

JUDGMENT : JUDGE TOULMIN CMG QC: TCC. 13th October 2006

1. The two claims arise out of the construction of luxury lodge accommodation at Tilford Woods, Tilford in Surrey. The claimant in claim No: HT-05-342, Dene Construction Limited ("Dene"), is a small building contractor based at Ringwood in Hampshire. The claimant in claim No: HT-05-317 is R & J Morgan Carpenters ("Morgan"). It is a small family firm of carpenters based in Chichester, West Sussex. The brothers Reginald and John Morgan are the principals.
2. The defendants in both actions are Antshire Limited ("Antshire") the owner and developer of the Tilford Woods site. Mr. John Donnachie and Mr. Andrew Donnachie, father and son, are the two principal directors. Both are co-defendants in the Dene action. Only Mr. John Donnachie is also a defendant in the Morgan action.
3. The Dene action has come to trial after a checkered and costly history. Previous proceedings were started in the Southampton County Court on 11th October 2002 by Dene's previous solicitors. They were discontinued by Dene's current solicitors in October 2003. The claim form in the current proceedings was issued on 8th October 2004 in the Bournemouth District Registry. Defences were served on 11th December 2004. There was a further round of pleadings in October and November 2005. The case was transferred to this court in November 2005 and since then there have been further amendments to the pleadings so that the current pleadings are the re-re-amended particulars of claim of Dene and the re-re-amended defence of the defendants.
4. In addition to the costly court litigation there have been two adjudications relating to the dispute. The first resulted in an award dated 27th August 2002, that a firm called G J Associates & Builders Limited ("GJAB") described in those proceedings as "the contractor" should pay Dene the sum of £31,705.86, within seven days. The second adjudication dated 11th April 2003 related to the final account for the building works at Tilford Woods and resulted in a further award against GJAB of £74,174.75. On 11th September 2002 GJAB paid Dene £29,167.66, in relation to the first award. Neither Antshire nor the Donnachies were a party to either adjudication. The total cost of resolving this dispute is wholly disproportionate to the amount at stake.
5. Dene claims that the JCT contract between GJAB and Antshire made on 16th February 2001 is a sham and that, therefore, Dene was engaged by GJAB to carry out works at Tilford in September 2001, with GJAB not acting as principal but acting as agent for Antshire and/or the Donnachies.
6. Secondly, Dene's claim is that on 30th August 2002 Mr. Martin Smith, the managing director of Dene, met with Mr. John Donnachie and Mr. Andrew Donnachie at the Percy Hobbs public house near Winchester to discuss Dene's suspension of the works. It is alleged that in the course of the meeting the Donnachies agreed personally to guarantee the sums due and owing to Dene and that at the end of the meeting Mr. Smith wrote out a memorandum of guarantee in his day book which was signed by Mr. Andrew Donnachie and Mr. Smith and was witnessed by Mr. Atyeo, a subcontractor who acted as the site foreman for Dene.
7. Dene makes a third alternative claim that on various dates between September 2001 and August 2002 the Donnachies orally requested Dene to carry out certain additional works on site amounting to £152,718.33. It is claimed that each request gave rise to a separate oral agreement which was not part of the main contract and for which Dene was entitled to be paid on a quantum meruit basis by Antshire and/or the Donnachies. It is claimed that Dene received payments on account, including in particular a sum of £20,000 on 10th October 2002.
8. For a long time there was a dispute on quantum. The sum originally claimed under the alleged guarantee was £121,026.47, whereas the sum originally claimed under the alleged separate oral contract as £107,428.04. Dene has agreed to limit its monetary claim under each of the various headings and the parties have been able to agree quantum subject to liability. It is now agreed that if Dene succeeds in its claims on any of the bases on which they are put forward it is entitled to recover the sum of £106,052.97 from the defendants. This agreement has saved substantial additional costs.
9. In the re-re-amended defence the defendants deny that the JCT contract was a sham. They claim that it was intended to and did create legal relations between the parties. It is admitted by the defendants that the contract works were substantially varied after the date of the JCT contract. It is denied in relation to the first issue that this fact was relevant to the validity of the JCT contract. The defendants deny that, in relation to the engagement of Dene, GJAB was acting as agent of the defendants or any of them.
10. In relation to the meeting on 30th August 2002, it is admitted that the meeting took place at the Percy Hobbs public house. It is admitted that Mr. Smith said that substantial sums were outstanding on the contract. The defendants deny that any document of guarantee was prepared by Mr. Smith at the meeting and signed by Mr. Andrew Donnachie.
11. In relation to the third issue, the alternative claim for additional works alleged to have been ordered by the defendants directly and separate to the contract, it is denied, with one exception, that this is the case. It is contended that variations to the contract works were made pursuant to the contract. The one exception set out in paragraph 28 of the re-re-amended defence is that it is admitted that one instruction given by Mr. Andrew Donnachie was given on behalf of Antshire and was confirmed by a document signed by Mr. Andrew Donnachie dated 13th May 2002. This related to an instruction to dig twenty holes for pergola posts on single balcony chalets. The defendants assert that no claim or demand for payment has been made in relation to this instruction.

12. It is clear from the foregoing recital that the claimants' claims have developed in the pleadings in a number of different and potentially conflicting directions. For example, if the JCT contract was a sham as they allege and Antshire and/or the Donnachies were primarily liable as principal contracting parties, there would have been no need for a memorandum of guarantee, such as is alleged to have been signed in the Percy Hobbs public house, nor in the alternative claim against the Donnachies on a quantum meruit.
13. I must bear in mind that the parties are relatively small-time businessmen and business contractors and do not necessarily weigh the legal consequences of their actions, although the parties consulted solicitors at a relatively early stage. It is necessary for me to piece together the story from the documents which have been disclosed and the evidence of the witnesses assisted by counsel's submissions. I was anxious to have a bundle of documents in strict chronological order so that I could understand the actions of the individuals concerned in their proper contemporary context. I am particularly indebted to both counsel for the clarity of their written and oral final submissions.
14. Before dealing with the facts I should outline the law which provides the context within which they must be considered. This is not in dispute. It is agreed that the normal principles of contract law apply and that the only unusual feature is the claim that the JCT contract was a sham. In *Snook v. London and West Riding Investment Limited* [1967] 2 QB 786 at 802 Diplock LJ said: "... it is, I think, necessary to consider what, if any, legal concept is involved in the use of this popular and pejorative word. I apprehend that, if it has any meaning in law, it means acts done or documents executed by the parties to the 'sham' which are intended by them to give to third parties or to the court the appearance of creating between the parties legal rights and obligations different from the actual legal rights and obligations (if any) which the parties intend to create "... for acts or documents to be a 'sham', with whatever legal consequences follow from this, all the parties thereto must have a common intention that the acts or documents are not to create the legal rights and obligations which they give the appearance of creating. No unexpressed intentions of a 'shammer' affect the rights of a party whom he deceived."
15. In *Hitch v. Stone* [2001] EWCA CV 63, Arden LJ at paragraphs 36 and following explained the proposition set out above. From her judgment I derive the following propositions:
 - a) an enquiry as to whether an act or document is a sham requires a careful analysis of the facts;
 - b) the enquiry in the case of a document is not restricted to an examination of the four corners of the document. It may extend not only to the circumstances surrounding the making of the document but also to the subsequent conduct of the parties;
 - c) the test of intention is subjective, i.e. what the parties themselves intended at the time when the document was brought into existence;
 - d) it is important to keep well in mind the distinction between an unfavourable agreement (which is of course not a sham) and one which is artificial where the parties intend some other arrangement to bind them;
 - e) it cannot necessarily be inferred from the fact that the parties depart from an agreement that it was a sham in the first place. It may well be that by subsequent agreement between the parties the original agreement has been varied.

Witnesses in the Dene Action

16. There were eight oral witnesses of fact, five for the claimants and three for the defendants. In addition Mr. Handy, a handwriting expert, produced two reports relating to the alleged guarantee and gave oral evidence. Mr. Smith, the managing director of Dene, produced two witness statements, the second relating to Mr. Handy's second report. He also gave extensive oral evidence. Mr. Atyeo, Dene's site foreman, produced a witness statement dated 18th May 2006 and gave oral evidence particularly in relation to the meeting in the Percy Hobbs public house.
17. Mr. Aslett, the sole director and principal shareholder of GJAB, prepared a witness statement dated 22nd May 2006 and also gave oral evidence for the claimant. He was clearly in a difficult position and in cross-examination gave answers which were inconsistent with the initial assertion that the JCT contract was a sham. Mr. Corcoran, a civil engineer engaged by Dene, gave a witness statement and also gave oral evidence. Finally, Mr. Evans gave brief evidence in relation to paragraph 9 of a witness statement prepared for an interlocutory application to set aside judgment in May 2005.
18. For the defendants Mr. John Donnachie and Mr. Andrew Donnachie gave witness statements and also oral evidence. In addition Mr. Murrell of Staple Inn Partnership, solicitors for the defendants, gave a witness statement and also oral evidence in relation to his firm's involvement in the two adjudications.

Witnesses in the Morgan action

19. Both Mr. Reginald and Mr. John Morgan made written statements and gave oral evidence. It is clear that they are practical men, good, no doubt, at their job. There was certainly no criticism of their work in this case. They left the business side to Mr. Lesley Walsh. Mr. Walsh was also acting in a sense as a claim consultant in carrying through their claim and said that he stood to gain £15,000 if they were successful. He gave two witness statements and extensive oral evidence. He was rather too anxious to push their case and came across as a partial witness.
20. However, as it has turned out, the primary source of much of Morgan's case has been contained in the documents. Mr. Aslett gave a witness statement and also some evidence relevant to Morgan's case. Mr. John Donnachie and Mr. Andrew Donnachie gave witness statements and also gave oral evidence and Mr. Murrell, the defendants' solicitor, gave a witness statement and also oral evidence in the Morgan action. In addition to the evidence in the

two actions to which I have referred, reference was made to some statements in previous interlocutory proceedings.

The facts in the Morgan action

21. The searches show that Antshire acquired the Tilford site on 23rd April 1997. GJAB was incorporated on 28th April 1999. It was a £1 company. It ceased to trade on 20th January 2004. Mr. Aslett's evidence was that it was intended to be a vehicle through which the Tilford Woods project and other projects would be conducted with the Donnachies. It was intended that the contracts (including the one at Tilford) would be with GJAB as head contractor and that Mr. Aslett would administer the contracts. As Mr. Aslett put it in oral evidence "the intention was that they would go through me from start to finish". He agreed that in some cases on other developments contractors made contracts directly with the Donnachies.
22. In December 1999 the Donnachies made an application for planning consent for a fixed caravan park on the Tilford site. As Mr. Aslett explained the original scheme was tailored to conform to the caravan legislation which was less onerous than the consents required for a chalet development because it was not subject to the Building Regulations. The planning scheme was subject to the provision of appropriate funding. In September 2000 Mr. Aslett met with the Donnachies in relation to developing the site.
23. Antshire approached Bank Leumi (UK) Plc ("the bank") to fund the project. On 1st February 2001 the bank agreed to lend £1,850,000 to finance the development to be known as Tilford Woods Holiday Development. (This figure had increased to £3,080,000 by 13th October 2003). The agreement was the subject of certain expressed conditions. These were:
 - a) a debenture;
 - b) a first legal mortgage over the freehold development;
 - c) an assignment and/or charge over a building contract acceptable to the bank, this related to the contract dated 16th February 2001;
 - d) the unlimited guarantee of Mr. Andrew Donnachie for the liabilities of Antshire, this was executed;
 - e) the unlimited guarantee of Mr. John Donnachie for the liabilities of the company, this also was executed.
24. The completion of the requisite security to the satisfaction of the bank was required prior to the drawdown of any funds. The drawdown was to be borrowing by way of advance to be covered by two thirds of the Estimated Restricted Realisation Price of the property (expected when completed to have an estimated realisation price of £1,000,000) plus two thirds of development costs as certified by the bank's project monitor. The bank's project monitor was Dearle & Henderson ("D&H"), surveyors, who were to certify on a monthly basis after agreeing the value of the work with Mr. Aslett.
25. I have seen a copy of the form for certified requests for payment addressed to Antshire Developments. It has a box for Antshire's application for payment and below it a box for D&H to certify that the work was being carried out in accordance with the facility letter and to recommend release of the appropriate advance.
26. On 16th February 2001 Antshire purported to enter into a written contract with GJAB on the JCT standard form with Contractors Design. This document is said by Dene and Morgan to be a sham. There is no doubt that at the time when the document was signed Antshire was contemplating converting the development into chalets subject to the Building Regulations and on or around that date, probably 1st February 2001, had submitted planning proposals to the Waverley District Council which was the Planning Authority.
27. It appears that planning consent for the revised development was granted in June 2001 after further discussions with the Planning Authority. It seems clear that through D&H, who conducted a feasibility study, the bank was aware of the change in the development but no new written contract was entered into. The contract of 1st February 2001 governed the relationship between the bank and Antshire. An example of a later valuation certificate is one dated 27th September 2001 which refers to a contract date of 16th February 2001.
28. Equally no other written document was brought into existence governing the relationship between GJAB and Antshire. The only written document purporting to govern that relationship is the one dated 16th February 2001. There is a dispute between the parties as to whether the subject matter relates to the original scheme of a permanent caravan site or the proposed scheme of homes compliant with the Building Regulations. Antshire now argues that it is the latter.
29. I have only been provided with an extract of the JCT form in relation to the alleged contract on 16th February 2001. Although the contents page sets out the normal articles of agreement I have not seen the full document. It is claimed that the document was not completed and what I have seen is all that ever existed. In particular Dene contends that it is a fatal flaw that the employer's requirements and the contractors' proposals which define the scope of the work never existed.
30. The articles of agreement are expressed to be between Antshire and GJAB, both companies having the same registered office at Frensham, near Farnham in Surrey. The employer is said to be desirous of erecting 31 holiday cottages together with ancillary works.
31. Article 2 provides that Antshire will pay GJAB the sum of £1,532,860. The name of the employer's agent is left blank.
32. Article 4 provides: *"The employer's requirements. The contractors' proposals and the contract sum analysis have been signed by the parties and are identified in Appendix 3 to the Conditions."*

33. I have not seen Appendix 3 to the Conditions. The requirement was for 31 holiday lodges. These conformed to the legislation for caravans but not, as I understand it, the Building Regulations. Mr. Aslett explains in his letter of 17th October 2005 that after the change to pine lodges the number would subsequently increase to 33 chalets with a reception building.
34. Article 7 provides for a planning supervisor and the document indicates that references to the planning supervisor are references to the contractor or Mr. Andrew Donnachie. Mr. Donnachie said in oral evidence that he would not be capable of acting as planning supervisor although it is clear from the documents that he did, on occasion, carry out that function. Presumably Mr. Aslett was capable of so acting. The contract is signed by Mr. Andrew Donnachie and Mr. Aslett in the presence of an independent witness.
35. The only other part of the contract which I have seen is Appendix 1 which sets out 6th June 2001 as the base date and 28th September 2001 as the completion date. Mr. Andrew Donnachie said that both were correct at the time when they were written but the completion date was not achieved. The document specified the defect period at six months, provided for insurance cover, and specified that clause 22(c) of the standard conditions applied in relation to insurance. This clause requires the employer to insure the existing structures and works in the joint names of the employer and the contractor. Provision was made for possession of the site on 8th April 2001 and for liquidated and ascertained damages which Mr. Aslett said had been the subject of negotiation. The periods of suspension under the contract were also specified.
36. Some evidence that a complete contract was or is in existence is contained in a covering letter from Mr. Aslett to the bank on 5th February 2002 sent by recorded delivery. The letter said: *"I report our telephone conversation today and as requested now have pleasure in enclosing the original JCT form relating to the above development for your perusal. I confirm that our mutual client has the counterpart copy."*
37. On 9th April 2001 Bank Leumi sent John Donnachie a copy of D&H's feasibility study. The study related to the feasibility of building log cabins at Tilford, not the original concept of fixed caravans. This was in accordance with the amended planning proposal
38. Antshire is described in the feasibility study as developer and GJAB as developer's contract administrator. GJAB is also described as contractor's development and quantity surveyors and developer's architects. In oral evidence Mr. Aslett said that D&H had got the relationship right.
39. There were to be 34 log cabins. Paragraph 11 indicated that the works were to be carried out using a JCT design and build contract. The construction budget was £1,532,860, excluding professional fees and contingency, i.e. the same figure as in the 16th February 2001 document. This was thought by D&H to be too low. They recommended a budget of £1,865,600, i.e. £600 above the current developer's loan. D&H noted that a local estate agent had already forecast the value of the development, when completed, to be £3,980,000.
40. Under "Payment Recommendations", D&H agreed to provide on a monthly basis signed statements of considered work value carried out on the project. This exercise was carried out by Mr. Silvester of D&H and Mr. Aslett of GJAB. It gave rise to the valuation on the basis of which the bank released the money. The defendants say that this is in fact what happened. (A copy of a later report of October 2001 shows a later completion date of April 2002.)
41. By a letter dated 18th April 2001 the proposal to build 34 holiday chalets was amended to provide for 31 chalets. This was done after a site visit with a representative from the planning authority on the previous day. This paved the way for the planning meeting on 25th April 2001 at which the local authority considered the project.
42. It appears that there were preliminary discussions between Mr. Aslett and Mr. Smith of Dene going back to 27th July 2000. There is no evidence that either Antshire or the Donnachie's were involved.
43. On 4th September 2001 Mr. Smith wrote to Mr. Aslett at GJAB forwarding his quotation for providing ground works for the holiday chalets. It is clear that there had been earlier dealings, but this is the earliest document which I have seen. The contract was to be the standard JCT 98 and was to run between September 2001 and February 2002. The total sum for preliminaries, foundations and road construction was £185,594.22. Mr. Smith and Mr. Aslett met and on 14th September 2001 Mr. Aslett wrote, as it appears on the face of the letter, "for and on behalf of GJAB". Mr. Aslett was pleased to confirm that, subject to contract, Dene's quotation dated 4th September 2001 to carry out the works was acceptable. The letter went on:
"As agreed the works will commence early next week and we will meet again on site on Tuesday at 10.30 a.m. with a view to finalising matters relating to the contract.
In the meantime, on behalf of Antshire Limited, I thank you for your efforts to date and now look forward to bringing this prestigious project to a mutually satisfactory conclusion."
44. Dene claims that the reference to the JCT form and the thanks on behalf of Antshire reveal the true nature of the agreement. Dene emphasises that the JCT contract is apt for a main contract design and build but not for a subcontract. The letter was copied to John Donnachie and Mr. Andrew Donnachie (Antshire Limited). It is said by Dene that GJAB was acting not as an independent contractor but as agent for Antshire and the Donnachie's. The defendants disagreed with this.
45. There is a fax from a Mr. Peter Duffell, a project quantity surveyor on site, to GJAB dated 16th October 2001 relating to the removal of stock piled excavated material from site. Mr. Duffell was an employee of Dene. He

refers to "the client John spent time on site this morning with Wilf (Atyeo) and requested their operation stop." He is clearly referring to Mr. John Donnachie and Mr. Wilf Atyeo. The claimants say that this is evidence that Mr. Donnachie was their client. The defendants say that Mr. Donnachie was acting as owner and was entitled in that capacity to give the instruction which he did.

46. On 16th October 2001 GJAB requested Dene to provide a quotation for roofing works and a variation to the foundation. It was in October/November 2001 that Mr. Aslett was in discussion with Mr. Walsh on behalf of Morgans relating to carpentry. I will deal with the facts relating to this contract separately.
47. On 15th November 2001 Dene provided GJAB with a quotation for the guttering. On 17th November 2001 Dene provided GJAB with a quotation for roofing works. The quotations on 15th and 17th November 2001 were followed up by a revised quotation of 7th December 2001.
48. On 19th December 2001 Mr. Aslett sent Mr. Duffell a fax on GJAB notepaper inviting Dene to tender for works to the proposed car park extension at the Duke of Cambridge public house. Mr. Aslett wrote as follows: *"I confirm that having obtained the necessary planning permission the owners now invite you to submit your most competitive quotation for carrying out the works."*
This letter said that the quotation should be addressed to Mr. John Donnachie at Antshire Limited.
49. On 31st December 2001 Mr. Duffell sent the quotation detailing the works in respect of the Duke of Cambridge public house and quoted the price of £10,992.96 plus VAT to Mr. John Donnachie. He also sent a copy of the fax to Mr. Aslett.
50. There is a separate claim in relation to the Duke of Cambridge public house against Mr. John Donnachie which is now admitted. This claim is on the basis that Mr. John Donnachie ordered the work directly. That is now accepted.
51. On 11th January 2002 GJAB (Mr. Aslett) sent a fax to D&H relating to employer's liability insurance and design and construction professional indemnity. These are in the name of GJAB. The assured's business is described as "design department of general building contractors". The cover is for £1,000,000.
52. On 14th January 2002 Mr. Aslett sent a fax on GJAB notepaper to Mr. Duffell. It refers to "our mutual client" which Mr. Aslett said in oral evidence was Antshire Limited. There are other places in correspondence where GJAB describes Antshire as "our mutual client".
53. A further fax letter from Mr. Duffell dated 24th January 2002 to Mr. Aslett refers to the construction of ground floor slab and foundation for plots 13, 19 and 34. These are the plots which were withdrawn from the planning application in April 2001. As I understand it from Mr. Aslett's evidence these three plots were reinstated.
54. Mr. Aslett responded to Mr. Duffell by fax on 28th January 2002. He wrote: *"I will write to you under separate cover as soon as full details of the 'special' lodges proposed to be sited adjacent to the pond have been received from ATT and Structural Solutions to enable the costing to be prepared for consideration by our mutual client."*
Mr. Aslett said the details would be passed to Dene to be costed.
55. On 31st January 2002 Mr. Aslett accepted Bachelor and Smith ("B&S") electrical and engineering contractor's quotation on behalf, so the defendants say, of GJAB.
56. It was at this time that Bank Leumi was interested in getting its documents in order. I have already referred to Mr. Aslett sending the original JCT form relating to the development under a covering letter dated 5th February 2002. On 14th February 2002 Bank Leumi sent a deed under which Antshire conveyed to the bank a charge on its assets in respect of the building contract dated 16th February 2001.
57. On 18th February 2002 by fax and by post Mr. Aslett forwarded the document to Mr. John Donnachie for his signature. The covering letter explained: *"I refer to our telephone conversation regarding the recent requests of your Funder for us to give them a suitable collateral warranty for the building works being carried out in accordance with the JCT Building Contract dated 16th February 2001."*
58. The collateral warranty was duly signed and copies were sent on 26th February 2002 to D&H. Mr. Aslett said in oral evidence that as at 18th February 2002 his understanding was that the contract which governed the work being carried out was the JCT contract dated 16th February 2001.
59. On 13th May 2002 a written instruction was given to Mr. Corcoran, one of Dene's engineers, as a confirmation of a verbal instruction. It is on a Dene form and it is countersigned by Mr. Andrew Donnachie and signed by Mr. Corcoran. It relates to the instruction to dig 20 holes for pergola posts on single balcony chalets. It is admitted on the pleadings that this instruction was given directly by the Donnachies.
60. It was put to Mr. Atyeo in cross-examination that this was the only extra work instructed by either Mr. Andrew or Mr. John Donnachie. Mr. Atyeo disagreed. He said that Mr. John Donnachie ordered a lot of work verbally.
61. On 28th May 2002 a letter from Mr. Aslett to D&H enclosed valuation No 9, Mr. Aslett apparently addressing the Donnachies, endorsed on the letter "Jason (Silvester) is assuming that Antshire have in fact paid £540,000 plus directly to GJAB to date!" The claimants said that no independent contractor would accept such a shortfall in payment.
62. On 10th July 2002 Mr. Andrew Donnachie wrote to Mr. Aslett on Antshire notepaper to say that following the site meetings on 4th and 10th July 2002, he enclosed his certificate of practical completion in respect of the sectional

completion of the roofing works on the holiday lodges "in accordance with our contract dated 16th February 2001". Interestingly the notice omits the three properties deleted from the original permission, Nos. 13, 19 and 34. Mr. Donnachie signed the certificate as "employer's agent". Antshire is specified as the employer and GJAB is specified as the contractor.

63. On 16th July 2002 Mr. Duffell wrote to Mr. Aslett at GJAB on Dene notepaper complaining of the difficulty in making progress over the previous two weeks. He also complained of difficulties over payment of monies said to be due. It is clear from this letter that various of its invoices and the letter of 3rd July 2002 are not included in the bundle. I make no complaint about this but must bear in mind when drawing inferences that documents may not have been included because the parties did not regard them as relevant to either party's case.
64. On 31st July 2002 Dene submitted Invoice 11 to GJAB. By then they had instructed solicitors, Philip Kirkland & Co., to commence adjudication proceedings against GJAB. On 2nd August 2002 Philip Kirkland & Co. wrote to Antshire to inform them about the proceedings in advance of a meeting due to take place between Antshire and GJAB. The letter, presumably written on instruction, states: *"For the avoidance of doubt this adjudication has been issued by our client for several reasons, the most important of which is to prevent you, the end user, from receiving unsatisfactory work which you have paid for a reasonable quality of work."*
65. The letter makes it clear that until GJAB carried out enabling works, Dene would not be able to continue with the project. Antshire was invited in accordance with the contract to take occupation of the site and give instructions direct to Dene to carry out works.
66. On 27th August 2002 (notice of adjudication having been given on 12th July 2002) Mr. J. D. Murphy, as adjudicator, ordered GJAB to pay Dene £31,705.86 within seven days. In his cross-examination in these proceedings Mr. Smith confirmed that, as managing director of Dene, he thought that the party legally liable was GJAB and that for all works ordered before the end of August 2002, the instructions were being given on GJAB's behalf.
67. I note also that in Paragraph 4 of the original Particulars of Claim Dene asserted: *"The first Defendant ("Antshire") engaged a company called G J Associates and Builders Limited ("the contractor") as main contractor in relation to the works."*
68. Dene claims that it is of great significance that in some or all of the adjudication proceedings Staple Inn Partnership, Antshire and the Donnachie's solicitors acted for GJAB and did not send GJAB a care letter. It appears that Antshire and/or the Donnachie's paid Staple Inn Partnership's fees in relation to such proceedings, although in oral evidence Mr. John Donnachie said that Antshire had contra charged/set off the amounts from other monies due to GJAB.
69. I do not find that the fact that the Staple Inn Partnership acted for GJAB in the adjudication proceedings is of great significance nor is the fact that they did not send GJAB a care letter. I do not know whether the Staple Inn Partnership sent the Donnachie's or Antshire a care letter and if so when or in what terms. Solicitors are supposed to send care letters to their clients in accordance with Law Society rules but Mr. Murrell was not asked in evidence whether this was or was not the firm's regular practice. All the evidence makes clear is that GJAB was not sent a care letter. On its own it does not take the matter very far. I am inclined to accept Mr. John Donnachie's evidence that GJAB was contra charged amounts paid by Antshire by way of legal fees, but I do not find this evidence to be of more than marginal relevance to the question of whether the contract of 16th February 2001 was or was not a sham.
70. I come now to the meeting at the Percy Hobbs public house and the alleged written guarantee. The nature of the meeting is only explicable on the basis that Dene thought that GJAB was acting as an independent contractor and not as the agent of Antshire, otherwise Antshire would have been included in the adjudication and there would be no need for any guarantee. Mr. Smith said that he thought that GJAB was the party liable to pay Dene and it was for this reason that he wanted the employer, i.e. Antshire and the Donnachie's, to guarantee to agree to pay his company.
71. The re-amended pleadings assert in paragraph 11 that the minutes of the meeting were written by Mr. Smith at the back of his "day book" immediately upon his return to the office following the meeting. In paragraph 14(a) the pleading claims that the written guarantee of payment was signed by Mr. Andrew Donnachie on his own behalf and that of Antshire and Mr. John Donnachie towards the end of the meeting. The agreement was, it is claimed, also signed by Mr. Smith and Mr. Atyeo. It is claimed that the original of the agreement remained in Mr. Smith's day book until the following week when Mr. Smith met Mr. Andrew Donnachie. At that point the original of the agreement was removed from the day book and given to Mr. Andrew Donnachie. It has disappeared.
72. The defendants' case is simply that Mr. Andrew Donnachie's signature is a forgery. The page has a number five and follows in sequence in the book, pages 1-4, which purport to be Mr. Smith's note of the meeting. The document, alleged to be a guarantee, reads as follows and I have kept the original spelling:
"John Donachie and Andrew Donachie of Antshire Limited has stated to Martin Smith in front of a witness, Wilf Atyeo that they will underwrite any debt for work - (illegible) by ourselves (Dene) in construction with the Tilford Wood Holiday Lodges. We will return to site tomorrow and continue work supplying plant, labour and materials although we are exercising a non-performance stop work (seven day's notice has been given) in light of non-payment. Instruction detail, design, payment will now be made directly from Antshire from this day on. This agreement is in

addition to any contract in place and is legally binding by all parties. Dene to forward detail as requested i.e. bank detail outstanding monies ASAP."

73. The document purports to be signed by Mr. Smith and immediately underneath by Mr. Andrew Donnachie for Antshire Limited and then underneath Mr. Atyeo as a witness. In cross-examination Mr. Atyeo said that he did not actually witness the physical signing. Each time the name Donnachie appears it is spelt incorrectly with one "n".
74. The defendants instructed Mr. Handy, a handwriting expert, to examine the documents. He made two reports and gave oral evidence. He had before him the six pages of notes and the day book entries by Mr. Smith. He had eleven signatures attributable to Mr. Andrew Donnachie for comparison.
75. Mr. Handy commented that the degree of similarity between the questioned and referenced signatures was greater than would have occurred by chance and either Mr. Andrew Donnachie signed the agreement or somebody else attempted to copy his signature. He said that the nature of the differences was not what he would have expected if an attempt had been made to replicate Mr. Donnachie's signature. He considered the possibility that Mr. Andrew Donnachie might have deliberately disguised his own signature but said that such forgeries tended to follow a specific plan. By implication they were not present in this case.
76. In paragraph 51 he states: *"On balance I considered these to be greater support for the proposition that Andrew Donnachie did not sign the agreement than there was for the proposition that he did."*
77. In paragraph 52 of his report he gives his conclusion that: *"The documents available provided strong evidence to support the proposition that someone other than Andrew Donnachie signed the agreement forming part of the Meeting notes dated 30th August 2002."*

Part of his conclusion was based on the supposition that the Meeting Notes and the Guarantee documents were made at the same time. At the end of this report he sets out his scale of certainty which, descending from the most certain, conclusive, strong, moderate, limited and inconclusive.
78. On 20th June 2006 Mr. Handy gave a supplemental report. This referred to words which appear at the top of page 4 of Mr. Smith's note of the meeting which he said he made after the meeting. Taking the passage from the bottom of page 4 it reads: *"John said on leaving that he did not understand why we had not been paid and he had learn't something today with regard to (GJAB) Wilf witnessed all the meeting and signed agreement."* (Underlining my emphasis)
79. Mr. Handy was asked whether the words "and signed agreement" had been written with the same pen as other writings on this and other pages forming notes relating to the meeting of 30th August 2002. Mr. Handy concluded that the ink was different from the other writing forming the notes. He concluded that the entry which had previously ended with the words *"all the meeting"* had been amended to read *"all the meeting and signed agreement"* using a ballpoint pen different from that used elsewhere on the four pages of the notes.
80. Mr. Smith responded in a witness statement of 30th June 2006 by saying that the words were not added subsequently and that he often used different pen in the same document. In cross-examination he said that it was possible that he added the words after reading through the notes. It was conceded in effect by the claimants that the words were in different ink but this was said not to be significant.
81. Mr. Handy was rightly pressed in cross-examination on his conclusion in relation to Mr. Andrew Donnachie's signature. Mr. Evans, for Dene, rightly pointed out that a conclusion that on balance it was more likely to have been a poor attempt to copy Mr. Donnachie's signature was less strong than a conclusion that there was strong evidence to that effect. Mr. Handy responded by saying that his considered evidence was that there was strong evidence for that conclusion. I accept his oral evidence and conclude that in his opinion there is strong evidence for the conclusion that Mr. Andrew Donnachie's signature on the purported guarantee was written by somebody else.
82. The essential elements of Mr. Smith's evidence were that he attended the meeting on 30th August 2006. He had received the result of the adjudication award a few days before and while the adjudication was taking place he had been going slow with the work. The Donnachie's were impatient and Mr. John Donnachie was very confrontational. A point had been reached where the Donnachie's seemed to have agreed that they would pay Dene direct. Mr. Smith said that he would like a memorandum of that. Mr. John Donnachie became hostile and asked if Mr. Smith trusted him. Mr. Smith wrote out the form of guarantee and Mr. John Donnachie said that Mr. Andrew Donnachie would sign. Mr. Smith said that he did not remember seeing Mr. Donnachie sign it although Mr. Smith believed that he did sign it. Mr. Andrew Donnachie and Mr. Atyeo went to the bar and on their return Mr. Smith asked Mr. Atyeo to sign. He read through the document briefly and then signed it. There was then a discussion about ongoing works. Mr. Smith remembers Mr. John Donnachie saying "we have agreed payment, send me the details you will be paid. Now let's get on with discussing the project." At the end of the meeting Mr. John Donnachie again assured Mr. Smith that they would be paid. He also asked for the original of the agreement. In the course of the following week at the site he handed Mr. Andrew Donnachie the original document.
83. Mr. Atyeo acted as the working foreman for Dene at the Tilford Woods site. He was present at the meeting. He said he regarded the handwritten memorandum as "notes that Martin had prepared". Mr. Atyeo and Mr. Andrew Donnachie went to the bar to get some drinks. When they returned from the bar Mr. Atyeo said that Mr. Smith pushed a note across the table and asked him, Mr. Atyeo, to sign. He quickly read it through and signed it.

84. Mr. Atyeo said in his witness statement dated 22nd May 2006 "by the time that I had signed it it had already been signed by Andrew. At least a signature appeared next to Andrew's name. I had not actually seen Andrew sign it."
85. Mr. Atyeo's previous witness statement dated 19th August 2004 is rather brief on this issue: *"In order to conclude the agreement Andrew Donnachie on behalf of Antshire Limited signed an agreement ... I have no doubt but that this signed agreement was signed by the parties as I believe that it reflects the agreement that they reached at the time and that each party was fully aware and understood the agreement reached at the time. The meeting was very civil and there was no pressure exerted by either party."*
86. In oral evidence Mr. Atyeo said that the Donnachie's assured them verbally that everything was going to be fine and that they would "underwrite any debt for work undertaken by us." Mr. Atyeo said that he stayed back from the business side of things. It was put to him that he signed the document a long time after the meeting in order to help Mr. Smith get the money. He denied that this was so.
87. Mr. John Donnachie said in his witness statement that he told Mr. Smith that everybody who works for Antshire Limited gets paid. It was intended, so Mr. Donnachie said, to indicate that GJAB would be paid sufficient money to discharge any debts which were properly payable as approved by D&H. He gave no written guarantee, nor did Mr. Andrew Donnachie, nor did they make any commitment to pay money owed by GJAB. He did request various documents from Dene at the meeting so that he could understand the current problem.
88. In oral evidence it was put to him that Antshire gave a guarantee to the subcontractor B&S. He agreed but denied that any similar guarantee was given to Dene or Morgan. He accepted that he did tell Mr. Smith at the meeting words to the effect that Mr. Smith would be paid, everybody got paid who worked for him.
89. Mr. Andrew Donnachie made two witness statements. The first followed the line of his father's statement. This issue is not addressed in the second statement. In oral evidence Mr. Andrew Donnachie was adamant that he did not sign the guarantee or that he met Mr. Smith on site the following week when Mr. Smith handed him the original document.
90. Mr. Smith also made brief entries in what was called the red book. It has on the first page *"meeting John at Winchester. Discuss account at Tilford meeting on rear."* The word "page" appears after the word rear and is then crossed out. On a later page the entry for 3rd September 2002 at 4.30pm reads:
"John call continued" "Said he will pay me direct if Graham (Aslett) does not want to pay."
"He feels he will make enquiries to Graham if he may have spent our money!" Graham presumably refers to Mr. Aslett
91. The notes give no indication that Antshire or the Donnachie's had already entered into the written guarantee purported to have been signed by Mr. Andrew Donnachie on 30th August 2002.
92. In relation to Mr. Smith's notes of the meeting on 30th August 2002, much of it was in fact agreed but Mr. Smith recorded that he had told the Donnachie's that Dene had issued a seven-day notice to suspend performance and had applied for an order against GJAB under the Housing Grants Act 1996 for non-payment. It appears that that notice was not sent until 3rd September 2002.
93. The Donnachie's deny that Mr. John Donnachie said to Mr. Smith that he would get paid, "everybody gets paid who works for me", although in oral evidence, as I have already described, they agreed they did say words to that effect. The reference in Mr. Smith's note to "a gentlemen's agreement" is not immediately consistent with the signed legally binding agreement which is said to have taken place.
94. Despite the meeting with the Donnachie's on 30th August 2002, on 3rd September 2002, immediately after the bank holiday, Mr. Smith sent GJAB a notice of intention to withdraw labour from site for seven days on the grounds that the adjudicator's award had not been paid and the June and July invoices also had not been paid. The total amount owing was £82,650.51. The notice was not copied to the Donnachie's.
95. On 4th September 2002 Mr. Andrew Donnachie wrote to GJAB. The letter referred specifically to the meeting on 30th August 2002. It also referred to the adjudication award and noted: *"It is hard for us to determine the points raised by Dene Construction as we are only authorized to send monies to your company via our bank following the usual valuations carried out by Dearle & Henderson. As the amounts that are valued as and when due and totaled we are unable to establish exactly how much is directed to each contractor."*
He asked that when the sums due to Dene had been calculated, GJAB should contact Dene.
96. Also on 4th September 2002 Mr. Smith sent a fax to Mr. John Donnachie setting out details of the adjudication award and the two outstanding invoices. Antshire passed details on to GJAB by a letter of the same date.
97. On site on 4th September 2002 there is a note from Mr. Atyeo's site diary, "John plots route for drain to avoid fir tree roots but close to lodges and new services and rising main." This is said by Dene to be an example of Mr. John Donnachie ordering work direct. The explanation, which I accept, is that it refers to a change to avoid the obstacles referred to and provide the safest route for the drainage contracted for under the existing contract.
98. This is consistent with the letter from Dene to the defendants dated 6th September 2006 where Mr. Smith complained that he was finding it impossible to contact Mr. Aslett: *"In frustration our employer, Mr. John*

Donnachie of Antshire Limited, who has in your absence over the last week resolved many queries and design details all requested from yourself. They have also been supervising works on your behalf on a day-to-day basis."

99. Under the JCT contract Antshire was described as the employer, GJAB as the main contractor and Dene as the subcontractor. The letter went on: *"Our employer has also confirmed that albeit they have been forced to take a proactive role on your behalf, are you going to be coordinating this project in the future? Please confirm."*
100. On the same day Mr. Smith wrote to Mr. John Donnachie: *"Thank you for confirming you have spoken to your main contractor G J Associates and Builders and thank you for passing on his instructions."*
101. On 9th September 2002 Mr. Andrew Donnachie gave authority for Bank Leumi to transfer £42,282 to GJAB following certification of that amount by D&H.
102. Mr. John Donnachie spoke to Mr. Smith on site on 11th September 2002 and confirmed that sufficient monies had been paid to GJAB to pay the invoices to date. In the letter of confirmation Mr. Smith referred to Mr. Aslett specifically as "the main contractor". On the same day 11th September 2002, GJAB sent Dene a cheque for £29,167.66.
103. On 12th September 2002 Mr. Duffell wrote to Mr. John Donnachie after Mr. Donnachie had had a discussion with Mr. Smith. This letter set out outstanding sums which Dene said were due for payment. They were expressed to be "for Antshire's consideration". There was no reference to a written guarantee by Antshire.
104. Also on 12th September 2002 Mr. Aslett wrote to Dene and sent the letter by special delivery. It attempted to refute Dene's complaints including the claim that Mr. Aslett (and Mr. Walsh) were difficult to contact.
105. On 17th September 2002 Mr. Aslett wrote to Antshire saying that only £35,000 had been transferred from Bank Leumi which left a shortfall of £57,204.56 of funds certified for payment.
106. On 20th September 2002 Mr. Aslett met Mr. Duffell on site to discuss outstanding matters. It appears that the meeting was a success.
107. However, financial problems continued and there was a diary note of Mr. Smith of 25th September 2002 that he was chasing Mr. John Donnachie on behalf of GJAB for £60,000 as soon as possible to enable him to pay invoices in his possession.
108. Mr. Aslett had confirmed that GJAB would make the payments immediately. It had received the money from Antshire by telegraphic transfer. There is again no reference in the letter to any alleged written guarantee.
109. Mr. John Donnachie did acknowledge that there were problems not of GJAB's making. In a handwritten letter to Mr. Aslett of 26th September 2002 he enclosed a cheque for £5,000 against the latest account. The letter went on: *"I am very sorry for the delays you are encountering and I will endeavour to resolve accordingly. Our personal guarantee still applies."*

Mr. John Donnachie said that the reference to the personal guarantee was a reference to the agreement with GJAB and not to a guarantee to Dene.
110. On 30th September 2002 Dene rendered its final account amounting to £616,524.47 having completed the work. On 9th October 2002 Mr. Aslett sent Dene a cheque for £20,000 as an interim payment in respect of work carried out by Dene on site. Dene replied on the same day saying that the sum should have been £60,000.
111. It is now convenient to follow through the first set of court proceedings before returning to the chronological narrative. On 4th October 2002 Dene started proceedings in the Southampton County Court against GJAB as the first defendant, Mr. Aslett as the second defendant, Antshire as the third defendant and Mr. John Donnachie as the fourth defendant. No defences were served and the proceedings were discontinued on 8th October 2001.
112. The statement of truth is signed by Mr. Colridge of Philip Kirkland & Co. as the claimants' solicitor. The claim alleges in paragraph 10 that Mr. Aslett gave his personal guarantee that he would pay the balance of the invoices amounting to £86,320.68. Paragraph 12 of the pleading alleges that Mr. John Donnachie gave Dene his personal guarantee that he would pay those monies to Dene if GJAB or Mr. Aslett defaulted on their obligations. Dene does not say that the alleged guarantee was a written guarantee. This was followed up by a solicitor's letter to Mr. John Donnachie dated 24th October 2002 written in general terms threatening summary judgment. By at the latest 30th October 2002 the Donnachie's had consulted Staple Inn Partnership as their solicitors.
113. Returning to the narrative, on 15th October 2002 Mr. Andrew Donnachie gave instructions to Bank Leumi to transfer £33,769 to the account of GJAB. This followed the certified request for payment by D&H on the same day. Payment of £44,978 was requested on 25th November 2002.
114. It was on 16th October 2002 that the Donnachie's wrote a letter to B&S which confirmed that they gave B&S a written guarantee of payment. The letter explained that processing of funds by the bank, i.e. Bank Leumi, and the main contractor, i.e. GJAB had taken a long time. Dene relies on the fact that the Donnachie's gave a written guarantee to B&S as important evidence to support its claim that it was given a similar guarantee.
115. On 22nd October 2002 a letter in similar terms to that sent to B&S was written by the Donnachie's to Glenmay Heating Limited giving a personal guarantee that all payments due would be honoured if GJAB defaulted in any way.

116. There was still a dispute between Dene and GJAB as to whether the practical completion of the ground work and roofing works carried out by Dene had been achieved. Dene claimed that it had been achieved by 30th August 2002 and was the subject of a formal notification on 11th October 2002. Mr. Aslett wrote to Dene on 29th October 2002 disputing practical completion and giving notice that GJAB was terminating Dene's employment under the contract.
117. Dene relies on the Monthly Development Report No. 14 dated 27th November 2002 to support its claim that extra work was ordered direct by Antshire and/or the Donnachies. This report refers to the whole development and not simply to ground work and roofing works carried out by Dene.
118. In paragraph 12.5 D&H wrote: *"We previously advised that the contract sum was forecast to increase from £1,532,860 to £2,078,813, an increase of £545,953. This is due to various changes, including changes to the type of units, Building Control requirements, changes to fittings and fixtures and changes to the internal envelope (vaulted ceilings). The biggest increase is in the statutory services and the domestic services."*
119. Paragraph 12.6 of the report indicated that the final account figure had increased to £2,182,000 "due to the late changes and client instructions."
120. Paragraph 12.7 complained: *"We note our concern that the client is still issuing instructions directly to the works contractor without agreeing these with the main contractor first."*
In oral evidence Mr. John Donnachie accepted this comment.
121. On 6th March 2003 Dene gave notice to GJAB of a second adjudication. The notice of referral was again directed solely to GJAB and not to Antshire or the Donnachies. It asserted that these parties entered into a contract to the value of £185,594.22 and that this contract was confirmed by the previous adjudication. The adjudicator, Mr. Kennedy, issued his award on 11th April 2003. It was favourable to Dene.
122. Mr. Aslett continued to deal with the subcontractors. For example, he wrote to Mr. John Donnachie on 19th September 2003 to say that he had agreed figures with Morgan in relation to their completion of works at Tilford Woods.
123. On 3rd December 2003 Dene issued court proceedings against GJAB to enforce the decisions against GJAB in the two adjudications.
124. On 23rd January 2004 GJAB gave notice to Dene that it had ceased to trade and invited its creditors to petition for winding up. It gave as its reasons the decisions of the adjudicators which left it with liabilities which it had no means to defend in court proceedings. Dene was substantially the main creditor.
125. At this point Dene and its current solicitors, Turners, turned their attention to seeking to recover money from Antshire and the Donnachies. In a solicitor's letter dated 10th February 2004 GJAB is described as their agents. The solicitors wrote: *"In view of the adjudicator's decision there is no further capacity for argument in this matter and we have advised our client that they are entitled to summary judgment against you."*
126. This was misleading. First, of course, neither Antshire nor the Donnachies were party to either adjudication. Secondly, this misrepresents the nature of adjudication which provides a provisional decision immediately enforceable but without prejudice to a party's right to resolve the matter by litigation, arbitration or settlement. In any of these methods of subsequent resolution there is capacity for argument. On its own this might be thought to be solicitors' hyperbole. The misapprehension was carried forward into the subsequent pleadings.
127. A subsequent letter from Turners, dated 25th March 2004 issued a demand against Antshire under the alleged guarantee. It said that at the meeting on 30th August 2002:
"In order to entice them back to work, your client, Antshire Limited, entered into a guarantee of all obligations in respect of works carried out by our client ...
We take the view that the agreement of the 30th August 2002 amounted to a guarantee on the part of your client, a guarantee which is in accordance with the Statute of Frauds and signed by or on behalf of guarantor."
128. The Staple Inn Partnership response dated 30th March 2004 denied that there was any contractual nexus between Dene and Antshire or that any guarantee had been given by or on behalf of Antshire. It stated clearly "neither our client nor its directors have ever seen the document dated 30th August 2002 and Mr. Andrew Donnachie denies that it has been signed by him."
129. Turners' instructions in relation to the document of guarantee was somewhat confused. On 7th April 2004 they said that they would advise their client that it should only be released directly to a forensic scientist for examination implying that the document was in their client's possession. On 7th June 2004 Turners wrote to Staple Inn Partnership to say that the original was "handed to your client".
130. On 5th August 2004 Turners gave notice that their client intended to join Antshire in the proceedings and envisaged the possibility of joining Mr. Andrew Donnachie. On 17th September 2004 they gave notice of intention to join both the Donnachies as co-defendants. Finally, on 19th August 2004 Dene obtained a default judgment against GJAB.

The Morgan action

131. The two claimants, Mr. Reginald and Mr. John Morgan were and are the practical men who carried out the work. They relied to a very considerable extent on Mr. Les Walsh for the business side of their activities. As I have already said Mr. Walsh acted throughout as the representative for the Morgans and, I am told, stands to benefit financially if the Morgans are successful in the action. Their claim, which commenced with the issue of their claim form on 4th November 2005, is made against Antshire for the outstanding balance for their final account on the basis that Morgan contracted directly with Antshire and that Mr. Aslett and/or GJAB were acting at all times as Antshire's agent.
132. It is claimed in the alternative that it represented the value of the work carried out pursuant to instructions received directly from Mr. John Donnachie in respect of additional fitting out and additional work to the lodges and the outstanding balance of work instructed by Mr. John Donnachie at the Duke of Cambridge public house which adjoins the Tilford Woods site. In addition a small additional sum is claimed by Morgan against Mr. John Donnachie in the sum of £3,591.96 in respect of interest and surcharges incurred by Morgan as a result of its inability to pay tax at the due date.
133. Significant progress has been made in resolving these disputes. The first claim remains in dispute. This is against Antshire and relates to the outstanding balance of the value of Morgan's final account in the agreed sum of £79,237.34. Antshire claimed that the original contract was made with GJAB and that it is not liable to pay this sum.
134. The second claim is that between October 2002 and March 2003 Morgan was instructed direct by Mr. John Donnachie to carry out interior fitting out. Morgan claims that Mr. John Donnachie is directly liable. Mr. Donnachie claims that he was acting on behalf of Tilford Woods Limited who are not parties to the action. If successful Morgan is entitled to recover £29,128.28.
135. A further claim against Antshire and Mr. Donnachie in relation to landscaping and car parking work at the Duke of Cambridge public house is now agreed in the sum of £21,635.80 and Morgan is entitled to judgment in that sum.
136. Finally Morgan's claim relating to the Inland Revenue is not agreed. The defendants argue that they are not liable to pay any sum because the precise sum has not been proved. They admit they agreed to pay the actual costs to the Morgans.

Facts in relation to the Morgan's claim

137. The earlier evidence relating to the claim that the contract dated 16th February 2001 is a sham is also relied on by Morgan. On 5th November 2001 Mr. Walsh wrote to GJAB after telephone discussions over the previous few weeks asking for R & J Morgan to be included in the list of subcontractors for labour only carpentry. The letter provided information about R & J Morgan and references. In Morgan's request for information the other contracting party is described as Graham Aslett G J Associates. The response dated 30th November 2001 is signed by Mr. Aslett for and on behalf of GJAB.
138. On 13th and 30th December 2001 Mr. Walsh provided priced quantities for carpentry for Mr. Aslett. Morgan was in due course engaged to provide the carpentry. They were also involved in placing the order with B&S for the supply and installation of electrical goods in the holiday cottages. On 5th February 2002 Morgan wrote to B&S to accept their quotation. The letter stated: *"We have been instructed by G J Associates & Builders Limited, the client's representative for the above project ...". Later in the letter there is a reference to their meeting "with Graham Aslett, the client's representative on Monday, 4th February ..."*
139. On 23rd March 2002 Morgan accepted the quotation from another subcontractor A T Jones & Sons Limited for dry lining works. Mr. Walsh said that he was instructed to do so by Mr. John Donnachie. On 2nd April 2002 Mr. Walsh wrote to Glenmay Heating Limited, another subcontractor, on Morgan notepaper in similar terms. The health and safety plan for Morgan, undated but said to be made on 24th June 2002, describes the client as Antshire Limited, the project manager as GJAB and the planning supervisor as Dene.
140. On 24th May 2002 Morgan invoiced Donnachie for the work done at the Duke of Cambridge public house. This is now agreed to be separate to the main contract.
141. On 23rd July 2002 Mr. Aslett wrote to Mr. John Donnachie in relation to outstanding sums due to them and to other associated contractors to be paid by Morgan. He noted that the total sum due to Morgan was £116,841.35 due for payment on 15th July 2002 and that sums were due and outstanding to others including B&S. The letter ended: "I know that you are arranging the necessary transfer of funds to cover the foregoing."
142. The fax dated 29th July 2002 made it clear that GJAB made a payment to Morgan and that the arrangement was that Antshire/the Donnachie's would put GJAB in funds. GJAB would then make payments to the various tradesmen.
143. There is a note from Mr. Walsh to Mr. John Donnachie dated 15th August 2002 in relation to the changes in the bathroom, sauna and kitchen layouts for lodges 1 and 2. Mr. John Donnachie said in evidence that a problem had arisen and he agreed a solution to the problem with Mr. Walsh and instructed him that the work should go ahead.
144. Clearly Morgan were having, by this time, difficulty in obtaining payment despite assurances on 16th August 2002 that monies owing would be paid. On 23rd August 2002 Mr. Walsh wrote to GJAB saying the position had

to be resolved as a matter of urgency. The letter was not copied to Antshire or the Donnachies and I accept Mr. John Donnachie's evidence that he had not seen it before the court hearing. Mr. Walsh said that the letter had not been copied to Antshire or the Donnachies because he thought that Mr. Aslett was their project manager looking after their affairs. I do not accept this explanation.

145. On 13th October 2002 Mr. Walsh was asked by Mr. John Donnachie what sums were outstanding to B&S and responded by setting out the various sums.
146. On 16th October 2002 Antshire guaranteed in writing the monies due to B&S. The letter refers to "the main contractor" i.e. GJAB. The letter was said to be written after discussions with Mr. Walsh. Mr. Walsh said in evidence that the letter was misleading. He also said that he did not know that GJAB had been paid money to pay B&S.
147. On 22nd October 2002 Antshire gave a similar guarantee to Glenmay Heating, another contractor in the same position as B&S. The letter said:
*"We ask that you accept this letter as our confirmation as owners that all your payments due will be honoured.
This letter is intended as our personal guarantee should the contractor default in any way."*
148. This letter was seen by Mr. Walsh. The claimants contend that this letter strengthens their argument in relation to the validity of their guarantee. On the other hand it tends to support the relationship of owner and main contractor contended for by the defendants.
149. In relation to additional work on 1st November 2002 Mr. Walsh wrote to Glenmay Heating, copied to Mr. Aslett and Mr. Donnachie, instructing them to carry out additional mechanical heating and plumbing installation works. Mr. John Donnachie confirmed that the instructions were given by Antshire as the letter itself indicated.
150. On the 5th, 11th and 12th November 2002 Mr. Walsh sent a series of invoices numbered 1 to 7 for work at Tilford Holiday Village. These invoices form the subject matter of the second claim against the defendants. The defendants claim that they are rightly addressed to Tilford Woods Limited who are not parties to these proceedings. They acknowledged that the work was done and the debt was incurred, but the defendants say that it was incurred by Tilford Woods Limited and not by either of these defendants.
151. On 8th January 2003 Mr. Walsh wrote again to Mr. John Donnachie in relation to these invoices which had now reached number 16 and total £24,216.77 (the first two having been paid). This section of the letter is headed Tilford Woods Limited.
152. This was followed up by Mr. Walsh in a similar letter dated 18th March 2003. Again these outstanding invoices are headed Tilford Woods Limited. Further letters addressed to Tilford Woods Limited were sent by Mr. Walsh on 9th June 2003, 21st July 2003, September 2003, 1st February 2004 and 2nd December 2004.
153. On 7th May 2003 Mr. Aslett wrote to Mr. Walsh on GJAB notepaper enclosing a cheque for £15,000: *"... being the interim payment in respect of the works carried out by your firm at Tilford Woods as agreed with John and Andrew Donnachie at your recent meeting."*
154. On 9th June 2003 Mr. John Donnachie received details of the Morgan's bank account because he was about to make a payment direct to the Morgans. In the week of 17th July 2003 a payment was made by Antshire directly into the Morgan's bank account.
155. On 17th July 2003 Mr. Aslett wrote to Mr. John Donnachie copied to Antshire, the Morgans and Mr. Walsh. He said: *"As you are aware to date, without exception all other payments in respect of works carried out by R & J Morgan have in fact been paid to them by GJAB. No other payments have in fact been received by Antshire Limited ... It is acknowledged however that R & J (Morgan) have received interim payments, (Invoices Nos. 1 and 2), from Tilford Woods Limited in respect of works undertaken outside of the GJAB/Antshire contract at the Tilford wood site."*
He went on to say that it would have been preferable from all points of view for payments to continue to be directed through GJAB.
156. On 19th September 2003 Mr. Aslett wrote to Antshire on GJAB notepaper. The letter was addressed to Mr. John Donnachie and was copied to Morgan. The letter set out the items completed by Morgan under what is described as practical completion of the GJAB Limited contract. It noted that the work included a number of items of which work on the completion of the ATT Limited contract was singled out as having been underwritten by Antshire. ATT had by then gone into litigation. The letter confirmed that the total outstanding sum agreed with Morgan in respect of all works was £97,944:
157. In relation to the Inland Revenue claim the letter went on:
*"As you are aware R & J Morgan are now being pursued by the Inland Revenue to settle certain matters relating to their tax affairs and accordingly are now looking to you to settle their account as a matter of urgency to avoid any further penalties being incurred. Obviously, as previously stated, R & J, in addition to the above sum, are entitled to interest under the Late Payment of Interest under the Act unless otherwise agreed ...
"Finally, I enclose for your kind attention my invoice to cover the fees, as agreed, for managing the work undertaken by R & J Morgan and other related matters."*

158. A tax statement of June 2003 in respect of the Morgans showed a demand for interest of £4,213.26, a payment of £621.30 paid on 11th June 2003 and an outstanding balance of a surcharge and interest of £3,591.96. It is the sum of £3,591.96 which is claimed in these proceedings. The sum has not been disputed, nor has it been agreed. It was in January 2004, as I have already described, that GJAB went into liquidation. Morgans are listed as creditors in the sum of £40,000.
159. On 1st April 2004 Morgan (Mr. Walsh) wrote to Mr. John Donnachie in a letter addressed to Tilford Woods Limited enclosing Invoices 17 and 18 in respect of work said to have been carried out on Mr. Donnachie's direct instructions. I was told by Mr. Donnachie that the work was in fact carried out in May/June 2002. The letter provided a long list of other additional work said to have been carried out.
160. Invoice 19 was sent to Antshire Limited on 28th April 2004. It was for £21,635.80. The covering letter said that further invoices would be sent in the near future and that these items of work will be deducted from the account sent to GJAB "as directed by you."
161. Further letters were sent by Mr. Walsh to Mr. John Donnachie but addressed to Tilford Woods Limited on 12th July 2004 and 31st August 2004. The letter dated 31st August 2004 enclosed Invoice 20 and also referred to the Inland Revenue charges. There was no suggestion that the sum was disputed. The statement of 2nd December 2004 indicated that the sum claimed from Tilford Woods Limited had arisen to £78,349.43. This letter also included the statement of sums due to the Inspector of Taxes which it was said that Mr. John Donnachie had agreed to pay.
162. There were further discussions in December 2004 as a result of which Mr. Walsh wrote on 13th December 2004 to say that Invoices 18, 19 and 20 had been taken out of the Tilford Woods Limited account and placed in the main works contract. The payment schedule for additional works was addressed to Tilford Woods Limited and was reduced to £29,128.27. Finally, R & J Morgan started proceedings in November 2005 but did not make Tilford Woods Limited a party to the action.

The Claimants' Contentions

163. Dene and Morgan's primary case is that the contract between Antshire and the Donnachie's and GJAB was a sham and was never intended to create bona fide legal relations. It is argued that the fact that Dene and Morgan acted as though there was a bona fide contract is not decisive because Bank Leumi paid funds to GJAB and not to Antshire and Dene and Morgan needed to apply to GJAB if they wished to be paid. In fact Morgan and others did receive, so it is alleged, some payments direct from Antshire.
164. It is argued that the JCT contract is signed only by Mr. Andrew Donnachie despite the fact that Mr. John Donnachie insisted in evidence, in refuting the claim that the guarantee was an important document, that important documents were signed by both father and son. Dene and Morgan note the absence of any employer's requirements and contractor's proposal which is central, so they say, to the working of the JCT contract. This demonstrates, so they claim, that the document (and the purported arrangement) was a sham.
165. The claimants also contend that the uncertainty as to which scheme the contract is intended to apply, demonstrates that the purported contract was a sham. They note that GJAB had the same company address as Antshire, was a £1 company and was said at the annual return at Companies House to be a dormant company. Together with other evidence to which I have already referred Dene and Morgan contend that the evidence demonstrates that GJAB and Antshire did not intend to create the legal relations of employer and contractor. It is argued that the JCT contract created no rights and obligations between Antshire and GJAB. The document was intended to give the appearance of creating a misleading impression to third parties, including Dene and Morgan, that the relationship was one of owner and independent contractor when it was in fact one of principal and agent.
166. Contractual documents between Dene and GJAB and Morgan and GJAB were brought into existence, so it is argued, to perpetuate this misleading impression.
167. It is claimed that the relationship of principal and agent was acknowledged by Antshire and/or the Donnachie's in the payment by Antshire of GJAB's costs in the adjudication proceedings. It is also claimed that the direct payments by Antshire to Morgan amounted to acceptance that Antshire was liable for those sums. It is further claimed that the direct instructions from the Donnachie's to the contractors reflected the true position that Antshire and the Donnachie's were acting as principals and GJAB was their agent.
168. Dene's second claim relates to the alleged written guarantee which Dene claims was signed by Mr. Andrew Donnachie at the meeting at the Percy Hobbs public house near Winchester on 30th August 2002. Dene contends that the document was genuine and given against the background of the adjudication which had recently taken place and Dene's threat to suspend the works which would have had serious consequences in relation to Antshire's contract with Hoseasons for the letting of the chalets once they had been constructed.
169. In its final submission Dene contends that Mr. Handy was not the first expert the defendants had instructed and that I should infer that another expert had previously been instructed whose conclusions were unsatisfactory to the defendants and should discount his evidence accordingly. They also contend that "on balance" reflected the real and rather weak conclusion which Mr. Handy had reached and that I should not follow it. Further, it is contended that on the totality of the evidence I should find that the document was a genuine written guarantee. I should accept the evidence of the oral witnesses of fact on behalf of the claimants and take into account the fact that the Donnachie's gave guarantees to other contractors.

170. I should not infer against Dene that because they did not immediately pursue the alleged guarantee, it did not exist. Rather they were simply concerned that they should be paid and did not understand the significance of the guarantee in writing. I cannot help observing that before and after 30th August 2002 Dene consulted their previous solicitors, Philip Kirkland & Co., and that the addendum to the particulars of claim in the Southampton County Court proceedings which followed the commencement of proceedings on 11th October 2002, just over one month after the meeting in the public house, made no reference to a written guarantee but only referred to a guarantee which if it had been oral would not have had the legal effect now contended for by the claimants.
171. Dene makes an additional claim added to the pleading in August 2005, on the basis that either or both Mr. John Donnachie and Mr. Andrew Donnachie requested Dene in a personal capacity to carry out additional works on site for which they have not been paid. The single joint expert to whom the court is greatly indebted has valued the work, subject to liability, in the sum of £106,052.97. This valuation has been accepted by the parties. The alleged works were carried out about between February 2002 and August 2002. None relate to a period after the meeting in the public house. The work relates to foundations, gas, water and electrical installations, storm water systems, drainage and road layout and adaptations. Dene argues that it is plain that the work was not covered by the original contract nor could be properly regarded as filling gaps in the original plans or finding ways round problems. The positive evidence is alleged as follows.
172. Items 3, 6 and 7, Telecom, gas, water and electrical installation. Mr. Corcoran says that these instructions were passed by Mr. Walsh and Mr. John Donnachie instructed where they should be placed. Item 3 relates to February 2002. Items 6 and 7 relate to July 2002.
173. Item 4, foundation 1 to 5 and filling, from waste ground from pub Mr. Atyeo suggests that the instructions were given by Mr. John Donnachie. Item 4 relates to work carried out in May 2002.
174. Item 5 As item 4 (also May 2002)
175. Item 8 This is claimed as the increased costs of the road layout and adaptations as a result of changes required by Mr. John Donnachie and instructed direct. This item relates to work carried out in July/August 2002.
176. Item 9 The claim is that Mr. John Donnachie gave the instruction for the discharge spillway into the waterway. It is claimed that all drainage work was additional to the original contract. The work was carried out in August 2002.
177. Item 10 This again relates to drainage. The work is said to have been instructed by Mr. John Donnachie in August 2002.
178. Item 11 This again relates to drainage. The work is said to have been instructed by Mr. John Donnachie in August 2002.
179. Dene relies on the oral evidence from Mr. Walsh and Mr. Atyeo that the Donnachie's were given direct instructions on site from an early stage. Mr. Walsh said they were giving instructions virtually every day from January 2002.
180. Morgan supports Dene in claiming that the alleged agreement of 16 February 2001 was a sham
181. In relation to its separate claim for extra work valued at £29,128.27 it claims that the contract was with Mr. John Donnachie and/or Antshire. Morgan argues that the fact that the letters written on their behalf were addressed to Tilford Woods Limited is not decisive because they were asked to do so by Mr. John Donnachie. They further note that Tilford Woods Limited was at the time and has been described in the annual returns to Companies House as a dormant company and in cross-examination Mr. John Donnachie gave a number of different answers as to when Tilford Woods Limited started trading. On the basis of Mr. John Donnachie's answers they contend that it may well be that Tilford Woods Limited started trading in late 2003 or 2004, long after the work in question had been completed.
182. The claim in respect of the Duke of Cambridge public house is now admitted.
183. In respect of the claim for interest and surcharge the claimants rely on the documents which I have set out showing the figures and on a short witness statement by Mr. Walsh dated 2nd June 2006.

The Defendants' Response

184. The defendants emphasise that even after the various amendments the claimants in both actions rely on their claim that the JCT contract was a sham. They do not suggest that it was superseded by a further contract. The sole issue they say is whether or not it was a sham. The logical conclusion, they argue, is that if it was a sham they lose but if it was not a sham they succeed unless the defendants succeed on one of the alternative claims.
185. They argue that in order to succeed in establishing that the contract was a sham, the claimants must show that when they signed the document which purports to be the JCT contract, neither GJAB nor the defendants intended to be bound by it and that when they signed the contract, both GJAB and the Donnachie's intended that a third party would be deceived into thinking the JCT contract was valid.
186. They claim that the claimants seek to rely on events which happened long after 16th February 2001 to prove that the contract always was a sham and that these events do not provide the necessary proof.
187. Further, the defendants refute the suggestion that Bank Leumi required Antshire and GJAB to enter in a JCT contract before they were prepared to fund the development. They say that this is demonstrated by the fact that the JCT contract was not sent to the bank until 5th February 2002 and the charge was not executed until 14th February 2002, by which time a large proportion of the loan had been drawn down.

188. The defendants' central case is that all the contemporary documents demonstrate that the certification method of valuing the works proposed to Bank Leumi by D&H was followed throughout and that GJAB acted throughout as though they were the main contractors and were accepted and treated as such by Dene, Morgan and the other contractors on site. They note that Dene's quotation for the works was addressed to GJAB. All the invoices from Dene were addressed to GJAB. All the invoices from Morgan were addressed to GJAB and, until payment difficulties arose in the closing stages of the works, all payments were made by GJAB.
189. The defendants contend that Mr. Aslett acted at all times as a main contractor would act. By way of example he sent a copy of GJAB's insurance policies as main contractor to D&H on 11th January 2002. He sent the JCT contract to Bank Leumi on 5th February 2002 and a contractor's collateral warranty to Antshire, copied to Bank Leumi, on 18th February 2002.
190. The works were valued in a way that was entirely consistent with GJAB acting as the main contractor. Mr. Silvester of D&H walked round the site with Mr. Aslett and Mr. Walsh. Mr. Silvester would then be presented with documents setting out the work done and the materials supplied. He would raise a request which he would certify and it would then be sent to Antshire. The Donnachies were not part of the process. The defendants played no part in assessing what sums would be paid to individual contractors.
191. Further, the defendants contend that Mr. Aslett and GJAB continued to conduct correspondence with Dene after August 2002 and until GJAB purported to terminate the subcontract on 29th October 2002. GJAB also continued to conduct correspondence with Morgan after August 2002. The defendants say that there is no evidence that Mr. Aslett acted under the direction of Antshire and the Donnachies, i.e. in a manner consistent with that of an agent. In particular it is contended that there is no evidence that Mr. Aslett consulted the Donnachies before purporting to terminate the Dene's contract.
192. In relation to Dene's claim under the guarantee, the defendants claim that it was a forgery. They say that there was no reference to it in the meeting notes. The explanation for the words in a different ball point "and signed agreement" was implausible and should not be accepted. The original document has not been seen. The evidence that it was handed over to the Donnachies should not be accepted. This explanation was first given, they say, only in June 2004. They note that the name Donnachie is misspelt in the purported guarantee and the document is only signed by Mr. Andrew Donnachie. None of the parties acted thereafter as though a written guarantee had been signed. The court proceedings begun in October 2002, less than two months later, made no reference to the document.
193. All this circumstantial evidence, it is claimed, supports the conclusion of the expert, Mr. Handy, that Mr. Andrew Donnachie's signature is a forgery.
194. The Donnachies' affirmative case is contained in the statement of Mr. John Donnachie, namely that he gave an assurance that GJAB would be paid sufficient money to discharge any debts which were properly payable, but neither he nor Mr. Andrew Donnachie either made in the case of Mr. Andrew Donnachie nor saw him make, in the case of Mr. John Donnachie, a signature which would have made the guarantee an effective guarantee. They say clearly and have maintained at all stages that Mr. Andrew Donnachie's signature is a forgery.
195. With regard to the alternative case set out in Paragraph 27 and following of the Dene claim, the defendants note that in its original version Mr. Walsh is described as "the second and third defendants' representative". This was plainly wrong and was properly deleted from the pleading.
196. In oral evidence Mr. Smith confirmed that all the works in the additional claim were instructed and completed before the end of August 2002. The suggestion was put to him that any instructions which the Donnachies gave were given as agents for GJAB and he agreed that this was so. The defendants contend that this is consistent with Mr. Smith's understanding that at all times until 30th August 2002 GJAB were the main contractors with authority to instruct Dene to carry out work.
197. In relation to the Morgan claims, as I have already set out, the defendants contend in relation to the first claim that the contract on 16th February 2001 was not a sham for the same reasons as in the Dene action. The defendants were not party to the original Morgan contract and are not liable.
198. In relation to the second claim, the work carried out for Antshire/Mr. John Donnachie, they admit that the work was carried out. They agree the sum is due and owing but they say it is due and owing from Tilford Woods Limited and not these defendants as appears from the invoices. They admit the claim in relation to landscaping and work in the car park of the Duke of Cambridge public house and they admit liability in respect of any valid claim relating to tax but say that it has not been proved.

Conclusion

199. The first issue is, was the contract of 16th February 2001 a sham? The test is whether Antshire and/or the Donnachies and GJAB entered into an agreement which was intended by them to give to third parties and the court the appearance of creating between them legal relations and obligations different from the actual rights and obligations (if any) which the parties intended to create.
200. In this case it is alleged that the agreement evidenced by the JCT contract to create the relationship of employer and independent contractor was a sham and was intended to mislead third parties at a time when their real intention was to create the relationship between Antshire and the Donnachies, and GJAB of principal and agent. This deception was, it is alleged, carried through into the contracts with Dene and Morgan.

201. In resolving this question I am to consider carefully the facts bearing in mind that the test is subjective, i.e. what the parties intended at the time when the document was brought into existence. There is no direct evidence that it was a sham. Dene and Morgan say that it can be inferred.
202. I must consider the background. I find that GJAB was incorporated on 28th April 1999 to be a vehicle through which the Tilford Woods project and other projects could be conducted with the Donnachies. I accept Mr. Aslett's evidence that this was the intention of the parties when GJAB was incorporated. I find that that was done so that Mr. Aslett could act as an independent contractor employing subcontractors and dealing with projects for the Donnachies and Antshire. I am satisfied that on the part of both Mr. Aslett and the Donnachies it was intended to reflect Mr. Aslett's independent status.
203. In December 1999 the Donnachies made an application to develop the Tilford Woods site which Antshire had acquired in April 1997. Whether the project was the initial project of a fixed caravan site or the subsequent project of the chalets it needed funding. Bank Leumi was approached and agreed, subject to receiving appropriate security including the personal guarantees of Antshire and Mr. John Donnachie, that it was prepared to fund the project.
204. A revised planning permission was applied for on about 1st February 2002 and I find that Bank Leumi was prepared to fund either the original or the revised project. The loan was subject to drawdown conditions which required D&H to act independently as the Bank's project monitor who were to certify on a monthly basis after agreeing the value of the work with Mr. Aslett as main contractor.
205. If Bank Leumi was unaware of the new scheme for chalets on 1st February 2002 it was certainly made aware of the scheme shortly after and made no objection and was prepared to continue its lending on the basis of the 1st February 2001 agreement. There is no suggestion at any stage that Bank Leumi was misled as to the arrangement between Antshire, the Donnachies, GJAB and Mr. Aslett. This was set up to be that of employer and independent contractor.
206. The 16th February 2001 contract was consistent with the early intentions of those parties. It was also entered into at the request of Bank Leumi and was operated in a manner consistent with the relationship of employer and independent contractor at least until difficulties occurred for GJAB and Mr. Aslett at the end of the contract.
207. I cannot infer from events in about July 2002, even if I accept the claimants' evidence in relation to them, that the contract was a sham when it was entered into in February 2001. I can and do take into account the return at Companies House which claimed that GJAB was a dormant company, but on the evidence I find that whatever was declared in that return it was not a dormant company.
208. I take into account the fact that GJAB was represented in adjudication proceedings in July 2002 by Antshire's solicitors but this does not alter my finding in relation to the 16th February 2001 agreement, nor does the fact that Antshire paid the costs, although this is a matter of greater account than the solicitors' representation. I am inclined to believe Mr. John Donnachie when he said that GJAB would be contra charged for the solicitors fees but whether this is so or not, weighing all the evidence relating to events well over a year after the formation of the contract, it does not alter my finding.
209. Having taken all the matters raised by Dene into account, both singly and cumulatively, together with the rest of the evidence, I conclude that the agreement on 16th February 2001 was not a sham. I find GJAB was set up in 1999 as a separate entity. I accept Mr. Aslett's evidence that it was to be used to enable him to act as the head contractor in contracts in which the Donnachies were involved. The transaction with the bank on 1st February 2001 was a genuine transaction. It set out the basis on which the bank was prepared to fund the project. It required the Donnachies to guarantee the project and provided that the money was only to be released after independent certification by D&H in conjunction with Mr. Aslett as head contractor. GJAB was to act as independent head contractor in this process. This procedure was carried through as the work at Tilford Woods progressed.
210. I should add that I incline to the view that at the time when the contract between GJAB and Antshire was made on 16th February 2001 the subject matter of the contract was the proposed caravan park, although it was no doubt contemplated that it (and the financing) would apply to the proposed chalets if planning permission was given. When in June 2001 planning permission was given, the agreement proceeded on the same terms.
211. In relation to subsequent conduct which may be taken into account in order to decide whether or not the agreement entered into by GJAB and Antshire was a sham, I note in particular that Mr. Aslett dealt with Dene and Morgan and other tradesmen as subcontractors both in relation to the formation of their contract and thereafter. Mr. Smith, who is and was at the time an experienced builder, thought in August 2002 that Mr. Aslett/GJAB was acting as the main contractor. It was for this reason that he initiated the meeting in the Percy Hobbs public house in order to obtain assurances from the Donnachies that if Dene resumed work on site and completed the contract the Donnachies would pay in the event of default by GJAB. Mr. Smith was an experienced businessman and his evidence in this regard is important.
212. By August 2002 Dene was acting on the professional advice of solicitors. Dene's previous solicitors commenced two adjudications against GJAB, neither Antshire nor the Donnachies were involved. The second of these adjudications took place as late as April 2003.
213. I therefore find against Dene and Morgan on this issue.

214. In relation to Dene's claim on the alleged written memorandum of guarantee, taking into account the matters that have been raised on both sides, I conclude that Mr. Andrew Donnachie's signature on the purported document of guarantee was written by somebody else. I also conclude that the words "and signed agreement" in Mr. Smith's note of the meeting were added after the rest of his note of the meeting. I accept Mr. Handy's analysis and conclusions in relation to the handwriting. I accept his considered view expressed at the hearing that it is based on strong evidence. It follows that I accept Mr. Andrew Donnachie's evidence that he did not sign a form of guarantee. It follows also that I accept Mr. John Donnachie's evidence that he did not see his son sign the note of guarantee.
215. I reject Mr. Smith's evidence that he drew up the note of guarantee at the meeting and that Mr. Andrew Donnachie signed it. I also reject Mr. Atyeo's evidence when he said that although he did not see Mr. Andrew Donnachie sign, he had already signed the note when he, Mr. Atyeo, signed after he and Mr. Andrew Donnachie had been to the bar towards the end of the meeting to get some drinks.
216. It follows from these findings that I also reject Mr. Smith's evidence that the words "and signed agreement" were written at the same time as the rest of his note of the meeting. I have no doubt that Mr. John Donnachie, in particular, in the public house assured Mr. Smith in general terms that Dene would be paying outstanding monies. The assurances were positive but vague. I accept that Mr. John Donnachie said words to the effect that everybody gets paid who works for me. Mr. Smith might well have inferred from this that he was receiving some general assurance that he would be paid direct by the Donnachies but I am satisfied that the Donnachies gave no specific assurance to this effect.
217. In any event I am satisfied that no written guarantee was given. In reaching these conclusions I take into account the fact that later written guarantees were given to other subcontractors.
218. I find for the defendants on this issue.
219. I now consider Dene's claim in relation to works alleged to have been instructed direct by the defendants. The Donnachies admit that on one occasion Mr. John Donnachie gave a direct instruction for work to be carried out. I have considered carefully the items in the claimants' schedule in relation to work which is said to be outside the scope of the original contract. In so far as it is necessary to do so I prefer the evidence of the Donnachies to that of Mr. Corcoran, Mr. Walsh and Mr. Atyeo and conclude that the work which was instituted was within the general scope of the original contract. Having said this, I note that an important part of the difference between the claimants' and the defendants' witnesses is not the factual issue of what was said but its effect when put into its proper context.
220. I am satisfied that particularly in relation to the period of July/August 2002 Mr. John Donnachie did instruct work within the overall terms of the contract and, therefore, as variations, but in the circumstances set out in Mr. Smith's letter dated 6th September 2006, namely Mr. Aslett's absence from site. Although that letter refers specifically to a period of one week I am satisfied that problems occurred in dealing with Mr. Aslett as the main contractor before that date.
221. I note that, Mr. Smith, himself did not claim in the period before 30th August 2002 that the Donnachies and/or Antshire were giving instructions direct outside the scope of the contract and were therefore directly liable. Also this was not an issue which was raised at the meeting on 30th August 2002. I find that in so far as the Donnachies were giving instructions for changes, they were not given or understood to be pursuant to a separate agreement or series of agreements outside the scope of the contract between Dene and GJAB but was part of the existing contract between Dene and GJAB.
222. I therefore find for the defendants in the Dene action.
223. It follows from my conclusions in the Dene action that in the Morgan action I find that the contract between the first defendant and GJAB dated 16 February 2001 was not a sham and was intended to create legal relations between Antshire and GJAB. I find, therefore, that Mr. Aslett was acting as independent contractor and not as agent for the first defendant.
224. It also follows that there was a valid contract between Morgan as subcontractor and GJAB as contractor pursuant to which Morgan was engaged by GJAB. The value of unpaid work was valued by the expert in the sum of £79,237.34. Since the contract for the works was between Morgan and GJAB, neither Antshire nor Mr John Donnachie is liable to pay this sum.
225. In respect of the claim for £29,128.28 for work directly instructed by Mr. John Donnachie, I find on the evidence that not only was Tilford Woods Limited declared in the annual return to be a dormant company but (unlike GJAB) it was a dormant company at the time when the work was instructed and carried out, I am satisfied that the work was instructed by Mr. John Donnachie on his own behalf or that of Antshire and not on behalf of Tilford Woods Limited, a company which was not at the relevant time trading.
226. If the position had been otherwise, Mr. John Donnachie would have given clear oral evidence to that effect and would have produced documents to support that evidence. I hold that the invoices were addressed to Tilford Woods Limited at the expressed request of Mr. John Donnachie. I find, therefore, that Morgan is entitled to recover the sum of £29,128.28 against Mr. John Donnachie and/or Antshire.

227. Morgan is also entitled to recover the sum of £21,635.80 in respect of work done at the Duke of Cambridge public house as a result of a late concession by the defendants.
228. The claim in relation to tax pleaded at paragraph 30 of the particulars of claim is made and quantified in the documents which are clearly genuine. This powerful evidence is supported by Mr. Walsh who gave written evidence on this point in a witness statement dated 2nd July 2006. None of this evidence was challenged. In these circumstances I accept it. I find for Morgan on this issue and give judgment in the sum of £3,591.96.
229. I therefore give judgment for Morgan against Antshire and Mr. John Donnachie in the sum of £54,356.04.

MR. ROBERT EVANS (instructed by Turners Solicitors LLP) for the Claimants
MR. DONALD McCUE (instructed by Staple Inn Partnership) for the Defendant