their validity" (last words of clause 2.4). The contractor then issues a certificate (see clause 2.5). "The certificate shall show the manner in which the total certified has been calculated under the terms of the contract". That is what is to be paid (clause 2.6). Thus section 110(2) is satisfied. That notice is linked to date of payment which has not yet arrived. In determining what is to be certified as due Alstom has to assess the effect of the any replies received to questions or queries. They may no longer warrant total exclusion. The amount certified is that which Alstom considers to be due. Alstom must act reasonably objectively. If the contractor does not take advantage of its right to question or query the information provided within the time allowed then and to that extent the application might be described as "self-certifying" but otherwise it is not a "self-certifying cost reimbursable contract". Indeed Schedule F appears to allow the subcontractor to apply for and to be paid for work not done at the date of the application, no doubt in order to implement the policy of a "Neutral Cash Flow" method of financing (see clause 1.3). Whether this extends to getting paid in advance for "claims" (particularly those of sub-subcontractors which have not been paid or in question) is, at the least, unclear. Nevertheless for the purposes of section 111 the amount due is the amount certified. Mr ter Haar referred to the decision of the Court of Appeal in **Rupert Morgan Building Services (LLC) Ltd. v Jervis** [2003] EWCA Civ. 1563. I consider it later. It illustrates how provisions such as clauses 2.4 and 2.5 of Schedule F are to be read (see for example paragraph 13 which is relevant to this type of contract).

27. For the reasons that I have given I see no reason why Schedule F should not apply to determine what is due. However it seems still necessary to decide what is due. If the Scheme applies, it apparently does so because the parties have failed to agree on "the intervals at which, or circumstances in which, such payments become due…." (see paragraph 1(b) of the Scheme). Thus the end of paragraph 1 calls for the use of the relevant provisions of paragraphs 2 to 4. They are about what is to be paid. The route is like a maze. It seems that an answer cannot be given to a question about when a payment is due without also considering what may be due and, in turn, how that sum is arrived at. On timing alone the relevant provision is paragraph 3 which takes one to the relevant provisions of paragraphs 4 to 7. Paragraph 4 is plainly relevant. Paragraph 4(1) takes one to paragraph 2(1) and to the relevant period there mentioned. However paragraph 2(1) does not mention the relevant period other than that defined in paragraph 12: *"relevant period" means a period which is specified in, or is calculated by reference to the construction contract or where no such period is so specified or is so calculable, a period of 28 days.*

As that definition could have been used in paragraph 4 the backward reference to paragraph 2 is significant. So in this instance the period is 28 days as the construction contract cannot be used because the mechanism

has supposedly failed. At this stage in the tortuous trail we have effectively arrived back where we have started since 28 days is the period in the Railtrack cycle and, since the parties used it, the period of 28 days reached by this route is identical. The period is specified in the construction contract; it certainly can be calculated by reference to it. Thus on the face of paragraph 4(1) of the Scheme payment is due either seven days later or on "the making of a claim by the payee" (if that it is to be read). In the context of this contract that might mean Jarvis' application for payment. That has however occurred at the end of the relevant period of 28 days and cannot therefore happen later. Under paragraph 7 the amount due is thus payable within seven days and not, as Mr Bowdery submitted, on the making of the claim. Under paragraph 8 the final date for payment is 17 days later, i.e. 24 days from the end of the relevant period. Given that Alstom was to issue a certificate within 14 days of the receipt of Jarvis' application there appears to be no real significance between the final date established by the Scheme and that derived from Schedule F.

Contract Price

28. This exercise may establish certain dates for payment, but it does not itself establish the content of the payment. Mr ter Haar submitted that by reason of paragraphs 2, 4, 5 and 6 of part II of the Scheme the most that could ever be payable was the "contract price" as defined in paragraph 12 of part II of the Scheme. Accordingly in order to decide whether a withholding notice was necessary it was necessary to decide what was the contract price. As the adjudicator had not done so, he was wrong in law and had acted outside his jurisdiction as he failed to resolve part of the dispute that was placed before him. Alstom's case was that the "contract price" was £10,238,432.66. Thus the effect of Alstom's case was that, since paragraph 2(4) of the Scheme was as a buffer since the total amount of interim payments could not be greater than the contract price. Thus the interim payment provisions could not be operated if as a result the contract price is going to be exceeded.

29. Mr Bowdery said that this interpretation was not only wrong but it was inconsistent with Alstom's actions as it had already paid Jarvis much more than that sum (about £12 million), and in its settlement agreement with Railtrack had said that the figure for the Jarvis subcontract was forecast to be £14.1 million. The latter point was not sound as the agreement assumed certain figures. Mr Bowdery's case was, basically, that clause 1.1 of Schedule E stated: "Subcontract Price shall be determined by the application of the rules in this schedule." Clause 1.2 said: The Subcontract Price shall be as set out in Annex E3 - Target Cost Summary." Thus the Subcontract Price was precisely the moving target which Alstom said it could not be. The "Target Cost Summary" was adapted from the main contract with references to the "contractor" being treated as references to the subcontractor and references to "employer" being substituted by "contractor". Clause 39.1 of the contract was also relevant. It said: *"The contractor shall pay the subcontractor for the subcontract works and the total of the sums payable shall constitute the subcontract price. The sums payable shall be calculated in accordance with the provisions of schedule E - Prices, Rates and Charges - and paid in accordance with provisions of schedule F - Terms of Payment."*

The value or cost of additional work formed part of the target cost and was to be applied for was added to the target cost. The structure of the contract was that the work that Alstom required to be carried out was to be valued, based on the agreed rates and prices and based on uplift in the target cost. The form of application required estimates of the work in hand.

30. In my judgment the case advanced for Alstom on the meaning of contract price is not correct. This part of Alstom's case is too literal, is artificial and is not consistent with reality. The meaning can be determined by looking the contract as a whole, not by using the order of priority in clause 2.2 of the conditions. The Scheme defines "contract price" as: *"the entire sum payable under the construction contract in respect of the work"*.

Like so much of the Scheme the drafting is not ideal. The use of the word "entire" is unfortunate. It has connotations of "entire contracts" (although that concept fits with the provisions of paragraph 2, and in particular paragraph 2(4)). It means the final sum due. The Scheme has to cover a wide variety of contracts. It is not to be assumed that in promulgating the Part II of the Scheme the Government was unaware of remeasurement contracts or other contracts in which the contract price is no more than the tender sum and the "price" is arrived at by the application of rates and prices to the quantities of work executed. In order to find out what is meant by the "entire sum" it is necessary to examine the construction contract, to ascertain the

work done under it and then to determine what is payable for that work. The buffer may still apply, e.g. where interim payments prove to be overestimates or other mistaken assessments. It is probably directed to mundane situations where a contractor or subcontractor is paid generally on account what is asked for (e.g. by way of "drawings") which then get close to the total sum payable. It is aimed at over payments which are always difficult to recover. The final sum that will be due to Jarvis will be that which takes account of the work actually executed. It is clear that the Target Cost Summary left out certain expected variations and other contingencies. By its very nature it was the basic budget, not a basic amount that would be subject to adjustment. It would effectively be replaced as Jarvis carried the work authorised by Alstom to meet Railtrack's requirements. Mr Bowdery helpfully listed many of the provisions of the contract which he submitted lead to this conclusion. I agree that, for example, the provisions of clause C3.1 et seq. in Schedule E are relevant. However, although some of them are not easy to comprehend, I consider that they actually demonstrate that this subcontract is fundamentally no more than a simple cost reimbursement contract, although it has also to take account of value. In addition what costs are eligible for reimbursement remain to be decided. That is a common problem. The "entire sum" is therefore what turns out to be payable to Jarvis by the application of Schedule F.

31. In addition paragraph 2 of the Scheme requires the determination of the value of the work – see paragraph 2(2)(a): *"an amount equal to the value of any work performed in accordance with the relevant construction contract during the period from the commencement of the contract to the end of the relevant period ….".*

Value of work is defined in paragraph 12: *"value of work" means an amount determined in accordance with the construction contract under which the work is performed or where the contract contains no such provision, the cost of any work performed in accordance with that contract together with an amount equal to any overhead or profit included in the contract price;*

Thus for the purposes of the Scheme the value is that which the construction contract says that it is. The value is that which Alstom considers to be due (in reality, informed by Railtrack's view). That is normal practice and evidently worked. I have already decided that the relevant period is the same as the Railtrack cycle. Thus the "value of work" for the purposes of the Scheme is the amount which Alstom considers should be included in a certificate, having taken account of any answers to any questions or queries. For these reasons Alstom's case on the adjudicator's lack of jurisdiction fails. It is not entitled to declarations (1) and (2) in action 85. In the case of declaration (1) this conclusion is on the basis of the rejection of the submissions as to the Contract Price and not on any other ground. I deal later with whether the decision of 18 December 2002 was affected by the conclusions about a withholding notice. I do not have the material to conclude what other sum, if any, might then have been due to Jarvis. If Alstom wish to pursue recovery it has to do so on another occasion (as it envisaged at the CMC).

32. Accordingly, if the Scheme applies, both as regards the mechanism for deciding amount as well as the timing of any payment, then questions and queries may legitimately be put and are to be answered prior to the determination of the value. Once the value has been determined the amount of any payment can be calculated for the purposes of paragraph 2. That amount is then due for payment as provided in paragraph 4. As already set out, if there is no final date for payment, as the adjudicator thought, then paragraph 8 applies. It is 17 days later.

The Withholding Notice

33. Mr ter Haar submitted that the absence of a withholding notice was irrelevant to both the first and second Adjudications. Alstom had to pay the amount shown on the certificate issued under paragraph 2.6 of Schedule F of the Contract. It had done so. Jarvis's remedy was to seek to have the relevant certificates opened up revised and reviewed, as provided by the contract, but it had not wished such an investigation. Mr ter Haar said that **Rupert Morgan Building Services (LLC) Ltd. v Jervis** supported Alstom's submissions in respect of this aspect of the case. I agree. It establishes, first, that determining what is due does not involve the use of a withholding notice, unless, for example, by oversight, the amount to be due is overstated by the paying party (as the notice is concerned with what will not be paid, not with what is not due) and, secondly, that, even though a notice was not given, the party making the payment can still establish what was truly due or to be paid, by the use of the appropriate contractual procedure or proceedings. It follows that in action 85 Alstom can obtain a decision as to what was or was not to be paid in respect of applications 31 and 32.

34. Mr Bowdery maintained that unless Alstom had issued a withholding notice the amount claimed by Jarvis was the amount due (and thus payable). I reject that submission for the reasons already given. The amount due was that which Alstom certified. If Jarvis disagreed with Alstom's valuation it could ask for a determination of what was truly due, based on its application and on the answers that it had given to questions or queries raised. With the advent of action 85, the issue of the withholding notice is in any event now academic. I return to the events of the summer of 2003. First, Jarvis did not comply with either the contractual timetable or the timetable under the Scheme. On any view it ought to have submitted its applications or claims at four weekly intervals. If it had paid some regard to the intervals it should have submitted application 32 on 18 June 2003, as Alstom said in its letter of 29 May 2003. Alstom therefore was not obliged to consider it until the latter date. However it did so, and, in any event, the Railtrack reporting cycle was then spent so the point, although valid in law, is of no real consequence, until one has to consider what was expected of Alstom on receiving the application. It looks very much like the type of "ambush" that is deplored. I have already recorded the size of the material which Alstom was to digest in a week. The submission was effectively the final account, not an interim application. Jarvis ignored Alstom's request to send the application or claim to its offices at Borehamwood so the effective date of the receipt of the application could not be 27 or even 28 May. According to Alstom, it should have been Monday, 2 June 2003. That is understandable but too favourable; in my view the effective date of receipt should be taken to be no later than 30 May. It is to be noted that the application was itself dated 24 May and related to costs up to 17 May and thus does not square with Jarvis' present interpretation of its rights. Alstom raised questions and queries in its letter of 4 June, with an express and pointed reminder on 6 June. Its action therefore complied with paragraph 2.4 of Schedule F, even if the effective date of the application was 28 or 29 May. (I deal later with the adequacy of the questions and queries.) Alstom received no reply so on 13 June it warned Jarvis of the consequences. In that letter it accepted that a certificate was to be issued within 14 days of the receipt of the application. It did not do so. It continued to pursue its questions and from its letter of 18 June it realised that it ought to being issuing a certificate of nil value. Jarvis meanwhile in its letter contended that the final date for payment had passed: under the Scheme it thought that the final date was 15 June, based on 28 May. On 2 July 2003 Alstom sent Jarvis its valuation of some £11.5 million, i.e. there had been an overpayment and nothing was due. The valuation was expressly "pending submission of further documented substantiation of cost expenditure". Alstom also said in its letter that if any notice under section 111 of the Act was required then the letter should be taken as that notice.

35. Jarvis now contend that the timetable started on about 20 May (seven days before the date of the claim, 27 May) and not 17 May as suggested in 2003. If the Scheme applied, a payment notice under section 110 should have been issued on 1 June and the final date for payment was 13 June (not 15 June, as claimed in 2003). Unless Jarvis was entitled to ignore Alstom's questions and queries altogether, in my judgment Alstom was entitled not to issue a certificate as the value of the work for the purposes of the Scheme or the contract is dependent on Alstom having answers to its questions to enable it to determine what is due. The absence of a withholding notice is irrelevant. Whether or not the Scheme applied, the amount due was not that which Jarvis considered to be due to it, but that which Alstom considered to be due. On this basis alone Alstom is entitled to declarations (3) and (4) in action 85. In my judgment the adjudicator failed to deal with the dispute referred to him, or did not ask himself the right question, namely what was due to Jarvis and, as such, Alstom is right in its submission that the adjudicator's decision was not that which he authorised to make. The adjudicator's decision of 18 December 2002 is similarly wrong and invalid. As I have mentioned since it is not possible to conclude what other sum, if any, might have been due to Jarvis in respect of application 31, it would not be right to grant Alstom declaration (1). Entitlement, one way or the other, requires further investigation.

36. If the relevant period commenced on 18 June 2003 (as I have decided) then and if the application were treated as received on that day the due date for payment would be 25 June and the final date 17 days thereafter, i.e. 11 July. A withholding notice would have to be given by 4 July. In my judgment Alstom's letter of 2 July 2003 therefore not only satisfied Schedule F, since, read along with Alstom's questions and queries (including "the lilac file") it set out how Alstom's valuation had been arrived at and the reasons, but it also satisfied section 111 of the Act, were it to be relevant and applicable, both in terms of timing and content. In the case of the latter I take account of all the circumstances leading up to and surrounding the letter, such as the nature of the

contract, the application made and its timing, since it could be said that the letter and its attachment on their face might not precisely meet the requirement that a notice should specify "each ground and the amount attributable to it". However I have little doubt that the recipient, Jarvis, would know the grounds and the amounts.

Questions and Queries

37. Mr ter Haar submitted the adjudicator was wrong in deciding that, in relation to both applications 31 and 32, Alstom had failed to ask sufficiently specific and focused questions and queries within the time specified in paragraph 2.4 of Schedule F. It was said that this was an error of law because it would have the result that if Jarvis wrongly claimed a sum in excess of the Contract Price which Alstom did not query the Contract Price would be taken to have been increased by the relevant amount. Thus, as I have indicated, Alstom's case was that Schedule F would then prevail over Schedule E, contrary to the precedence established by Clause 2.2 of the Special Conditions (and contrary to clause 39.1 of the General Conditions of Sub-Contract). I have rejected that submission in so far it related to the meaning of Contract Price.

38. It must be recalled that the material submitted was voluminous. On the one hand it was therefore incumbent on Alstom to be specific but on the other hand it did not have the time to be too specific as it only had the week to turn round the application and, assuming prompt and useable replies, a further week to issue a certificate. In the case of application 32 the previous application had been some 278 days earlier. It is not necessary for me to reach a concluded view on each of the questions and queries raised by Alstom for reasons which I am about to give. I am however satisfied that it was perfectly proper for Alstom to have acted as it did, for example by incorporating by reference the previous questions and queries ("the lilac file") as Alstom decided that they had not been answered satisfactorily or at all. Each application has to be considered on its merits. Just as an omission to answer a question may be made good so too may the same question be put. The applicant has the material at its finger-tips; the questioner has a very limited time to pose the question and to deal with the answers. Those previous questions and the new questions and queries raised are also in my judgment sufficiently clear for the purposes of clause 2.4. Whilst no doubt a question or query has to be clear, clause 2.4 does not say that it has to be specific or focussed; it could well be general, if appropriate. It has to be remembered that, certainly at this stage of the contract when the application was really the final account, Alstom was entitled to a meticulous account from Jarvis. Estimates of future expenditure were things of the past. Jarvis had to comply with clause 40.1 of the Conditions under which Alstom was entitled to have an audit (as called for by Alstom on 24 January 2003).

39. Alstom took as a particular instance the amount claimed in respect of Jackson Eve Rail. Mr Chapman here regarded Alstom's questions as sufficiently specific. Jarvis had claimed £2,928,734.50 for this sub-subcontractor. In its covering letter to application 32 Jarvis said it had included "the sum claimed by Jackson Eve in respect of its loss and expense in the sum of £569,019.00". The amount applied for by Jarvis was £1,328,350 so a very large part was referable to the Jackson Eve Rail claim. In a witness statement Mr Alan Robson, Jarvis' Divisional Director, said that the sub-subcontractor "amended its account to £2,880,899.34". After an adjudication which excluded the loss and expense claim, Mr Robson said that Jarvis had paid Eve Rail £2,411,979.53. (Jarvis produced an authenticated receipt for some £2.2 million and the balance appears to be what Jarvis paid after the adjudication with Jackson Eve Rail.) Alstom point out if the adjudicator's decision on application 32 were met it would have to pay Jarvis some £500,000 in respect of Jackson Eve Rail claim which Jarvis has not paid and which they dispute. That is clearly wrong. Whatever may be the position during the course of the work, once it has been completed the amount due (whether the Scheme applies or not) should be the value or cost based on actual expenditure or an acknowledged and established liability. Jarvis is not entitled to be paid amounts asserted which it does not accept and thus disputes. On any view therefore there is substance in Alstom's complaint that it has been very difficult for Alstom to grapple with this contract because of the approach adopted by Jarvis to providing information. As Mr ter Haar said: "It is partial, it is late and it has to be dragged out".

40. The upshot is that although Mr Chapman held in his second decision that Alstom had raised a sufficiently specific query in respect of part of Application 32 (amounting to £641,000 more than had been included in Application 31) he failed to decide what was due but instead, because of his interpretation of Schedule F, held that the full amount of Application 32 was payable. As I have held, if Alstom had raised proper questions and

queries Mr Chapman ought to have decided what was due. That was what Jarvis' notice of adjudication had asked him to do, but in fairness to Mr Chapman that was not what Jarvis' solicitors' letter of 17 February asked him to do. From his decision that it would appear that at one stage Mr Chapman was "contemplating a deduction from the application of a sum equivalent to that claimed by Jarvis in respect of the Jackson-Eve sub-contract and the reduced sums due for Mr Berridge and Ms Breen." (The latter were the subject of queries 7 and 8, both considered proper by Mr Chapman.) The amount of that deduction is not known since Mr Chapman did not quantify them in view of his other conclusions. In my judgment therefore, even if Alstom were not entitled to the first part of declaration (4) in action 85, it is entitled to the alternative declaration.

Conclusions

41. In my judgment (subject to any further submissions) Alstom is entitled to declarations (3) and (4), namely
the Adjudicator was wrong to decide that the ALSTOM had failed to issue a withholding notice which they were required to issue in respect of Payment Application No. 32;

and

upon the true construction of the Sub-Contract and in the events which had happened Jarvis were not entitled to any payment in respect of Payment Application No. 32 alternatively were not entitled to any payment in respect of the amounts included in Payment Application No. 32 relating to the Eve Rail sub-sub-contract.

It also follows that in action 100 Jarvis is not entitled to summary judgment as the adjudicator's decision should be set aside. Its application should be dismissed. On that basis the order sought by Alstom restraining Jarvis from enforcing or seeking to enforce the adjudicator's decision of 16 March 2004 is no longer necessary, even if it were justifiable.

42. Mr ter Haar was therefore correct to conclude his note for the CMC on 23 April by saying that what has now to be done is to give directions to enable the amount due from one party to another to be known.

Roger ter Haar QC appeared for Alstom, instructed by Lovells.

Martin Bowdery QC appeared for Jarvis, instructed by Eversheds.