JUDGMENT : HIS HONOUR JUDGE HUMPHREY LLOYD Q.C. 7th February 1997

1. Pursuant to the Practice Statement of 9 July 1990 this text records my judgment and no note or further record is to be made.

2. His Honour Judge Humphrey LLoyd QC 7 February 1997

3. Mr Richard Fernyhough QC appeared for the plaintiff, instructed by Winward Fearon & Co.

4. Mr Adrian Williamson appeared for the defendant, instructed by McKenna & Co.

5. For the hearing of the adjourned summons for directions three summonses were issued:
   1. The defendant's summons of 29 February 1996 to strike out the writ and amended statement of claim pursuant to Order 18, rule 19 or under the inherent jurisdiction of the court.
   2. The plaintiff's summons of 20 June 1996 for leave to serve a substituted statement of claim.
   3. A further summons from the plaintiff of 22 October 1996 which also seeks leave to serve a substituted statement of claim.

6. I shall first set out the background to this action and to the summonses.

7. The plaintiff is a landscape contractor who in 1985 tendered for and was awarded a contract for work on the construction of a new golf course at a reclaimed landfill site at Stockley Park in the London Borough of Hillingdon. The developer of the golf course was Trust Securities Holdings Ltd (TSH). It retained Schal International Ltd as its construction manager (Schal) and other consultants as design team leader, reclamation consultants, golf course architects and landscape architects. Edmund Nuttall Ltd (ENL) was the earthworks contractor for the provision of landfill and class B soil capping. Cinnamonds Ltd was another earthwork contractor.

8. Negotiations between BRL and TSH took place in the summer of 1985. BRL maintain that during that period representations or warranties were given by Schal and/or TSH's reclamation consultants about a number of matters including the capabilities of a spading machine. BRL submitted a tender in July 1985 and revised on 1 August 1985. It was effectively accepted by a letter of intent from Schal dated 28 August 1985. BRL started the work on 9 September 1985. BRL maintain that a contract was made in September 1985 for the works, the value of which was approximately ,800,000. This contract was number 3010. Under it work was to be finished within 67 weeks i.e. by 27 December 1986. The formal contract documents were executed under seal by BRL and TSH and dated 5 December 1985.

9. The progress of BRL's work was largely dependent upon the completion by ENL of its work and the provision of the site and access to various parts of the site by TSH. The contract required the topsoiling of cerain Sections to be completed within the first 8 weeks and the remainder within the 1986 season. The site was split into about 19 areas which were shown on the clause 14 programme. According to BRL its progress overall and within every Section and area was held up by various acts and defaults on the part of TSH. The contract incorporated conditions based upon the ICE Conditions, 5th edition. Schal as the Construction Manager had the powers usually given to the Engineer under the ICE Conditions. Although BRL maintain that it was entitled to extensions of time and the recovery of additional costs, its work was not completed by the end of 1986 and it was not finished until 1990. In 1987 TSH entered into a further contract (3160) with BRL for the modification of work previously carried out. Contract 3160 was executed along with contract 3010. Contract 3160 was to be completed by 12 May 1988.

10. In January 1989 contract 3010 was novated whereby the rights and obligations of TSH were transferred to the present defendant, SPCL, a company which had not been incorporated in 1985. Since argument turned on the effect of this novation I shall set out its terms in full. (In the agreement SPCL was called "the Purchaser.) "<u>WHEREAS</u>

11. *A. This deed is supplemental to a contract dated the 5th day of December 85 and made between TSH of the one part and the Contractor of the other part ("the Contract").*

12. *B. TSH has agreed to assign to the Purchaser its entire rights, obligations and interest in and under the Contract upon terms that the Purchaser undertakes to perform the Contract and to be bound by its terms and the Contractor has agreed to enter into this Deed for the purpose of giving its consent to such assignment.*

<u>NOW IT IS HEREBY AGREED</u> as follows:

13. *1. The Contractor undertakes to perform the Contract and to be bound by its terms in every way as if the Purchaser were and had been from the effective date of the Contract a party to the Contract in the place of TSH.*

14. *2. The Contractor releases and discharges TSH from all obligations claims and demands whatsoever under or in respect of the Contract and accepts the liability of the Purchaser under the Contract in lieu of the liability of TSH.*

15. *3. The Purchaser agrees to be bound by the terms of the Contract in every way as if it were named in the Contract as a party thereto in place of TSH.*

16. *4. The Contractor acknowledges that references to TSH in any collateral agreement entered into by the Contractor with any person in connection with the Contract are, by virtue of this Deed and with effect from the date of any such agreement, references to the Purchaser and that nothing in this Deed in any way otherwise affects or vitiates the terms of such agreement.*

17. *5. The Contractor consents to the assignment by TSH to the Purchaser of TSH's entire benefit, rights and interest in and under any bond or parent company guarantee given by any surety or guarantor of the Contractor to TSH in connection with the Contract."*

18. The formal contract documents for contract 3160 had not been executed at the time of the novation of contract 3010 and accordingly were executed between BRL and SPCL. Thus contract 3160 was not apparently novated. Contract 3160 was completed in October 1989, 17 weeks late.

19. Since both contracts contain conditions based upon the ICE Conditions, 5th ed., maintenance certificates were issued on 27 November 1990 for contract 3160 and on 7 November 1991 for contract 3010. Clause 66 of the ICE Conditions was not used. Instead clause 68 provided:-

20. *"(1) If any dispute or difference of any kind whatsoever shall arise between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works including any dispute as to any decision opinion, instruction direction certification or valuation of the Construction Manager (whether during the progress of the Works or after their completion and whether before or after the termination abandonment or breach of the Contract) it shall be referred to and settled by the Construction Manager who shall state his decision in writing and give notice of the same to the Employer and the Contractor. Unless the Contract shall have been already determined or abandoned the Contractor shall in every case continue to proceed with the Works with all diligence and he shall give effect forthwith to every such decision of the Construction Manager. Such a decision in respect of every matter so referred shall be final and binding upon the Employer and the Contractor until completion of the Works.*

21. *(2) The English Courts shall have jurisdiction over any dispute or difference which shall arise between the Employer or the Construction Manager on his behalf and the Contractor arising out of or in connection with the Contract or the Works. The Contract shall be governed by and shall be construed in accordance with English Law.*

22. *(3) The Courts shall, without prejudice to the generality of their powers, have power to direct such measurements and/or valuations as may in their opinion be desirable in order to determine the rights of the parties and to ascertain and award any such sum which ought to have been the subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision, requirement or notice and to determine all matters in dispute which shall be submitted to it in the same manner as if no such certificate, opinion, decision, requirement or notice had been given."*

(It should be noted that clause 68(1) did not state any period within which either the dispute was to be referred or Schal was to give its decision.)

23. On 22 April 1992 BRL submitted to Schal its final account for contract 3010 and on 11 November 1993 it submitted the account for contract 3160. On 5 June 1992 Schal raised questions and sought further information from BRL about the account on contract 3010.

24. In May 1995 BRL presented lengthy and detailed claims to Schal for both contracts 3010 and 3160 and requested Schal to give decisions under clause 68 on these claims within 4 weeks. The claims were not the same as the 1992 or 1993 final accounts.

25. Schal replied in June 1995 saying that it would not be able to complete its assessment within 4 weeks. Nothing apparently happened thereafter, so in October 1995 BRL sent additional documents to assist Schal and called upon it to act. At the same time it told SPCL that it intended to issue proceedings. On 9 October 1995 Schal said that it would need a further 14 days to consider the new information and followed that letter with a

further letter raising 27 questions on the measured work element of contract 3010. On 25 October 1995 the plaintiff launched the present proceedings by a writ with a statement of claim and accompanying schedules which were in essence no more than the 1995 claims submissions. On 19 December 1995 Schal informed BRL that its interim assessment of the final accounts suggested that BRL had been overpaid ,14,486 on contract 3160 and that more information was required.

26. On 20 December 1995 the summons for directions was heard. The defendant submitted, with reason, that until Schal had finally made up its mind about BRL's claims no effective progress was likely to be made in the action and that it ought to be allowed to make its final assessment and give a decision under clause 68. The defendant also reserved its position as to whether the statement of claim complied with the rules of court. The statement of claim described the parties, set out the contracts and the novation of contract 3010, stated that there were express terms as to commencement and completion and then went on to say in paragraph 7:

27. *"By reason of the employer's acts, including instructions to vary the 3010 Works and 3160 Works and/or to carry out works additional thereto, omissions, failures and breaches BRL was prevented from commencing and/or completing the 3010 or the 3160 Works by the contractual commencement and/or completion dates..."*

28. There then followed in paragraph 8 a statement that the final accounts had been submitted which claimed "The value of work carried out, extensions of time and prolongation costs and/or damages for delay". These statements of account were annexed in toto as schedules S/C1 and S/C2 to the statement of claim. BRL's claim was summarised in paragraph 9. Paragraph 10 stated:

29. *"Full particulars of BRL's claims are set out herein and/or in the 3010 Submission and the 3160 Submission (schedules S/C1 and S/C2)."*

30. Schedule S/C1 comprised hundreds of pages: first, a lever arch file containing a 63-page "Contract Narrative", schedules A-F, schedule I being the 3010 final account, schedule II being the "Loss and Expense/Additional Cost/Disruption" claim plus backup tables for each such financial schedule, as well as 10 Appendices, and, secondly, a ring binder with schedule III and charts. The statement of claim then set out the documents comprising or evidencing the 3010 contract and in paragraph 12 under the heading "Express Terms" again stated:

31. *"Full particulars of the express written terms relied on are set out in the 3010 submission paragraphs 12 to 43A inclusive (Schedule S/C1) which include, inter alia, the following ..."*.

32. There were then listed 12 express terms the source of which was either not identified or was no more than a portmanteau description of a large number of the contract conditions, e.g. "Provisions as to entitlement of extensions of time". The pleading then went on to describe how the contract might have been made in writing, what the implied terms might have been, (also to be found in paragraphs 49 to 58 of the 3010 submission, ie schedule S/C1). The variations relied on were also pleaded by reference to paragraphs 75 to 77 of the narrative, schedules A to F inclusive and appendix 10 to that submission (see paragraph 17 of the statement of claim) and in paragraph 18 additional works were set out again by reference to that submission. The statement of claim therefore left the reader to ferret in the enormous supporting schedules to find the heart and real nature of the plaintiff's case. The terms of the contract were not set out in the statement of claim; the nature of the breaches of these terms which were relied upon as founding claims for damages were not set out in the statement of claim; the basis upon which claims were advanced under express terms of the contract for the recovery of additional cost were not pleaded in the statement of claim. The pleading was therefore of the type customarily known as a "forest" pleading since the statement of claim was virtually no more than a vehicle for the relaunch of the plaintiff's original contractual claim submissions. No attempt had apparently been made to consider the contractual claim submissions and to extract from them the material which ought properly to have appeared in a statement of claim, leaving to the schedules, as is customary and proper, the finer details of the specific allegations in the statement of claim, and, where appropriate, embodying the relevant parts of the original claim submission where they could serve as such particulars Although the statement of claim superficially looked as if it complied with the Rules of the Supreme Court, in reality its structure was fundamentally wrong in that one had to delve in the accompanying schedules in search of the factual and the legal bases for the claimant's case. Mr Richard Fernyhough QC in the course of his submissions on behalf of the plaintiff acknowledged this to have been the situation. There were other

potential objections to the statement of claim but they were of a more orthodox nature and would not in themselves render the statement of claim open to radical attack. Whilst it is clearly desirable to make the best use possible of material that has already been prepared so as to avoid unnecessary costs being incurred and to maintain a continuity of approach, it must not be forgotten that there may be a marked difference between the form and content of a claim presented under the terms of a contract for consideration by an architect, engineer or other person appointed to issue certificates and/or reach decisions and the presentation of a claim in legal and arbitral proceedings. In litigation a claim has to comply with procedural rules which should secure that the plaintiff's case is presented after careful analysis and in a manner which will enable the defendant to plead to it in such a way that the issues which have to be decided between the parties may be clearly identified. A claims submission is generally written for the purposes of eliciting a line by line reply. Narratives which are in themselves persuasive presentations of a party's claim may well be unsuitable for incorporation lock stock and barrel in a pleading either because they fail to disclose the true grounds or cause of action or because they are repetitive or because they are argumentative.

33. I therefore said that the plaintiff should reconsider with counsel the statement of claim settled by her as it appeared to me to be seriously deficient. The summons was adjourned until mid- February 1996 on terms that the defendant should serve a written summary of its proposals for further pleadings by 9 February 1996 and that the plaintiff should either reply to that proposal or serve an amended statement of claim by the same date. On 8 February 1996 the defendant applied to amend the statement of claim. The defendant thereafter submitted that the action had been brought prematurely since the contractual procedures had not been complied with and in any event since Schal had not yet dealt with the claims further time was required to allow the parties to ascertain the true issues in the case. On the hearing of the adjourned summons for directions on 16 February 1996 the defendant indicated that it intended to strike out the statement of claim and accordingly leave to amend the statement of claim was given as sought by the plaintiff but without prejudice to the defendant's right to apply to strike it out provided that any application to do so was made within the next 14 days. Contingent directions were also given including one which required the parties to make up their minds within 28 days whether they intended to have any question as to whether the action was prematurely brought determined as a preliminary issue.

34. On 29 February the defendant issued its summons to strike out the writ and statement of claim and accordingly on 5 March 1996 time for service of the defendant's defence was extended until after the determination of that application. The defendant's summons not only attacked the statement of claim as amended but also sought to have the action dismissed or stayed on the grounds of non-compliance with clause 68. Thereafter arrangements were made between the parties to have meetings between BRL and Schal to enable decisions to be given under clause 68 and as a result the action was put "on hold". The plaintiff's solicitors informed the defendant's solicitors that once the meetings had taken place it was proposed to amend the pleadings in the light of their outcome and the comments which I had made on the first hearing of the summons for directions. Eventually meetings took place in May 1996. The summons for directions was adjourned until 28 June 1996. Not long before hand the plaintiff submitted its proposed first version of its substituted statement of claim plus new and altered schedules and issued its summons. On the adjourned summons for directions the defendant's application was heard by His Honour Judge Bowsher QC on 28 June 1996. He had time only to hear argument on the defendant's application that the action should be dismissed outright or stayed for non-compliance with the procedure set out in clause 68. He declined to do so as he considered that the application was inappropriate and that the issues should have been raised as preliminary issues and not by way of summary application. He dismissed the application with costs.

35. On 10 July 1996 Schal issued final certificates under both contracts which showed that a balance was due to SPCL of ,292,205.11 on contract 3010 and ,14,486 on contract 3160. Its letter was accompanied by a report on extensions of time and prolongation in which Schal considered the "critical events and impacts upon BRL". Its opinions were supported by a series of appendices including numerous notional programmes or progress analyses.

36. On 22 October 1996 the plaintiff issued its further summons to substitute a new statement of claim. The defendant's solicitors wrote on 16 December 1996 setting out an extensive list of objections to the proposed

pleading, some of which prompted the plaintiff on 14 January 1997 to make changes to the proposed second version of the substituted statement of claim. Leave is presently sought for this "Mark II".

37. The plaintiff accepts that leave to serve an amended or substituted statement of claim should not be given if or to the extent that the proposed pleading or a part of it is liable to be struck out under Order 18 rule 19. The plaintiff also does not proceed on the basis of its first summons for a substituted statement of claim, as it has been superseded by the later application for Mark II. Its second summons and the defendant's summons to strike out were effectively heard together as they were "back-to-back".

38. Mr Fernyhough QC submitted that Mark II was a great improvement on the original statement of claim and its first amendment and that leave should be granted to serve it even though there might be criticisms of part of it. However leave should not be refused simply because the pleading was open to criticisms which might be met by the service of further particulars etc. unless, of course, matters of principle were raised. Mr Fernyhough submitted as follows:

39. 1. The court must first be satisfied that the plaintiff has made a genuine diligent attempt to present its case coherently and comprehensively.

40. 2. Leave to amend should not of course be given in respect of any claims which are plainly and obviously unsustainable.

41. 3. However as to the rest even if there were omissions, inconsistencies or other defects leave to amend should be given for it is open to any defendant by means of requests for further and better particulars, requests for discovery or the administration of interrogatories to clarify or expose what it considers to be defects in the pleadings.

42. 4. If notwithstanding such steps having been taken by the defendant any part of the pleading remains embarrassing or is otherwise liable to be struck out under Order 18 rule 19 then an application ought then properly to be entertained. It would not however be right to have a trial of the pleadings at this stage before a defence has been served.

43. Mr Fernyhough relied upon the observations of Saville L.J. in **British Airways Pension Trustees Ltd v. Sir Robert McAlpine & Sons Ltd (**1994) 72 BLR 26 at 33I - 34D:-

44. *"The basic purpose of pleadings is to enable the opposing party to know what case is being made in sufficient detail to enable that party properly to prepare to answer it. To my mind it seems that in recent years there has been a tendency to forget this basic purpose and to seek particularisation even when it is not really required. This is not only costly in itself, but is calculated to lead to delay and to interlocutory battles in which the parties and the court poor over endless pages of pleadings to see whether or not some particular point has or has not been raised or answered, when in truth each party knows perfectly well what case is made by the other and is able properly to prepare to deal with it. Pleadings are not a game to be played at the expense of the litigants, nor an end in themselves, but a means to the end, and that end is to give each party a fair hearing. Each case must of course be looked at in the light of its own subject matter and circumstances. Thus general statements to the effect that global or composite claims are embarrassing and justify striking out, to be found for example in Hudson (11th edition), paragraph 8-204 are not automatically applicable to every case."*

45. Mr Fernyhough also referred to the assessment made by Schal in support of its final valuation and submitted that its detail indicated that the defendant had more than enough information at its disposal to deal with the case in the form in which it was proposed to be pleaded.

46. Mr Adrian Williamson for the defendant submitted that since it was common ground that the action was not to proceed on the basis of the amended statement of claim the issue was whether the Mark II version represented claims which the plaintiff was entitled to make, which were properly pleaded and were not statute barred. The issue was therefore not whether particular amendments should be allowed but whether the pleading as a whole was a proper one. The court should not allow its processes to be abused and whilst a defect which could be cured by an amendment or particulars might be allowed, the court would need to be satisfied that the amendment would indeed solve the problem. Mr Williamson relied on the approach of Sir Thomas Bingham MR in **E v. Dorset CC** [1995] 2 AC 633 at 693 as being equally applicable to the present circumstances:-

47. *"It is clear that a statement of claim should not be struck out under R.S.C., Ord.18, r.19 as disclosing no reasonable cause of action save in clear and obvious cases, where the legal basis of the claim is unarguable or almost incontestably bad. It was argued by Mr ter Haar, for Richard, that this procedure was inappropriate in a case such as his, raising issues which were novel and difficult. Relying in particular on* ***Lonrho Plc v. Fayed*** *[1992] 1 A.C. 448, 469-470, he argued the undesirability of courts attempting to formulate legal rules against a background of hypothetical facts and pointed to the potential unfairness to plaintiffs if their cases were finally ruled upon before they were able, with the benefit of discovery, to refine their factual allegations. If a summary procedure for determination of legal issues were to be adopted at all, it should (he submitted) follow joinder of issues on the pleadings and discovery, and should be by decision of an issue of law suitable for determination without a full trial under R.S.C., Ord. 14A. The defendants answered that their applications do in effect raise an issue of law for decision by the court: if they cannot show the plaintiffs' claims to be plainly bad, then their applications must fail; but if they can show that, then it is preferable in the interests of all concerned that the claims should be dismissed now before the costs of a full trial are incurred.*

48. *There is great force in both these arguments. I share the unease many judges have expressed at deciding questions of legal principle without knowing the full facts. But applications of this kind are fought on ground of a plaintiff's choosing, since he may generally be assumed to plead his best case, and there should be no risk of injustice to the plaintiffs if orders to strike out are indeed made only in plain and obvious cases. This must mean that where the legal viability of a cause of action is unclear (perhaps because the law is in a state of transition), or in any way sensitive to the facts, an order to strike out should not be made. But if after argument the court can be properly persuaded that no matter what (within the reasonable bounds of the pleading) the actual facts the claim is bound to fail for want of a cause of action, I can see no reason why the parties should be required to prolong the proceedings before that decision is reached. The court is of course bound to approach each pleaded cause of action separately, and need not reach the same decision on each."*

49. Since there is no essential conflict between the general principles suggested by Mr Fernyhough and those suggested by Mr Williamson and because the real difference between the parties lies in the application of those general principles to the present pleading and in the need to determine specific points to which other principles may be applicable, it is convenient to consider in turn each of the heads of objection raised by Mr Williamson. It was agreed that it was necessary only to look at the pleading as it related to contract 3010 for my decision on the heads of objection in relation to the pleading of the plaintiff's case under that contract would then be applied by the parties to Mark II so far as it related to contract 3160.

Clause 68

50. Mr Williamson submitted that under clause 68 (1) and (2) the court has jurisdiction if and only if a dispute had first been submitted to and settled by the construction manager. Thus BRL should not be permitted to substitute its statement of claim where to do so would introduce a claim or a dispute which had not been submitted to and resolved by the construction manager before the issue of the writ for to do so would sanction a breach of contract and confer a jurisdiction on the court which it does not have. The plaintiff ought to have obtained the decision of the construction manager in respect of such new claims and if it had not done so then it must issue a new writ or obtain a decision before the existing writ can be amended. Mr Williamson referred in particular to the claims for misrepresentation which had previously been put forward as variations; claims which had previously been put forward as variations but were now claimed as damages; so that as a result the original claim for the work fell from ,608,000 to ,152,000.

51. Mr Fernyhough submitted that this was an attempt to resurrect a point which had already been decided by Judge Bowsher QC who had declined to dismiss or stay the action on the grounds that it had been brought in breach of clause 68. The plaintiff's case was that clause 68 was not to be read in the sense contended for by the defendant, since it did not create a condition precedent and that in any event the point was not sufficiently clear to refuse the plaintiff leave to introduce its claims by way of a substituted statement of claim. It was furthermore highly arguable that under clause 68 Schal had to respond to the claims within a reasonable time and, since it had not done so by the date of the writ, the contractual machinery had by then broken down so that even if the defendant were right in its construction of clause 68, the plaintiff was thus entitled to bring its claims. In addition, as a matter of discretion, it would be wrong to force the plaintiff to adopt the alternative course suggested by the defendant namely to obtain Schal's decision on the claims. This would only lead to delay, further cost and, judging by Schal's reaction to the claims so far decided by it, would be a futile exercise. Schal were in any event functus officio from the date of the issue of the final certificate. Only a

relatively small number of claims were affected by the defendant's point and many of them were advanced in the alternative.

Decision on Clause 68

52. I consider that the defendant is entitled to rely upon clause 68 in opposition to the present application to substitute a new statement of claim. First, Judge Bowsher was concerned with dismissing or staying the original action and was not concerned with whether or not any amendment introduced new claims. Secondly, according to the record taken by the plaintiff's solicitor, although Judge Bowsher thought that clause 68 did not prevent the court from having jurisdiction over the claims eg because the machinery might have broken down, he decided the defendant's application on other grounds and was in favour of the questions raised by clause 68 being decided as preliminary issues. Accordingly the defendant is entitled to raise its arguments on the meaning of clause 68 in opposition to the introduction of new claims in Mark II.

53. Furthermore, I do not consider that the plaintiff is right in submitting that as a matter of public policy the court would not enforce clause 68. Even if it could be argued that clause 68 did not create an enforceable condition precedent, there is now such a tide running in favour of enforcing a contractual provision which requires resort to an alternative form of dispute resolution prior to recourse to litigation or arbitration that I would reject Mr Fernyhough's submission on such an interpretation of clause 68. I need only refer to the endorsement of **Enco Civil Engineering Ltd v. Zeus International Development Ltd** (1991) 56 BLR 43 by **Channel Tunnel Group Ltd v. Balfour Beatty Construction Ltd** [1993] AC 334 (HL); affirming on this point [1992] QB 656 (CA) and to the statutory restatement contained in section 9(2) of the Arbitration Act 1996 (albeit that the Act was not in force at the date of the hearing). In my judgment a clear provision to refer a dispute to a third party prior to litigation or arbitration will now be enforced. There is a distinction between a clause which envisages such a preliminary step before litigation and arbitration, e.g. a reference to an engineer or a construction manager and a clause which is tantamount to one which ousts the jurisdiction of the courts. Clause 68 is plainly in the former category and there is therefore no reason not to give effect to it as if it were a **Scott v. Avery** clause since unless the dispute is resolved by or as a result of the construction manager's decision the courts will have jurisdiction over it under clause 68(2). Nor can I see why clause 68(1) should cease to be applicable once a final certificate has been issued: Schal were appointed to perform a number of functions under the contract and whilst its powers of an administrative or supervisory nature may well cease on the issue of the final certificate (and to that extent Schal might be functus officio), its duties under clause 68 must surely continue so as to deal with "any dispute or difference of any kind whatsoever ....between the Employer and the Contractor in connection with or arising out of the Contract or the carrying out of the Works including any dispute as to any decision opinion, instruction direction certification or valuation of the Construction Manager (whether during the progress of the Works or after their completion ....)". The wording of clause 68(1) is wide, with no temporal limitation, and is apt to deal with, for example, a dispute about the final certificate itself or a dispute about a latent defect which does not appear for many years afterwards. A reference may of course be ineffective, eg if Schal's contract with the defendant does not require it to decide such a dispute, in which case the machinery will have broken down as a result of the defendant's failure to secure Schal's services.

54. Nevertheless I consider that it would be wrong to refuse to allow the plaintiff leave to substitute a new statement of claim to include any such new claims for it would be like barring the remedy and not the right. In my view the proper course is to allow the plaintiff to introduce any such new claims; for the defendant then to decide whether or not to raise, as a defence to such new claims, its arguments in relation to clause 68; and to see whether the plaintiff by way of reply might successfully dispose of those arguments, e.g. on the grounds that the contractual machinery has broken down, or that there are facts which might disentitle the defendant to rely upon clause 68 (assuming it were correct in its interpretation). Once these steps have been completed, a decision can then be taken as to whether or not the plaintiff's case justifies a preliminary issue if to do so might significantly reduce the area of inquiry that would otherwise have to take place. I also accept Mr Fernyhough's arguments on the exercise of discretion since unless and until it were then determined that, for example, the contractual machinery had not broken down, it would be wholly undesirable to sever from this action claims which are an integral part of the plaintiff's case and require them to await the outcome of the reference to Schal (with, moreover, no timetable set in clause 68) and then if, as seems likely, they remain unresolved, to leave them to catch up with this action.

55. This was the only objection which might be said to go to the whole of Mark II. Mr Fernyhough QC said he had thought that the original statement of claim was structurally inadequate and junior counsel had therefore produced Mark II which was intended to overcome the admitted inadequacies in the old pleading. Mr Williamson had however objections to parts of the proposed new pleading, to which I shall now turn.

Novation

56. Paragraph 4 of the proposed new pleading summarises the novation dated 6 January 1989 and then concludes, in a sentence added only on 14 January 1997:

57. *"BRL contend that all and any obligations owed to BRL by Trust Securities, for example, those giving rise to claims for misrepresentation and/or rectification hereinafter set out were transferred to the defendants herein by the Deed of Novation."*

58. Mr Williamson submitted that this sentence was objectionable as were those parts of the statement of claim which purported to rely on oral or implied terms and which led to the plaintiff seeking rectification of the contract of 5 December 1985. (I shall deal separately with the topic of rectification.) The objection in relation to the suggested implied terms on the grounds that they could not have been imported into the novated contract as they did not derive from the circumstances of that contract but the original contract really could not be pursued since an implied term is an integral part of a contract and just as much a term of it as an express term. Thus if the 1985 contract were novated then any terms implied in it must necessarily form part of the novated contract under the terms of this novation. In addition Mr Fernyhough made it clear that any reference to oral agreements or terms was not to be read as importing an oral term of the contract but rather was to be read as a reference to a fact upon which reliance might be placed in support of the circumstances surrounding the 1985 written contract. Mr Williamson however submitted that paragraphs 9, 10, 11 and 12(1)-(3) of the statement of claim should be struck out since they referred either to oral transactions which could not be imported into the written contract which was novated or to documents which came into existence and were pleaded as evidencing the 1985 contract under seal. Paragraph 9 described meetings and other events between June and September 1995. Paragraph 10 begins: *"By a Contract ("the 3010 Contract") partly oral and partly in writing made in September 1985, the Employer engaged BRL ...."* Paragraph 11 reads as follows:-

59. *"So far as the Contract terms were agreed orally, BRL rely upon the various discussions and meetings referred to in paragraph 9 above. So far as the Contract terms were agreed in writing, BRL rely upon the exchange of correspondence between the parties prior to the commencement of the 3010 Contract Works. So far as it is not inconsistent with the agreed terms of the 3010 Contract, BRL rely upon a formal Contract document executed by the parties after the formation of the 3010 Contract dated 5th December 1985."*

60. Paragraph 12 begins:-

61. *"So far as the 3010 Contract is in writing, BRL contend that the 3010 Contract is contained in, alternatively evidenced by the following documents:*

62. *(1) Schal's invitation to tender dated in or about June 1985*

63. *(2) BRL's tender dated 18th July 1985 and revised by telex dated 1st August 1985*

64. *(3) BRL's method statement dated 8th August 1985."*

65. Paragraph 12 then goes on to refer to *"the formal contract document executed under seal by BRL and the employer dated 5th December 1985"*.

66. Mr Fernyhough, in addition to clarifying the status of the implied term, accepted that the last sentence of paragraph 11 should be deleted. Since the novation refers to the written contract of 5 December 1985 I consider that it is potentially embarrassing to the defendant to have to meet a case which is in any way based upon what may have taken place in meetings or in correspondence between BRL and TSH prior to the contract under seal being entered into (except for the purposes of BRL's claim for rectification). I do not consider that Mr Fernyhough's concessions in relation to paragraph 11 are sufficient. If, as is common ground, there is no reason for BRL to rely upon any legally binding contract or relationship prior to the contract under seal of 5 December 1985, the references to the September 1985 contract are unnecessary and should not appear in the proposed statement of claim. Accordingly, except for the purposes of the claims for

misrepresentation and rectification, there is no need to refer to anything which took place prior to 5 December 1985. If the plaintiff wishes to plead any fact which is material to the circumstances in which the contract came to be made and which will be admissible as extrinsic evidence to construe or vary the written document, then that fact should in my judgment be specifically pleaded. Accordingly leave will not be granted in respect of paragraphs 9, 10 and 11 of the statement of claim or in respect of the words "alternatively evidenced by" in paragraph 12 of the statement of claim.

Misrepresentation

67. In paragraph 13 of the proposed new pleading BRL plead certain oral representations and warranties stemming from conversations and letters which are, in the main, identified by date. In paragraph 14 BRL plead reliance upon the representations and warranties (which are now called agreements) when preparing and submitting its tender and in paragraph 15 plead that it was, in the alternative, induced to enter into the 3010 contract on the basis of using spading machines to carry out the work because of the representations made about one or more spading machines.

68. In paragraph 33 BRL plead that the representations made by Mr Eric Scharff of the reclamation consultants as to the performance of the spading machines, as particularised in paragraph 13, were false and that Mr Scharff had no reasonable grounds for believing them to be true. Particulars are given of some of the respects in which these statements were false. In paragraph 34 BRL plead their loss and damage namely:

69. 1. Extra spading costs: ,90,000.00

70. 2. Additional spading costs: ,20,375.11

71. 3. Costs of supplying larger plant: ,16,355.14

72. 4. Third rip and pick costs: ,2,340.00

73. These amounts are the same as those which originally appeared as items 168A, 214D, 214E and 214G in schedule 1 attached to the writ and statement of claim where such items were pleaded as variations. The defendant's objections to the pleadings are as follows:

74. 1. Since this is a claim under section 2 of the Misrepresentation Act 1967 (which was confirmed by Mr Fernyhough QC) no basis was pleaded as to why the present defendant could be liable under the Act as it was not a party to the alleged representations or to the contract resulting from the representations: **Chitty on Contracts**, 27th ed, para.6-037.

75. 2. BRL's cause of action, if any, accrued in 1985 when it entered into the contract, alternatively, at the latest when the work was done, in both cases more than six years ago. The relevant date for limitation purposes is the date when the order giving leave to amend is made: see **Welsh Development Authority v. Redpath Dorman Long** [1994] 1 WLR 1409 at 1421D ; 67 BLR 1. In it the Court of Appeal also said:

76. *"We now wish to make it clear that, though the test applied in **Leicester Fruit Market** was the correct test in the circumstances of that case, in which s.36(1) gave the plaintiff no advantage, it was unnecessary for the decision in that case to disagree with what Purchas LJ said in **Grimsby Cold Stores.** Our view is that Judge Hicks was correct in concluding that where 35(1) does, or may well, give the plaintiff an advantage, a different test, namely that enunciated by Purchas LJ in **Grimsby Cold Stores** should be applied. In such a case, leave to amend by adding a new claim should not be given unless the plaintiff can show that the defendant does not have a reasonably arguable case on limitation which will be prejudiced by the new claim, or can bring himself with Ord 20, r 5."*

77. BRL had not shown that SPCL did not have a reasonably arguable case on limitation which would be prejudiced by the new claim.

78. 3. The representations were not pleaded as having become terms of the contract and do not form part of the existing statement of claim and are therefore new claims and furthermore should not be entertained because they had not been the subject of a submission under clause 68.

79. 4. The allegations made in paragraphs 13(4) and 33 were new and are not the same as the allegations made in paragraph 15 of the current amended statement of claim and did not qualify under Order 20, rule 5(5).

80. 5. The amounts claimed as damages are the same as those originally claimed as the value of the alleged variations. The contractual basis for valuing variations is set out in clause 52 of the contract conditions and could not be the same as the measure of damages recoverable for the tort of negligent misrepresentation.

81. Mr Fernyhough QC submitted that the effect of the novation was to place the present defendant in every respect in the shoes of TSH so that the present defendant was as liable for any misrepresentation as TSH would or might have been. In any event if the issue of the interpretation of the novation was one which raised difficult and interesting points it would not be right to refuse leave to amend at this stage; rather, the issue might be one for argument as a preliminary issue. Secondly, the claim for misrepresentation was not a new claim in the sense of raising any new cause of action, since in paragraph 15 of the original statement of claim BRL pleaded that there had been a representation as to the spading machine being reasonably fit for its intended purpose and had, by amendment, pleaded that particulars of the representations and warranties had been set out in paragraphs 44 and 45 of the submission in respect of contract 3010 which had been delivered in May 1995, and which formed part of schedule S/C1 accompanying the original statement of claim. In addition, on limitation, Mr Fernyhough relied upon **Ronex Properties Ltd v. John Laing Construction** [1983] QB 398 in support of the proposition that a potential limitation defence is not a justification for striking out; it is only in a very clear case that such an application should be made. He submitted that the same principles should apply to the plaintiff's present application. Mr Fernyhough furthermore argued that the claim would not in any event be barred by limitation since in a contract where a contractor's right to payment was dependent upon certificates issued by the construction manager (or other third party) (as here) the plaintiff's loss would not be suffered until the construction manager had failed to issue a certificate in favour of the plaintiff to cover the costs involved. In the alternative, the limitation period did not start until when the work was done and the expenditure was incurred. Mr Fernyhough referred to **Chitty on Contracts,** 27th edition, paragraph 28-023:

82. "*In some case, at least, he will suffer loss when the transaction into which he has been induced to enter is implemented. In other cases, however, he will not suffer loss until later, e.g. when he incurs expenditure or sustains other damage in consequence of having entered into the contract and not at the time the contract is entered into. Moreover his cause of action may not be complete until the representation can be shown to be false. So, for example, if there is a contract for the sale of unascertained goods, it may not be possible to show that the representation is false until such time as the goods are delivered and the limitation period will only then start to run.*"

83. Since the works were not completed until 1990 and the writ was issued in October 1995 a claim for misrepresentation should not be struck out until the facts have been investigated and the date upon which the cause of action at the latest accrued established. Mr Fernyhough repeated his arguments on clause 68 in relation to the assertion that the claim for misrepresentation had not been referred to or decided by the construction manager under clause 68.

Decision on Misrepresentation

84. In my judgment it is clearly arguable that the effect of the novation was that SPCL should for all purposes be treated as being as liable as TSH. The effect of the novation agreement on any alleged misrepresentation is an aguable point and as such will not bar the amendment proposed. Its interpretation may be an appropriate subject for a preliminary issue. As regards limitation, the claim for misrepresentation in the proposed substituted statement of claim is no more than a development of the claim originally pleaded in paragraph 15 of the statement of claim and is therefore not a new claim for the purposes of the Limitation Acts. In addition, this is a case in which leave to amend may be granted in respect of such a claim since, for the reasons advanced by Mr Fernyhough, the plaintiff has shown that the defendant does not have a reasonably arguable case on limitation (see **Welsh Development Authority v. Redpath Dorman Long** at page 1425). In any event, it is quite clear on the facts both that the claim for misrepresentation overlaps other issues (eg because it seems to be alternative to the variations valued in the same sums) and thus falls clearly within Order 20, rule 5(5) and that there would in any event be no prejudice to the defendants to allow the claim to proceed. The effect of **Ronex Properties Ltd v John Laing Construction Ltd** on an application for leave to amend was fully considered by the Court of Appeal in **Welsh Development Authority v. Redpath Dorman Long (**see pages 1424-1425) and the relevant principles are there set out. They are applicable here.

85. For the reasons I have already given it will be open to the defendant to raise, by way of a defence, its argument that this claim in its present form ought to have been but was not submitted to the construction manager under clause 68 and, as a result, the action has been commenced prematurely. Leave to amend will not be refused on that ground. The remaining points raised by the defendant seem to me to be ones which go largely to the particularisation of the plaintiff's case. As Mr Fernyhough has stated, if as a result of requests for particulars etc. the case is not properly pleaded and the defendant is embarrassed or other grounds to strike out any part of the claim are shown, then the claim may be struck out. That option will still be open to the defendant if the substituted statement of claim is allowed.

Rectification

86. I have already set out the pleaded references to discussions and the exchange of correspondence prior to the execution of the formal contract document on 5 December 1985. In paragraph 18 of the proposed substituted statement of claim BRL say that on 18 September 1985 it was sent copies of the formal contract under seal and that it was then noticed that there were discrepancies between that documentation and the prior agreement between the parties. The pleading continues:

87. *"Later some time before executing the document, Mr Osbourne of Schal contacted Mr R Taylor [of BRL] and asked for the return of the executed contract. Mr Taylor told Mr Osbourne that items in the specification were inconsistent with matters that had been agreed between the parties. BRL agreed to sign and seal the documentation on the basis that it did not accord with the true intentions and/or agreement of the parties. The contract documentation was returned to Schal under cover of a letter recording the discrepancies.*

88. *19. In the premises BRL claim and are entitled to rectification of the 3010 contract documentation so far as it does not accord with the parties' true intentions and/or agreement. In particular - .... "*

89. There then follow three specific respects in which the executed contract should be rectified. Mr Williamson accepted that in themselvess they were sufficiently clear.

90. The defendant's case was, first, that the claim for rectification had not been submitted to the construction manager under clause 68. Secondly, it was submitted that the claim for rectification was misconceived since the 1985 contract had been novated in 1989 and one could not seek the rectification of a contract which had been extinguished. Mr Williamson observed that the defendant ought perhaps to have sought rectification of the novated contract. SPCL had entered into the novation without any knowledge or warning that the contract which was being novated in its favour was not the true and complete agreement between the parties. Thirdly, paragraph 18 was manifestly deficient to found a claim for rectification since it failed to plead any date for the conversation between Mr Taylor and Mr Osbourne or the date of the letter recording the discrepancies, nor did it set out which items in the specification were then said to have been inconsistent. Paragraph 19 also was open to objection in that the second sentence was prefaced by the words "in particular" thereby leaving open the possibility that there might be other respects in which the contract should be rewritten.

91. Mr Fernyhough, whilst accepting that the claims for rectification had not been submitted under clause 68 maintained, for reasons that he had already set out, that the claim was sustainable in this action. He submitted that the effect of the novation was to transmit the contract subject to the right of either party to have it rectified and that that right was as much an incident of the contract as any of the terms. He further submitted that paragraph 18 was the best that BRL could do prior to discovery but he accepted that paragraph 19 should be better defined.

Decision on Rectification

92. A party seeking the rectification of a written contract has a heavy burden to discharge and in my judgment a pleading should be clear and precise as to what it is alleged was the prior agreement or intention which was not accurately reproduced in the written contract documents. Even though I have decided that paragraph 11 should not form part of the new pleading, I consider that paragraph 18 is capable of being clarified and accordingly leave will be granted for its inclusion but only on condition that all the missing dates are pleaded or that the plaintiff now pleads that it is unable to provide those particulars. Similarly, the plaintiff must specify which items in the specification were inconsistent with matters that had already been agreed. In

paragraph 19 the words "in particular" will be disallowed as the plaintiff must plead how the contract is to be rectified. I consider that I have now dealt sufficiently with the defendant's other objections.

Variations

93. In paragraphs 28 to 32 of the proposed pleading BRL plead:

"Effect of Variations on Progress of the 3010 Contract Works

94. 28. BRL contend that some of the variations and/or instructions ordered under Clause 51 and/or issued pursuant to Clauses 7 and 13 of the Conditions and particularised in Schedule 1 were causes of delay such as fairly to entitle BRL to an extension of time for the completion of the 3010 Contract Works pursuant to Clause 44 of the Conditions.

95. 29. BRL calculate the effect of variations and/or instructions and/or other causes of delay such as fairly to entitle BRL to an extension of time by reference to the Approved Programme. A chart setting out the Approved Programme is served herewith as Schedule 1A.

96. 30. Such variations as BRL rely upon as causing delay to the completion of the 3010 Contract Works are particularised in Schedule III served herewith. Schedule III sets out:

97. (1) the 19 areas of the 3010 Contract Works as described by the Approved Programme and the programmed periods for completion of the transitioning and topsoil construction and seeding works for each of those areas

98. (2) the causes of delay to the completion of 3010 Contract Works to each the areas described. Where the cause of delay is a variation it is identified as such

99. (3) the actual period of delay caused by the delaying event and the effect of the delaying event upon the completion of the 3010 Contract Works

100. (4) the duration of such delay in weeks.

101. Schedule III is cross referenced to the delay and disruption Schedules A to F inclusive.

102. 31. During the course of the 3010 Contract Works, the Employer engaged BRL to carry out the 3160 Contract Works (particulars of which are set out below). BRL contend that the letting of the 3160 Contract was a variation of the 3010 Contract Works. Particulars of delay caused to the 3010 Contract Works by the letting of the 3160 Contract are set out in Schedule III under the heading *"Letting of 3160 Contract whilst 3010 Contract was in Progress"*.

103. 32. Further or alternatively, BRL contend that the letting of the 3160 Contract and the letting of a separate reshaping Contract to Cinnamond constituted breaches by the Employer of Clauses 41 and 42 of the Conditions of the 3010 Contract and/or implied term pleaded at paragraph 17(1) above."

104. Mr Williamson submitted that this section of the pleading was not intelligible and was oppressive to the defendant. He maintained that this section was in the nature of a global delay or disruption claim and that, as such, it ought only to form part of the substituted statement of claim if it clearly set out a causal nexus between each of the variations relied on and the delay or delays alleged. He maintained that it was not clear which variations or other causes of delay were relied upon as causing delay, how the variations correlated with those listed in Schedule I, what events (whether variations or not) justified an entitlement to an extension of time under the contract and how much time was claimed for each cause. He referred to the judgment of Byrne J. in the Supreme Court of Victoria, Buildings Cases List, in the case of **John Holland Construction & Engineering Pty Ltd v. Kvaerner RJ Brown Pty Ltd** unrep., 11 October 1996. Byrne J. had before him an application to strike out substantial parts of a statement of claim on the grounds that, inter alia, the defendant was faced with allegations that by reason of breaches of contract the plaintiff had suffered loss of damage, particulars of which were given in a schedule A in which the loss and damage was calculated in terms of the difference between the tender estimate for the part in question and its actual cost. The defendant attacked the pleading on the grounds that such an allegation was embarrassing since it did not establish a causal link between the breach and the damage alleged. In the course of his most careful and helpful judgment, Byrne J. considered the relevant authorities and made the following points. (Some are relevant only to the defendant's later objections under the head of "The Global Costs Claim" and are included here for convenience.)

105. 1. The plaintiff's (Hollands) claim was a "global claim, that is, the claimant does not seek to attribute any specific loss to a specific breach of contract, but is content to allege a composite loss as a result of all the breaches alleged".

106. 2. Such a claim has been held to be permissible where it is impractical to disentangle that part of the loss which is attributable to each head of claim and the situation has not been brought about by delay or other conduct of the claimant: **London Borough of Merton v. Leach** (1985) 32 BLR 51 at 102; see also **Wharf Properties Ltd v. Eric Cumine Associates (No.2)** (1991) 52 BLR 1 at page 20, per Lord Oliver.

107. 3. This global claim was a total costs claim since the contractor had alleged a number of breaches of contract and quantified its global loss as the actual costs of the work less the expected cost. The logic of such a claim, namely that the contractor might reasonably have expected to perform the work for a particular sum, that the employer committed breaches of contract, that the actual reasonable costs of the work was a sum greater than the expected cost, led to the inference that the employer's breaches caused that extra cost or cost-overrun and that the causal nexus was to be inferred rather than would be demonstrated. (The global total cost claim in the case was a variant of the ordinary claim since there were two contracts.)

108. 4. *"Three things should be underlined at this stage. First, it is for the parties and not the Court, even in a judge-managed list, to determine how their case should be framed. It is not for the Court to impose upon them a manner or form of pleading which it thinks better than their own:* ***Nauru Phosphate Royalties Trust v. Matthew Hall Mechanical & Electrical Engineering Pty Ltd*** *[1994] 2 V.R. 386 at 406, per Smith, J. Second, the power of the Court to strike out a claim is very limited. So far as is here relevant, it may be exercised where the claim is so evidently untenable that it would be a waste of the resources of the Court or the parties for the Court to permit this to be demonstrated only after a trial:* ***General Steel Industries Inc. v. Commissioner for Railways (NSW)*** *(1964) 112 C.L.R. 125 at 129-30, per Barwick, C.J.; or where the pleading is likely to prejudice, embarrass or delay the fair trial of the action. The former imposes a very heavy burden on the applicant as is demonstrated by the refusal of the Privy Council to uphold an order striking out a global claim on that basis in* ***Wharf Properties Ltd v. Eric Cumine Associates (No.2)*** *(1991) 52 BLR 1, PC. In that case, however, the strike-out order was upheld on the alternative basis. It is this alternative basis which is relied upon in support of the attack on this part of the Holland statement of claim. Finally, this case is being managed in a specialist list and is still in its interlocutory stages. One of the advantages of such a list is that the judge, being familiar with the case, can encourage the parties to identify and formulate the issues so that the trial might be conducted in as economical and expeditious a manner as may be consistent with the just disposition of the dispute."*

109. 5. *"A pleading is not an end in itself: its adequacy must be assessed by reference to its function in the scheme of litigation, having regard to the type of proceedings in which it is delivered and the nature of the dispute with which it is concerned. Each case must be looked at in the light of its own subject matter and circumstances."* Byrne J. then referred to what Saville L.J. had said in the **British Airways** case at 72 BLR pages 33 to 34.

110. 6. Byrne J. considered further what Smith J. had said in Nauru Phosphate and concluded that, as in other cases, it showed only that a court would not interfere with the conduct of an arbitration and that it did not necessarily reflect a departure from the ordinary English practice of pleading.

111. 7. He continued (a passage upon which Mr Williamson placed reliance in relation to the global costs claim):-

112. *"The question whether in a given case a pleading based on a global claim, or even a total cost claim or some variant of this, is likely to or may prejudice, embarrass or delay the fair trial of a proceeding, must depend upon an examination of the pleading itself and the claim which it makes:* ***British Pension Trustees Ltd v. Sir Robert McAlpine & Sons Ltd*** *(1994) 72 BLR 26 at 34, per Saville, L.J. The fundamental concern of the Court is that the dispute between the parties should be determined expeditiously and economically and, above all, fairly. Where the proceeding is being managed in a specialist list, the judge, whose task it is to steer the case through its interlocutory stages, might, and perhaps should, explore the claim to determine whether the form it takes is driven by its nature and complexity, or by a desire to conceal its bogus nature and by presenting it in a snowstorm of unrelated and insufficiently particularised allegations, or by a desire to disadvantage the defendant in some way. Relevant to this is an acknowledgement that a total cost claim puts a burden on the defendant. This burden may involve the defendant in extensive discovery of documents relating to the performance of the project; it may mean that at trial the defendant must cross-examine the plaintiff's witnesses to expose the flaws in a claim which assumes that the defendant is, itself, responsible for every item of the plaintiff's costs overrun; it may mean that the defendant must lead evidence to explain what, in fact, was the impact of each of the acts complained of on the*

project, as was done in ***McAlpine Humberoak Ltd v. McDermott International Inc. (No.1)*** *(1991) 58 BLR 1 at 28, per Lloyd L.J. Litigation inevitably imposes burdens on the parties; the Court must exercise its powers to ensure that, as far as possible, these burdens are not unreasonable and are not unnecessarily imposed.*

113. *In my opinion, the Court should approach a total cost claim with a great deal of caution, even distrust. I would not, however, elevate this suspicion to the level of concluding that such a claim should be treated as prima facie bad:* ***British Airways Pension Trustees Ltd v. Sir Robert McAlpine & Sons Ltd*** *(1994) 72 BLR 26 at 34, per Saville, L.J., Beldam, Neill L.JJ. concurring. Compare* ***Hudson's Building and Engineering Contracts,*** *11th ed., 1995, par.8-204. Nevertheless, the point of logical weakness inherent in such claims, the causal nexus between the wrongful acts or omissions of the defendant and the loss of the plaintiff, must be addressed. I put to one side the straight-forward case where each aspect of the nexus is apparent from the nature of the breach and loss as alleged. In such a case the objectives of the pleading may be achieved by a short statement of the facts giving rise to the causal nexus. If it is necessary for the given case for this to be supported by particulars, this should be done. But, in other cases, each aspect of the nexus must be fully set out in the pleading unless its probable existence is demonstrated by evidence or argument and further, it is demonstrated that it is impossible or impractical for it to be spelt out further in the pleading. Moreover, the Court should be assiduous in pressing the plaintiff to set out this nexus with sufficient particularity to enable the defendant to know exactly what is the case it is required to meet and to enable the defendant to direct its discovery and its attention generally to that case. And it should not be overlooked that an important means of achieving the result that, once it starts, the trial should be conducted without undue prejudice, embarrassment and delay, is by ensuring that, when it begins, the issues between the parties including this nexus are defined with sufficient particularity to enable the trial Judge to address the issues, to rule on relevance and generally to contain the parties to those issues. An order to this effect in a global claim was made by the Official Referee in* ***Imperial Chemical Industries plc v. Bovis Construction Ltd (****1992) 32 Con.LR. 90, and by Moynihan, J. in* ***Ralph M. Lee Pty Ltd v. Gardiner & Naylor Industries Pty Ltd (****unreported, SC (Qld), 11 February 1993). And if, in such a case, the plaintiff fails to demonstrate this causal nexus in sufficient detail because it is unable or unwilling to do so, then this may provide the occasion for the Court to relieve the defendant of the unreasonable burden which the plaintiff would impose on it:* ***Wharf Properties Ltd v. Eric Cumine Associates (No.2) (****1994) 52 BLR 1 at 23."*

114. Mr Williamson also submitted that paragraph 32 introduced a new claim which would be statute barred in that the letting of the 3160 contract occurred more than six years ago.

115. Mr Fernyhough submitted that the defendant's real objection seemed to be that there was a lack of correlation but that could be overcome without difficulty and he undertook to provide a table which would correlate the variations relied on with those in schedule 1. He sought to demonstrate that otherwise the plaintiff's new pleading and schedules were perfectly manageable, both in themselves and particularly if use was made of Schal's analysis of possible extensions of time which was sent with the final certificates.

Decision on Variations

116. In my judgment the defendant's complaint about the lack of clarity about the variations is justified: the variations in schedules I and III cannot apparently be reconciled, and the pleading is therefore embarrassing. The objection may however be met, as regards variations, by the plaintiff's proposed table of correlation if the variations identified in schedule III are cross-referred to the numbered variations in schedule 1, part 1 and also if in consequence there are no variations in schedule 1 part 1 which are alleged to have caused delay which are not to be found in schedule III, even if they are referred to in the narratives in schedules A to F. Conditions to these ends will be incorporated in the order.

117. I also agree that the defendant's complaint in respect of the other grounds for extension, apart from variations, is justified. I gratefully adopt the analyses and restatements of principle made by Byrne J which are clearly directly applicable to construction cases in the list of an official referee. A distinction must be made by the plaintiff between the variations which are said to justify an extension of time and each of the other causes that are also said to entitle the plaintiff to further time for otherwise the defendant will not know what the plaintiff alleges in each case to be the causal link between the event and its effect on the completion of the works (or relevant section). The plaintiff must therefore, as a condition of obtaining leave to substitute the statement of claim, provide a list which will set out in relation to all the causes of delay in schedule III other than variations, the relevant contract condition if "*any cause of delay referred to these conditions*" is relied on, or any

other special circumstance, in which case the nature of the cause or breach, if any, relied on must also be provided.

118. The defendant's complaint that paragraph 32 introduced a cause of action which was statute barred does not in my view disentitle the plaintiff to leave in respect of this paragraph for the same reasons as those given in relation to the misrepresentation claim set out above, and in particular that a potential limitation defence is not a justification for striking out since paragraph 32 does not introduce a new claim for which leave should not be granted under the Limitation Act 1980 or Order 20, rule 5(5)

The Global Costs Claim

119. The proposed substituted statement of claim states in paragraphs 54 and 55:-

120. *"54. By reason of the variations pleaded in paragraph 28 to 31 above, the instructions and/or delaying events and/or acts and omissions pleaded in paragraph 39 to 52 above and particularised in Schedule III served herewith, BRL were delayed and/or disrupted in their execution of the 3010 Contract Works and have incurred additional costs for which they are entitled to payment pursuant to the provisions of the 3010 Contract Conditions, clauses 7(3), 13(3), 31(3), 40(1), 42(1), 52(4)(b) and 60(3).*

121. *55. BRL contend that such additional costs were incurred by reason of delay and disruption caused by various events whose consequences have a complex interaction rendering specific relation between the event relied upon and the financial consequences thereof impossible. Full particulars of* BRL's claim for additional costs are set out in Schedule II and Tables 1-7 inclusive served herewith."

122. *Schedule II is headed "Loss and Expense". Such a description is, of course, inappropriate for use where the contract incorporates conditions based upon the ICE Conditions for they are not the same as the JCT Conditions, whereby "loss and/or expense" which has not been or is not reimbursable under other conditions may be recovered under certain conditions. However in this case I can see why BRL use it. It has presented its claims on the basis that variations are valued at contract or analogous rates with no apparent allowance for the effects of delay and disruption in terms of increased or prolonged overhead and other costs. These costs are then sought to be recovered under paragraphs 54-57. However BRL do not in the make up of its costs differentiate between the costs attributable to variations and those attributable to other events for which they are entitled to payment under the contract conditions. In addition in paragraph 57 the amount claimed as additional costs (,648,418) is claimed also as damages for breach of contract "by reason of the disruption and/or delay to the completion to the 3010 Contract Works".*

123. Mr Williamson therefore attacked this part of Mark II on the grounds that, like the claims for extensions of time for variations and other events, it also did not provide a proper causal nexus. Mr Williamson submitted first that, although schedule III pleaded delays due to certain events, including variations, it did not demonstrate how those events either individually or overall delayed completion of the works as a whole or the sectional completion required by the contract. The 19 areas of the site identified (some of which were shown on the clause 14 programme) had no particular contractual significance in the context of a claim for delay and disruption. BRL had therefore failed to plead what the alleged "complex inter action" was which justified the contention in paragraph 55 that it would not be possible to provide a better breakdown. Leaving aside the agreed additional costs up to 3 June 1987 of ,29,687, the bulk of schedule II was no more than a re-presentation of the plaintiff's actual costs alleged to have been incurred which were claimed on the implicit basis they would not otherwise have been incurred and therefore were only incurred by reason of the variations and other events pleaded in paragraphs 54 and 55. Some of the amounts claimed as costs might represent actual costs, albeit expressed as a rate, but others did not. For example the claim in respect of Head Office overheads and profit was ,202,311. This represented 39 weeks at ,5,182 a week. The sum of ,5,182 was the anticipated average weekly gross return during the original contract period so it did not represent costs actually incurred after the expiry of that period. The period of 39 weeks is however derived from the overall actual additional period of working of 99.50 weeks less 60.46 weeks which is an expression of the recovered overheads and profit resulting from the increased value of work carried out above the contract figure of ,803,663.

124. A substantial part of the claim relates to costs allegedly incurred by a sub-contractor, Almonds, but Mr Williamson submitted that the pleading was deficient in failing to say whether the costs had been incurred by BRL or whether BRL were liable to reimburse Almonds under the terms of the sub-contract. In the alternative

claim for damages BRL claim as *"costs incurred by reason of the employer's breaches"*, sums which in schedule I, part 2, are said to be the value of variations amounting to ,184,837.

125. Accordingly Mr Williamson adopted what Byrne J. had said in **Holland v. Kvaerner RJ Brown** and submitted that this part of the plaintiff's claim should be approached with caution, if not suspicion, and that it should not be admitted in its present form. He argued that the financial effect of each of the delays alleged should be pleaded. He also incorporated in his submissions a number of detailed complaints about the pleading of variations which were set out in the affidavits in support of the defendant's case, but I do not need to rehearse them.

126. Mr Fernyhough submitted that the claims in paragraphs 54-57 did not comprise a total cost claim in the sense described by Byrne J. for the purposes of **Holland v. Kvaerner RJ Brown**. He pointed out that there had been a pleading of specific periods of delay attributable to specific variations and other identified events. He maintained that the costs were presented in a form which would enable them to be reduced pro-rota if the delay claimed should not be established in full. Mr Fernyhough therefore argued that the causal link between the events relied on and the delays alleged was clear. He invited me to consider the background to the plaintiff's case, namely that the project had been prolonged by many years and had been severely disrupted by numerous major and minor changes. In these circumstances it was inevitable that the claim would be presented in the form in which it was. He submitted that on the authorities set out by Byrne J. there was potential tension between two competing principles: that in a judge-managed list there should be control over a case at all stages but that a court should not place a party in a straightjacket or direct it as to how it should plead its case. He referred in particular to **GMTC Tools and Equipment v.Yuasa Warwick Machinery** (1994) 73 BLR 102 in which Leggatt LJ said (at page 113):

127. *"I refer to the fact that according to [defendant's counsel] submission an Official Referee or commercial judge, when dealing with the interlocutory stages of an action is entitled to prescribe the way in which quantum of damage is to be pleaded and proved. I disagree. No judge is entitled to require a party to establish causation and loss by a particular method. Especially when the method proceeds, as happened here, on what can only be regarded as an imperfect understanding of the commercial realities of the plaintiff's manufacturing process. With the benefit of hindsight, it is apparent that the plaintiffs might have fared better if at an earlier stage they had objected to the way in which they were being obliged to plead their claim. Understandably they tried so far as possible to do so, as a matter of expedience, what was being demanded of them by judge and defendants alike. When they proved unable to accomplish this satisfactorily, it was said against them that they were unable to particularise their claim sufficiently, and so those claims were struck out. In my judgment they ought never to have been put in that predicament in the first place. The plaintiffs were entitled to put their claims in the rational way which has been explained to us by [counsel]. That is not to say that either of the claims will necessarily succeed at trial, whether wholly, mainly or in part. The judge was wrong to determine that issue at this stage, especially when his approach involved stipulating a manner in which proof of quantum was to be attempted, and then striking out the pleadings before the plaintiffs further complied with it."*

128. Mr Fernyhough therefore argued that even in the climate of change which was affecting the courts prior to the implementation of Lord Woolf's proposals, the court should not prevent a party from amending its case in the way it thought fit simply because of apparent deficiencies which might well be made good after a request for particulars had been served.

Decision on Global Claim

129. A global claim can take a variety of forms. Where it describes a pleaded claim it has pejorative overtones as it is usually intended to describe a claim where the causal connection between the matters complained of and their consequences, whether in terms of time or money, are not fully spelt out, but, implicitly, could and should be spelled out. It is to be contrasted with the use of the term where an arbitrator has made an award of a sum which the arbitrator cannot apportion between the various events. This may be permissible but as Lord Oliver made clear in **Wharf Properties Ltd v. Eric Cumine** (at page 20) there is a clear distinction between that situation and the pleading of a claim:

130. *"....in cases where the full extent of extra costs incurred through delay depend upon a complex interaction between the consequences of various events, so that it may be difficult to make an accurate apportionment of the total extra costs, it may be proper for an arbitrator to make individual financial awards in respect of claims which can conveniently be dealt with in isolation and a supplementary award in respect of the financial consequences of the remainder as a composite*

whole. This has, however, no bearing upon the obligation of a plaintiff to plead his case with such particularity as is sufficient to alert the opposite party to the case which is going to be made against him at the trial."

131. In other words a global claim in the sense used in argument is the antithesis of a claim where the causal nexus between the wrongful act or omission of the defendant and the loss of the plaintiff has been clearly and intelligibly pleaded. However that nexus need not always be expressed since it may be inferred. As Lord Oliver emphasised in **Wharf Properties** there must be a discernable nexus between the wrong alleged and the consequent delay (or money) for otherwise there will be no "agenda" for the trial. Lord Oliver went on to say:

132. *"It is for the plaintiff in an action to formulate his claim in an intelligible form and it does not lie in his mouth to assert that it is impossible for him to formulate it and that it should, therefore, be allowed to continue unspecified in the hope that when it comes to trial, he may be able to reconstitute his case and make good what he then feels able to plead and substantiate."*

Smith J. in **Nauru Phosphate Royalties Trust v. Matthew Hall Mechanical & Electrical Engineering Pty Ltd** [1994] 2 V.R. 386 said:

133. *"Global claims are difficult for the parties and the court to handle. To compel a plaintiff to give particulars "of nexus" or justify its inability to do so may reveal the bogus claim. If particulars are produced they may clarify issues and reduce the area of argument even if the plaintiff can only provide alternative hypothesis. I can see no reason why, for example, a judge controlling a Building Cases List or arbitrator could not require the plaintiff to particularise the "nexus" or to justify its assertion that it is not possible to do so. Such directions would be justifiable upon the grounds that they would assist in the management of the litigation. The issue raised here for decision is whether there is an abuse of process arising from the globally pleaded claim. I consider that, in all the circumstances, there is not."*

In **Holland v. Kvaerner RJ Brown** Byrne J. said (at page 20):-

134. "*Nevertheless, the point of logical weakness inherent in such claims, the causal nexus between the wrongful acts or omissions of the defendant and the loss of the plaintiff, must be addressed. I put to one side the straight-forward case where each aspect of the nexus is apparent from the nature of the breach and loss as alleged. In such a case the objectives of the pleading may be achieved by a short statement of the facts giving rise to the causal nexus. If it is necessary for the given case for this to be supported by particulars, this should be done. But, in other cases, each aspect of the nexus must be fully set out in the pleading unless its probable existence is demonstrated by evidence or argument and further, it is demonstrated that it is impossible or impractical for it to be spelt out further in the pleading. Moreover, the Court should be assiduous in pressing the plaintiff to set out this nexus with sufficient particularity to enable the defendant to know exactly what is the case it is required to meet and to enable the defendant to direct its discovery and its attention generally to that case. And it should not be overlooked that an important means of achieving the result that, once it starts, the trial should be conducted without undue prejudice, embarrassment and delay, is by ensuring that, when it begins, the issues between the parties including this nexus are defined with sufficient particularity to enable the trial Judge to address the issues, to rule on relevance and generally to contain the parties to those issues."*

135. In this country the present rules of the Supreme Court do not envisage that, in general, a case will be judge-managed. Certainly the Court of Appeal in **GMTC** made it clear that it is not for any court, even an Official Referee, to direct a party as to the method by which its case should be established. I do not consider that any of the observations which I have cited conflict with **GMTC.** The approach of the Australian judges, both highly experienced in construction work, appears to me to be identical to that adopted here. Official Referees are expected to control the cases in their list and do so, either on application or, where permitted and appropriate, of their own motion, with a view to ensuring, within the rules of court, that the presentation of a case is such that it ensures that the issues raised by it are or will be clearly defined, as a matter of procedure, both with a view to trial and also to see that the parties should be aware of the strengths and weaknesses in their respective cases so that only those disputes which require to be tried should come to the court for decision. If Lord Woolf's proposals are to be adopted the time is fast approaching when a claimant party will be required from the outset to present its case in considerably more detail than is at present customary so that the defendant has no justification not to plead to it in comparable detail, making it clear which of the pleaded facts are admitted and which are not admitted and, if a fact is not admitted, the reasons why it is not accepted will also have to be given. A comparable situation already exists in Official Referees' cases where schedules

are ordered. It is normally not good enough for a party simply to say "denied" or "not admitted" if it has a positive case. It must put it forward. However unless that party is given sufficient information about the case that it has to face it may be driven to pleading negatively. For present purposes the position may be restated as follows:-

136. 1. Whilst a party is entitled to present its case as it thinks fit and it is not to be directed as to the method by which it is to plead or prove its claim whether on liability or quantum, a defendant on the other hand is entitled to know the case that it has to meet.

137. 2. With this in mind a court may - indeed must - in order to ensure fairness and observance of the principles of natural justice - require a party to spell out with sufficient particularity its case, and where its case depends upon the causal effect of an interaction of events, to spell out the nexus in an intelligible form. A party will not be entitled to prove at trial a case which it is unable to plead having been given a reasonable opportunity to do so, since the other party would be faced at the trial with a case which it also did not have a reasonable and sufficient opportunity to meet.

138. 3. What is sufficient particularity is a matter of fact and degree in each case. A balance has to be struck between excessive particularity and basic information. The approach must also be cost effective. The information may already in the possession of a party or readily available to it so it may not be necessary to go into great detail.

139. In my judgment Schedule II is in reality either a total cost claim or in the nature of one since it appears to seek to recover all BRL's costs in the period after the original date for completion, even if its technique for doing so is to present those costs as notional rates etc. I therefore approach it with caution (but not yet with suspicion since there may be legitimate reasons why such a quantification is justifiable in the circumstances of this contract). The vice of this part of Mark II lies in the fact that BRL says that it is unable to apportion the overall costs or other figures to any of the variations or other events set out in schedule III. I have to say that I do not find this proposition one which is easy to accept. It is clear from the analysis which has been made by BRL for the purposes of its claims for extensions of time that it is possible to identify periods of delay for each of the principal events upon which reliance is placed. I do not see why it is not possible thereafter to spell out the nexus between those events which it is said caused the costs claimed in paragraph 57 to have been incurred and to sever the events which did not have that cause, e.g. because they were concurrent or did not cause any delay to completion. Mr Fernyhough nevertheless pointed out that Schal's apparently detailed analysis in the report annexed to their final certificate of 10 July 1996 considered what extension of time should be granted and suggested that it was unnecessary for BRL to perform that exercise. I have already considered the work done by Schal in relations to the claim for an extension of time for certain causes. Schal's analysis does not, so far as I can judge, deal with the costs allegedly incurred by BRL which, as is usual, remain for BRL to establish (unless admitted) and BRL must prove the chain of causation. I do not therefore consider that paragraphs 54-57 and the relevant schedules and tables give SPCL adequate information about the case which it may have to meet.

140. In my judgment therefore the defendant's case is in principle well-founded but I do not consider that it would be right to refuse the plaintiff leave to amend the case in the form set out in paragraphs 54 to 57 of the proposed statement of claim simply because at this stage the claim is open to such attack. Its current form is not so oppressive or abusive as to justify refusal of leave to amend. The deficiencies may, as Mr Fernyhough submitted, be cured by the provision of particulars or in some other way. If however that is not done or if there is no reason for the plaintiff's inability to do so then the pleading will be susceptible to being struck out. I consider therefore that conditions should be attached to the grant of leave in respect of these paragraphs so as to elicit the plaintiff's case but not to require it to present a case other than the one that it wishes to put forward. I think that BRL should identify those variations, events or acts and omissions set out in schedule III which are relied upon as critical to or crucial to the costs claimed in paragraph 57 (and which are not) so that the defendant knows which of the events are said to lie on a notional critical path, as it were, and which are not and how the costs were caused by those key events. A party which pleads such a case has to make up its mind about the criticality of an event and its effect before witness statements and reports are prepared so that they can focus on the true issues and do not have to deal with irrelevant matters. Either an event caused the works to finish late or the plaintiff to incur costs or it did not. If it was concurrent with such a causative event

then the fact that that other covering event may not qualify as a variation or other event justifying compensation under the contract or an award of damages is immaterial. So too if the cost or part of it would been incurred in any event or for some other reason. It may not of course always be possible to separate out the individual events and some may have to be grouped so that there will be a combination of events all of which may be clearly demonstrated to have made some positive contribution to the overall delay as opposed to occurring about the time when the truly causative events were happening.

141. The points made by Mr Williamson and Mr O'Hanlon in his affidavit about the deficiencies in BRL's claim e.g. in relation to Almond's costs, are in principle well-founded but, following my previous conclusion, leave to amend will not be refused. It would not be appropriate to attach conditions to deal with such matters which the defendant should pursue by way of requests for particulars or in some other manner.

Schedule I Part 1

142. Mr Williamson incorporated in his submissions a large number of detailed objections to the pleading of variations in this part of schedule I. The defendant's attack was primarily concentrated on the respects in which BRL had failed to meet objections which had been raised in Mr O'Hanlon's second affidavit of 15 March 1996 where he dealt with the defendant's objection to schedule S/C1 to the amended statement of claim. BRL however here submit, with some reason, that certain items identified by Mr O'Hanlon as deriving from instructions for which no VO or CMI is pleaded, were nevertheless dealt with by Schal in the evaluation of their extension of time in July 1996, e.g. item 6 was included by Schal when considering VO1A; item 175A was related to the additional work "due to golf course" but Schal accepted that some reshaping work delayed the 3010 works; item 201A was considered by Schal (and rejected); and item 213A was considered by Schal together with some others for which an allowance was made. As to the remainder the plaintiff maintains that the points taken were "evidential". I would not normally regard such a plea as sufficient, i.e. a claim for a variation must be supported by particulars of how the variation came to be ordered by the employer and if not supported by a written instruction or written confirmation of an oral instruction (as permitted by clause 51(2) of the ICE conditions) must be particularised by reference to the conversation in which the order was given. Nonetheless these are matters to be pursued by the defendant by a formal request for particulars of the items in question. Here again I do not wish the plaintiff to be under any illusion that the quantification of a figure is not a matter of evidence but of substance albeit for particulars. The tedium of pleading actual costs in full may sometimes be averted by delivering to the requesting party the relevant supporting documents with an accompanying index or guide so as to show the source of the cost or calculation and thus how the sum claimed is arrived at. To provide such information "on a plate" usually also shifts the burden to the defendant to say why the sum is not admitted. Such a course would certainly be appropriate in a case of this complexity where some of the figures claimed are not large enough to justify extensive pleadings. Over particularity is always to be avoided.

Schedule I, Part 2.

143. It is not necessary to repeat the reasons why I do not accept that Mr Williamson's argument that the claim had not been presented to Schal under clause 68 is a reason not to allow the amendment. I have also dealt with the argument that it is presented as a global claim. There is no material distinction between the claims in paragraph 57 for breaches of contract and the claims in paragraphs 54 and 55 for additional costs due to varying events. BRL must state which of the many events relied upon as breaches of contract actually caused the losses claimed in paragraphs 57(5) and (6) as opposed to other breaches which did not cause those losses and to demonstrate the causal link betwen those breachs and the loss. For the reasons already given it would be conducive to the progress of this action to require the plaintiff to do so as a condition of granting leave to amend.

Financing Charges

144. In paragraph 93 of the proposed statement of claim BRL state:

145. *"Due to the carrying out of variations and/or where the regular progress of the 3010 Contract Works and/or 3160 Contract Works has been materially delayed and/or disputed by matters aforesaid, the provision of capital which is not reimbursed by regular interim payments has become necessary. The cost of funding that capital if borrowed, or the sum represented by the lost investment opportunity if not borrowed, is recoverable as part of BRL's loss and damage. BRL contend that by reason of the Employer's breaches as particularised in paragraph 89, BRL have incurred and are entitled*

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to claim financing charges as special damages. Full particulars of such financing charges set out in Schedule II and Schedule V(2) served herewith and can be summarised as follows:

3010 Contract

146. (1) financing charges on loss and damage 921,123.00

147. (2) financing charges on retention fund 22,831.00

148. (3) financing charges on undercertification 610,647.00

3160 Contract

149. (4) financing charges on retention fund 2,436.34

150. (5) financing charges on loss and damage 125,116.00

151. Total financing charges ,1,682,153.34"

152. Although Mr Williamson contended that there was no legal basis for this claim it seems to me that for present purposes a basis is pleaded since in paragraph 89 BRL contend that there have been breaches by the defendant or Schal in not making assessments of extension of time; not valuing the variations; not issuing certificates properly due; and not issuing the final certificate. Whether these breaches justify the claims in paragraph 93 in fact or in law will be an issue to be argued further. Certainly there are at present difficulties in seeing how the sums claimed tie back to paragraph 89 and such a potential deficiency will have to be overcome. At present however I see no reason for withholding leave to amend in respect of this claim.

Administration of Contracts

153. The same observations apply to paragraphs 89 to 92. At present they are very basic and general allegations and if the defendants request particulars of the occasions upon which there have been breaches, and if the plaintiffs were to fail to provide proper particulars this part of the claim might be liable to be struck out. At present however the pleading is not so deficient as to justify withholding a grant of leave to amend.

154. The defendant also advanced objections to paragraphs 83 to 86 and to the claim for interest in paragraph 94 but since they are eesentially the same as other objections which I have not considered justify refusal of leave I shall not deal with them specificially.

155. In summary leave to serve a substituted statement of claim in the form initialled will be granted with the exception of the parts referred to and subject to compliance by the plaintiff with the conditions in this judgment within such time as may be agreed or determined. I propose to make no order on the defendant's summons.