JUDGMENT : HIS HONOUR DEPUTY JUDGE COLIN REESE QC : TCC. 11th May 2004.

INTRODUCTION

1. The Claimant ("Alstom") was the main contractor engaged by Railtrack plc (now Network Rail Infrastructure Ltd but, for convenience referred to throughout as "Railtrack") to carry out works, referred to as "the Sunderland Direct Project", to extend the Tyne and Wear Metro. These proceedings arise from the arrangements made by Alstom with the Defendant ("Jarvis") whereby Jarvis was to undertake certain of those works on Alstom's behalf. The works themselves were carried out over a two year period from January 2000. In a letter dated 6th February 2002 which had the subject heading "Sunderland Direct – Main Commissioning Success" Alstom wrote to Jarvis in these terms:

   ***Putting our commercial issues to one side**, I wish to thank you for a successful commissioning. The Railtrack objective, to run Railtrack services 06:00 hours on 28 January 2002 was achieved on time. A great deal of hard work was put in by all your staff to achieve this. You successfully overcame the many problems that faced us. We still have some work to sort out post commissioning, such as speed proving, but hopefully this will not impact the project too much.*
   Please accept my personal thanks, and thanks on behalf of the whole project team.
   We look forward to true completion of the scheme, with Metro passenger services commencing 31 March 2002. The main commissioning success is a major step to achieving this. (TB 8/1345 - my emphasis)

   It is the still unresolved "commercial issues" which were the subject of an Adjudication (see paragraphs 12(4), 12(5) and 13 below) and which now come before the Court for decision.

2. The Main Contract dated 19th December 1999 (signed in about February 2000) provided for Alstom to be paid for the work on what can fairly be called a qualified "cost reimbursable basis". It is not necessary to explain all the complexities of the payment terms which were agreed between Railtrack and Alstom but, in order to understand the issues which now have to be decided between Alstom and Jarvis, the basis of the "pain/gain" incentive scheme must be explained. The commercial thinking which underlay the scheme was described by Alstom's Mr Irvine in an internal note that he prepared at the time (see TB 5/358 and 359 where the note is dated erroneously "4/1/99" rather than "4/1/00"). Mr Irvine later updated his note at the end of August 2001 (see TB 7/1048 to 1050) to reflect the continuing discussions that had been taking place between Alstom and other contractors who together formed a so-called "Alliance" on one side and Railtrack on the other side. The note explains that Alstom had begun by calculating what was called a "base tender cost". This was its best estimate of the "price (based on direct cost) to complete the contract, **prior to risk assessment**" (my emphasis).

   [Pausing at this point, it is convenient to note that the documents show a fairly loose or imprecise usage of the terms "cost" and "price" and I shall adopt the convention of referring to "cost/price" to try to make the position clear.]

   The "base tender cost/price" did not include a "management fee". The "management fee" was designed to cover production overheads, non-production overheads and profit. A base "management fee" was a separate figure calculated from the "base tender cost/price".

3. I have emboldened the words "prior to risk assessment" in the previous paragraph. The risk assessment that was carried out lay at the heart of the "pain/gain" incentive scheme. The nature of the very detailed exercise that was carried out is apparent from Clause 62.2 of the Main Contract (see TB 3/222) and it is explained (in broad outline only) in Mr Irvine's internal notes. Furthermore, the basis of it was explored in the final part of Mr Robson's evidence (Transcript, Day 2, pages 166 to 169). What was done was this - cost risks in relation to the proposed works were identified by Alstom and by Jarvis (acting, so far as Railtrack was concerned, on Alstom's behalf in identifying cost risks in relation to the parts of the works which it expected to be asked to undertake if Alstom's tender was to be accepted). These were then discussed between Alstom and Railtrack in joint Quantitative Risk Assessment ("QRA") Workshops where an agreed Risk Log for the contract was established. Some of the identified risks were set aside as matters which were to be "owned" exclusively by Railtrack. Other of the identified risks were agreed to be suitable for potential "pain/gain" sharing as between Railtrack and Alstom. These risks were priced and then subjected to the evaluation exercise which is described in Clause 62.2 of the Railtrack Particular Conditions:

   62.2.1 The total of the Schedule of Prices in Schedule 3.4 excluding Management Fee shall be the basis of the Target Price. The Schedule of Prices shall be priced at nett cost exclusive of any allowance for risk. The individual prices within

the Schedule of Prices may be used Post Contract for monitoring comparison of work activity progress against expenditure.

62.2.2 The Tenderer [Alstom] shall provide a priced risk log identifying what he considers to be the risks inherent in his tender and indicating most likely, optimistic and pessimistic costs.

62.2.3 At Post Tender Stage but prior to award a joint QRA workshop will be held with Railtrack and the Contractor [again, Alstom] to establish the agreed Risk Log for the Contract. This will be reviewed by the Employer's Representative and the Contractor and upon their agreement the 50% probability addition of risk [the so-called P50 figure] generated will form the ***Agreed Target Price****.*

62.2.4 The 80% probability addition of risk [the so-called P80 figure] generated by the QRA will form the ***Agreed Gross Maximum Price****.*

62.2.5 The Risk Analysis as detailed in 62.2.3 and 62.2.4 will be produced with the aid of Primavera P3 Montecarlo Simulation Software in order to produce cost probability graphs with P50/P80 figures. (TB 3/222 - Railtrack's emphasis and my clarifications)

Although the tender documents sent out by Railtrack had envisaged that the "management fee" would be a fixed amount "payable outwith the incentivisation mechanism" (see Clause 61.1 at TB 3/218), in post tender negotiations the parties agreed to vary this (see paragraph 5 of the "Agreement of Outstanding Tender Issues" dated 13th December 1999 at TB 3/206). The logic which underlay this agreement was explained by Mr Irvine in his internal note – Railtrack and Alstom agreed that a full pro-rata increase should be made to the base "management fee" up to the level of the "Agreed Target Cost/Price" and that a further limited pro-rata increase should be made to the overheads elements only up to the level of the "Agreed Gross Maximum Cost/Price" (ie. Alstom's profit was to be capped at the "Agreed Target Cost/Price" level).

4. The "Agreed Target Cost/Price" and the "Agreed Gross Maximum Cost/Price" were to be adjustable (see Clauses 62.3.1 and 62.3.2 at TB 3/223). Each was to be increased or decreased using the same principles to reflect costs resulting from any of the following:

62.3.1.1 Variations to the Works (Clause 17) provided that such Variation shall be a specific alteration made by [Railtrack] to the type and/or extent of [Alstom's] Services and/or to the Plant and shall not in any way be on account of any change in or development of the design or the Specification or of the method of carrying out the Works made by [Alstom]. It is intended that Scope Creep be included as a risk item and therefore form part of [Alstom's] Agreed Target Cost. Approval by [Railtrack] of any proposals by [Alstom] shall not constitute a Variation.

62.3.1.2 Any additional expense reasonably incurred, or loss reasonably suffered by [Alstom] as a result of any breach of Contract by [Railtrack], pursuant to sub-clause 14.4 of the Conditions of Contract. (Any monies paid to any Sub-Contractor arising out of the negligence, default, lack of skill and care or breach of Contract by [Alstom], his servant or agents or Sub-Contractors shall not adjust the Agreed Target Price, nor shall they be paid).

62.3.1.3 Any statutory or other obligations as defined in Sub-Clause 6.2 of the Conditions of Contract except that any such extra costs shall only adjust the Agreed Target Price to the extent that they were neither included nor capable of being included in the Agreed Target Price.

62.3.1.4 Matters outside [Alstom's] control including force majeure but shall exclude exceptionally adverse weather conditions which shall be included as an [Alstom] risk item.

The benchmark by reference to which "pain" or "gain" was to be assessed was the properly adjusted "Target Cost/Price". The "Contract Price" which Alstom was to be paid was "the final figure after adjustment for the incentivisation mechanism…" (see Clause 61.1 at TB 3/218). The "Contract Price" which would be payable was to depend on the relationship between the adjusted "Target Cost/Price" and the "Final Actual Cost/Price". If the "Final Actual Cost/Price" was to come in below the adjusted "Target Cost/Price" there would be a "gain" to be shared; if the "Final Actual Cost/Price" were to come in above the adjusted "Target Cost/Price" there would be "pain" to be shared.

5. In the tender documents the "gain" sharing provisions which were at Clauses 62.4.2 and 62.5 were more complicated than the "pain" sharing provision which was at Clause 62.4.3 and 62.4.4 (see TB 3/224 to 226). The complexity of the proposed "gain" sharing was the result of the existence of the so called "Alliance" of main-

contractors. What was envisaged was "gain" sharing on the basis of Railtrack receiving 40%, Alstom receiving 30% and an Alliance fund receiving 30%. In the event, according to the updated version of Mr Irvine's note, apparently after one of the Alliance members become insolvent, Alstom proposed to Railtrack that "gain" should be shared between them on a simple 50:50 basis. I do not know whether this proposal was ever formally agreed by Railtrack but, according to a letter written by Mr Irvine on 6th February 2002, the gain share had been so revised (see TB 8/1339 cited at paragraph 11 below). Turning to the "pain" sharing provisions, which featured much more prominently in the submissions advanced in the present case, no Alliance involvement was envisaged. What was envisaged in the tender documents was equal "pain" sharing between Railtrack and Alstom up to the adjusted "Gross Maximum Cost/Price" with the whole of any excess being borne by Alstom. The invitation to contract on this basis was not accepted. Negotiations between Railtrack and Alstom resulted in an agreement "**…to develop the principles of the pain limitation in accordance with the following…**". The Agreement is to be found at paragraph 5 of the "Agreement of Outstanding Tender Issues" dated 13th December 1999 (see TB 3/205 to 206) in these terms –

5. Alliancing

With regard to the Gain/Pain position as tendered, and subsequently under review, Alstom accept Railtrack principles other than unlimited pain share on the Gross Maximum Price ["GMP"[

The Parties are in agreement to develop the principles of the pain limitation in accordance with the following for the Sunderland Metro Work:-

Adjustment has been made to the P80 Risk level to establish a revised GMP in the value of £12,867,674. A cap on the Contractors 100% pain over the GMP has been agreed at a value of £14,117,674 after which Railtrack will reimburse the Contractor at net cost exclusive of any overhead or profit contribution.

This shall be with a Base Tender value of £11,003,114, with a Target Price of £12,367,674.

The above is intended to, and has been designed, to reflect a maximum loss position to Altsom where all Alstom profit and non production overhead has been eroded.

For the avoidance of doubt, should the Leamside Works be introduced then……

It is agreed that proposed [Key Performance Indicators] KPI's shall be developed on the Railtrack principles as tabled at post tender meetings and subject to Alliance review, synergy and acceptance with the Alliance Partners. At this stage Alstom accept the principles as detailed in the tender documents in respect of the operation and distribution on the KPI Fund. (TB 3/205 and 206 – my emphasis)

The wording used is consistent with Alstom and Railtrack having agreed to develop the pain sharing provisions **and recording the final agreement which had been reached** between them. It is on this reading, which accords with the original version of Mr Irvine's internal note (see TB 5/358 and 359), that Alstom's case against Jarvis is premised. However, the wording is also consistent with Alstom and Railtrack having agreed in principle to develop the pain sharing provisions in the manner described without the matter being finally settled at this time. A number of later documents appear to be rather more consistent with Alstom and Railtrack regarding both pain sharing and gain sharing as matters which were the subject of ongoing negotiations (see paragraphs 24, 30 and 31 below). If that was so, at some later time Alstom appears to have accepted that the Main Contract contained a finalised pain sharing term in the terms of paragraph 5, or in terms that were substantially the same as paragraph 5. However, assuming (as Alstom allege) that final agreement on gain sharing and on limited pain sharing was reached on or before 13th December 1999, and in the terms recorded in paragraph 5, the agreed incentive scheme can be summarised as follows:

(1) the agreed (adjustable) "Target Cost/Price" was £12,367,674;
(2) if the "Final Cost/Price" came in below the adjusted "Target Cost/Price", the "gain" was to be shared between Railtrack, Alstom and the Alliance;
(3) if the "Final Cost/Price" came in at a figure up to £500,000 above the adjusted "Target Cost/Price" (**i.e.** between £12,367,674 and £12,867,674 on the basis of the unadjusted initial figures) this first band of "pain" was to be shared equally between Alstom and Railtrack;

(4) if the "Final Cost/Price" came in at a figure up to £1,250,000 above the adjusted "Target Cost/Price" plus £500,000 (**i.e.** between £12,867,674 and £14,117,674 on the basis of the unadjusted initial figures) Alstom would bear the whole of this second band of "pain"; and

(5) if the "Final Cost/Price" came in above the adjusted "Target Cost/Price" plus £1,750,000, Alstom would be reimbursed the excess "cost/price" at net cost exclusive of any overhead or profit contribution.

Given that the same principles were to be used in adjusting both the "Agreed Target Cost/Price" and the "Agreed Maximum Cost/Price" (see paragraph 4 above) it would seem probable that the difference between these two figures would remain constant whether the "cost/price" increased or decreased. In the event of increase, Alstom could expect to see proportionate increases in overheads recovery and profit but there is no suggestion that the pain cap was to be subject to a corresponding adjustment. On Alstom's case, it seems that there was agreement that the maximum "pain" which Alstom might be expected to bear was £1,500,000.

6. In these proceedings Alstom's primary case is that it sub-contracted a significant part of those main contract works to Jarvis. The sub-contract is said to have been agreed in the terms of Issue 3 of the draft sub-contract documents ("the Issue 3 documents"). Although the sub-contract documents were never signed by either party, Alstom's analysis is that it made a contractual offer when the Issue 3 documents were submitted to Jarvis under cover of a letter dated 30th August 2001 (TB 7/1042 and 1043) which Jarvis later accepted. In Alstom's submission, when properly construed, the Issue 3 documents include a term that Jarvis was to receive a proportionate share of any main contract "gain" that it (Alstom) might receive from Railtrack and that Jarvis was to pay a proportionate share of any main contract "pain" for which it (Alstom) might be liable to account to Railtrack. The proportion of the "gain" or "pain" which Jarvis was to receive or pay is, it is submitted, the percentage of the final main contract value which the sub-contract works eventually represented.

7. Alstom's primary case was developed in a number of ways – see paragraphs 19 to 21 of the Particulars of Claim – each one of which is disputed by Jarvis. The primary case can be seen to have two quite separate limbs. A documentary construction case, with alternative facets, is pleaded at paragraphs 19 and 20 of the Particulars of Claim in this way –

19. (1) the parties agreed that the Subcontract Price would be calculated in accordance with the rules contained in Schedule E [of the Issue 3 documents];
(2) Schedule E clause 3.1 provided that one of the rules for calculating the price was the application of the Alliance Pain/Gain mechanism;
(3) Also by Clause 3.1 the principles of the Pain/Gain Mechanism were to be based on the details contained in Schedule B, Annex B1 [of the Issue 3 documents] – these included that the percentage to be borne (or enjoyed) by Jarvis of any pain or gain would be in the same ratio as the sub-contract value bore to the main contract value;
(4) the Railtrack/ALSTOM contract provided the mechanism for determining the amount of the pain or gain to which that percentage would be applied.

20. Alternatively, insofar as any element [of the sub-contract "pain/gain mechanism] yet remained to be agreed, it was agreed by Jarvis' acceptance of ALSTOM's letter of 31st January 2002 as set out at paragraph 10(1) and 10(2) [of the Particulars of Claim – and as to which, see paragraph 44 below]. (TB 1/13 and 14 – with my parenthetic clarifications)

In the alternative, Alstom contends at paragraph 21 of the Particulars of Claim –

…… if (contrary to ALSTOM's case, but as has been contended by Jarvis) any element of the pain/gain mechanism remained to be agreed, this Court has full power to determine what the amount of any pain to be borne or gain to be enjoyed by Jarvis should be, applying the principle set out in Schedule B Annex B1 and the provisions of Schedule E [of the Issue 3 documents]. (TB 1/14)

with the Court's power deriving from Clause 45.3 of the Special Conditions of the Sub-Contract (see TB 4/297 – the clause itself is set out at paragraph 54 below.)

In addition to responding by disputing each of Alstom's submissions, Jarvis advances a positive case of its own. Jarvis also contends that a sub-contract was agreed in the terms of the Issue 3 documents. However, Jarvis disputes the inclusion of the pain/gain sharing term pleaded by Alstom – or the inclusion of any pain/gain sharing term. Jarvis accepts that the "pain/gain" issue was raised and considered during the course

of intermittent and protracted sub-contract negotiations, between 1999 and 2002 but, it submits, the wording of Annex E5 which formed part of Schedule E to the Issue 3 documents contains a clear statement of the then current understanding of the parties -

1.0 The Pain/Gain share shall use the basic definitions and principles described within the ITT – Section A, Binding 1, dated July 1999, Clause 61 Schedule of amendments to the Special Conditions and General Conditions.

Details of the Pain/Gain Mechanism are to be reviewed and agreed in accordance with Action number 5 from the meeting dated 23rd August 2001. Once agreed by both parties the details shall be added to the Subcontract Agreement as an amendment. (TB 4/655 – my emphasis)

and, it further submits, that no agreement on a mutually acceptable "pain/gain" sharing mechanism was reached at any time thereafter. In answer to the second limb of Alstom's primary case **viz.** that the Court has full power to determine the amount of pain to be borne or gain to be enjoyed by Jarvis, at paragraph 31 of the Defence it is said –

…… it is denied that it is necessary, reasonable or appropriate for the Court to determine what should have been agreed but was not agreed regarding any pain/gain agreement as alleged or at all. (TB 1/91)

8. Alstom's secondary case in these proceedings is this – if Jarvis is right that, as a matter of construction of the Issue 3 documents, no term was agreed for the sharing of the main contract "pain/gain", and if Jarvis is also right that the Court has no power to determine the amount of the "pain" to be borne or the amount of "gain" to be enjoyed by Jarvis then –

22. …. The sub-contract did not contain a complete or workable statement as to the sub-contract price which was and is an essential and necessary term of the sub-contract. In the premises the sub-contract is unenforceable.

23. By reason of the foregoing, Jarvis's entitlement to be paid is upon a Quantum Meruit. Alstom will contend that the reasonable price to be paid to Jarvis for their work would take into account an appropriate percentage of any pain… suffered… by Alstom under the [main contract] … .

In support of the allegation that Jarvis' entitlement is to payment upon a Quantum Meruit, Alstom relies on the following –

"(1) the fact that from September 1999 onwards Jarvis at all times agreed to the principle that it would participate in the pain/gain share agreement;
(2) the facts and matters set out at paragraph 5 to 8 [of the Particulars of Claim];
(3) the provisions of the [Issue 3 documents]…"

Under the heading "**the Tendering Agreement**", at paragraphs 5 and 6 of the Particulars of Claim, Alstom referred to certain clauses of a Tendering Agreement dated 24th September 1999. The clauses referred to were –

Clause 2.1:
"The parties agree to co-operate in the preparation and submission of the Tender and in the event of the award of a Contract to ALSTOM on terms accepted by each of the Parties in writing to perform the said Contract.
The Tender shall be binding on the Parties and shall be complete for the purposes of the Project."

("Tender" was defined by Clause 1(h) as "the tender to be submitted by ALSTOM to the Purchaser for the Project".)

Clause 5.1:
"Each Party shall be responsible for preparing the content of the Tender for its Scope of Work and for ensuring that its Scope of Work is complete in all respects for the purposes of the Tender.

The parties shall provide each other promptly with all information and assistance reasonably required for the purposes of the preparation submission and negotiation of the Tender."

Clause 6.1:
"The Parties shall discuss and agree limitations of liability and risk-sharing arrangements between themselves in respect of the performance of the Tender prior to the submission of the Tender."

And at paragraphs 7 and 8 of the Particulars of Claim, Alstom alleged that –

"7 By reason of their involvement in the preparation of the tender, Jarvis were aware that and agreed that

(1) the tender to Railtrack would include a "Pain/Gain Share" provision;

(2) by the terms of the Pain/Gain Share provision it was provided

(a) that in principle ALSTOM would be paid upon a cost reimbursable basis;

(b) but that this entitlement to be paid upon a cost reimbursable basis was subject to the following (among other) provisions:

(i) that a Target Cost was agreed (subject to certain provisions to revise that cost in certain circumstances);

(ii) that if the cost of the project fell below the Target Cost then ALSTOM would be entitled to share in the "gain" by receiving 50% of any shortfall in cost;

(iii) that if the cost of the project exceeded the Target Cost then ALSTOM would bear 50% of the "pain" of the first £500,000 of excess cost over the Target Cost; of the next £1,250,000 of excess cost, ALSTOM would bear the whole of the "pain"; and Railtrack would bear the whole of any "pain" over and above an excess of £1,750,000;

(3) that it was at all times the expectation that Jarvis would be the sub-contractor to ALSTOM responsible for the installation works and some elements of design on the project;

(4) that the tender was prepared jointly on the basis that ALSTOM and Jarvis would be "in alliance" with the understanding that ALSTOM/Jarvis sub-contract would provide for ALSTOM and Jarvis to share any "gain" enjoyed or "pain" suffered by ALSTOM under the Railtrack/ALSTOM contract.

8. As Jarvis knew, ALSTOM entered into their contract with Railtrack on the basis of the expectations and understanding set out at sub-paragraphs 7(3) and 7(4) above."

In response to this secondary case, Jarvis takes issue with the submission that the pain/gain provision was an essential part of the sub-contract. Jarvis contends that the unsigned sub-contract could work, and that it did in fact work, without it. However, if the Court were to reject that submission and to hold that the "pain/gain" provision was fundamental or central to the formation of any sub-contract between itself and Alstom, Jarvis maintains the positive case advanced in answer to Alstom's primary case (**viz**. that no agreement was reached on any pain/gain provision) and submits that, in such circumstances, no sub-contract was concluded. The result of that, in Jarvis' submission, is that it (Jarvis) is entitled to be paid a reasonable price for the work and services which it carried out at Alstom's request. When the amount of that reasonable price comes to be calculated, Jarvis submits that no account should be taken of "any failure by Alstom to comply with their main contract targets allegedly agreed with Railtrack" (see paragraph 34 of the Defence).

9. In the event, after all the main contract works had been substantially completed, Alstom accepted that there was no question of any "gain" accruing to its benefit. Railtrack contended, and Alstom accepted, that the final account should include a deduction of £1,500,000 **i.e.** the maximum "pain" that had been envisaged at the time the Main Contract was agreed was inflicted. The position as between Railtrack and Alstom was recorded in a "Contract Amendment Agreement" made in May 2003. An undated copy of that Agreement was forwarded by Alstom's solicitors to Jarvis' solicitors under cover of a letter dated 17th November 2003 (see TB8/1504 ff) and the date was given in a Response to a Request for Further Information concerning paragraph 24 of the Particulars of Claim (see TB1/34). By its terms Railtrack and Alstom agreed to amend the payment terms in the main contract in the manner therein described. Alstom agreed to accept payment in the sum of £26,750,000 or such lesser sum as should become payable in accordance with Appendix 1 to that Agreement in full and final settlement of all its entitlements in respect of the main contract works. The sum of £26,750,000 was stated to include a provisional sub-contract price of £12,750,000 for Jarvis' sub-contract works. This agreed provisional sum was made the subject of a new "pain/gain" sharing agreement between Railtrack and Alstom in the following terms –

3.2 The Parties hereby agree that [the provisional sum of £12.75m] represents the Final Guaranteed Maximum Subcontract Price payable by [Railtrack] to [Alstom] in respect of the Jarvis subcontract works.

3.3 The Parties hereby agree that in the event that the Agreed Final Subcontract Price (as between [Alstom] and Jarvis) is in an amount less than the provisional Subcontract Price the amount of difference shall be a gain shared in equal proportions between [Alstom] and [Railtrack]

3.4 The Parties hereby agree that in the event that the Agreed Final Subcontract Price (as between [Alstom] and Jarvis) is in an amount in excess of the provisional Subcontract Price the excess shall be borne solely by [Alstom]

3.5 [Alstom] shall obtain [Railtrack's] prior written consent to the amount of the proposed Agreed Final Subcontract Price. (see TB 8/1513)

The deduction of the two elements of agreed "pain", which together total £1,500,000, can be seen in the calculation which was shown as Schedule 1 to Appendix 1 of the Contract Amendment Agreement -

Final Guaranteed Maximum Price ("GMP")	£21,118,000.00
LESS 50% of P80	(£250,000.00)
Final GMP payable	£20,868,000.00
ADD sum of difference between Agreed	
Final Actual Cost and Cap on Liability	
(£23,860,000.00 - £21,118,000.00)	£ 2,742,000.00
LESS Cap amount	(£1,250,000.00)
	£22,360,000.00
ADD Fixed Fee	£ 2,573,000.00
ADD Fee on PMIs (balance)	£ 1,817,000.00
Contract Price	£26,750,000.00
(Adjustable in accordance with paragraph 3 herein)	
(see TB 8/1514 - my emphasis)	

The method or methods used to arrive at the agreed revised "Final Guaranteed Maximum Cost/Price" of £21,118,000 and the Agreed "Final Actual Cost/Price" of £23,860,000 is/are not transparent (but, in passing, I note two points – first, the agreement does not bind and cannot adversely affect Jarvis' legal rights/obligations; secondly, in the agreement it was said that Railtrack and Alstom agreed that the "Guaranteed Maximum Final Cost/Price" was deemed to be calculated in accordance with the particular conditions [of the main contract]" – see Clause 1.1 – TB8/1512). No revised "Target Cost/Price" was shown in the Contract Amendment Agreement but, when calculating its claim against Jarvis, Alstom appeared to have simply maintained the £500,000 differential and fixed on £20,618,000 as the appropriately adjusted figure.

10. In these proceedings Alstom seeks to recover from Jarvis a contribution of £839,175 towards the total "pain" of £1,500,000 which, on the face of the Contract Amendment Agreement, it has suffered. The same sum is claimed on Alstom's primary case (i.e. as a sum due under the Sub-Contract provisions for which Alstom contends) and on Alstom's secondary case (i.e. as a sum due on a Quantum Meruit). The calculation, shown at paragraph 24 of the Particulars of Claim (TB1/16), can be seen to have been developed from the figures agreed between Railtrack and Alstom. However, Jarvis' claimed entitlement to be paid £14,108,559 has been factored into the equation in place of the provisional sum of £12,750,000. In the Further Information supplied by Alstom there is an express recognition that, assuming liability is established, the sum due from Jarvis cannot be finally calculated until the value of the Sub-Contract works is agreed or ascertained.

THE DEVELOPMENT OF THE DISPUTES – ADJUDICATION – THE PRESENT PROCEEDINGS

11. In paragraph 1 above, attention is drawn to the terms of Alstom's letter dated 6th February 2002 which was written shortly after the "successful commissioning" which had allowed Railtrack to begin running services on 28th January 2002. In that letter, the "commercial issues" had been put aside. However, the commercial issues had been addressed in Alstom's letter of 31st January 2002 which had the subject heading, "pain/gain". In that letter Alstom (Mr Irvine) said –

It was always the intent of both parties to operate on a partnering basis incorporating gain/pain arrangements and to back to back these to the head contract.

The Alstom/Railtrack pain/gain sharing was first described to Jarvis by ALSTOM in December 1999. It has not changed since then, save that the Alliance gain share has now moved to a 50/50 share with Railtrack for each contractor. Pain share was always specific to ALSTOM and did not involve the Alliance Performance.

At a meeting in April 2000 ALSTOM and Jarvis agreed in principle to the pain/gain concept above, but with the parameters reduced in scale by a % which describes the relative size of the Jarvis/ALSTOM base costs (at the time this stood at 37%, which is quoted in the meeting notes). Today that ratio is ~50%, reflecting the relative growth of Jarvis scope. Later correspondence between Peter Middleton and myself revisited the same ground.

Without finalising this pain/gain mechanism, the concept of a JARVIS target cost and variation is meaningless. An obvious way forward on this issue, which is jointly agreed to be outstanding, is to ratify the original concept of sharing the proceeds of Alstom's pain/gain mechanism with RT. The benefit of this would be to negate the current situation of double negotiation and to allow us to concentrate both of our efforts on the single issue of increasing ALSTOM's target cost.

At this late stage I cannot see any alternative way of concluding the contract between us but if you have any other suggestions please advise them. I would like to convene a meeting within the next two weeks to finalise this and any other outstanding issue. (TB 8/1339 and 1340 – my emphasis)

I shall have to return to this letter, which Jarvis apparently received on 6th February 2002, when I come to consider Alstom's primary case but, for now, I simply note it as the first in the series of documents where the parties set out their respective positions and which lead up to the Adjudication and then to these proceedings.

12. After receiving Alstom's letter, Jarvis agreed to the proposed meeting. It took place on 19th February 2002. Typed minutes prepared by Jarvis and manuscript notes taken by Alstom (see TB 8/1360 to 1369) indicate that, against the background of Railtrack's stopping payments under the main contract, each party stated its very different position so far as the "pain/gain" issue was concerned. The typed Minutes contain the following section –

Resolutions of the Contract

Alstom considered that the signing of the Contract was fundamental as far as they were concerned the parties had acted on the Contract and it should therefore be signed. Jarvis agreed that both parties had acted on the Contract however there was clear evidence that there were two outstanding items these being the Pain/Gain mechanism and the resolution of certain Nexus materials.

It was Alstom's view that a 50/50 Pain/Gain mechanism was in place and that this had been implied on the basis of a Partnership arrangement between Alstom and Railtrack and step down between Alstom and Jarvis. Jarvis did not accept this and considered that the Pain/Gain mechanism was still to be agreed this had been clearly spelt out in the document to date. *Jarvis did not accept that there was any Partnership Agreement implied or otherwise. In support of this Jarvis referred to the fact that there had been originally an alliance agreement of which they are a part.*

It was Jarvis view that Alstom considered them as sub-contractors, the documentation stressed this and indeed they had been excluded from any negotiations with Railtrack in many instances at the specific insistence of Railtrack.

Jarvis considered that the Pain/Gain mechanism was always an area which had never been agreed. Mr Robson had always expressed concerns over the non-agreement of the Contract. Since his connection with the Company almost one year ago, however the only matters outstanding had been the Pain/Gain mechanism which had not agreed on the simple basis that neither Alstom nor Jarvis could agree to a clear mechanism to which a Pain/Gain Agreement could be achieved.

Jarvis considered that they would still consider a Pain/Gain mechanism to which Alstom responded that the "ball was now in Jarvis' court".

Jarvis considered that as nothing was agreed there was now no way that Alstom could either imply or impose a Pain/Gain mechanism and this would have to be to the mutual agreement of both parties.

Jarvis assessed that they would continue to increase the target cost and at which time they would be pleased to operate a Pain/Gain mechanism.

Jarvis confirmed that current target was in the region of 12.25 million which was currently 2 million pounds above the current target leaving Jarvis exposed to the tune of 2 million pounds. (TB 8/1361 and 1362 – my emphasis)

The various different manuscript notes of or relating to the meeting are consistent in showing that Jarvis positively indicated a willingness to agree to a particular pain/gain mechanism. The mechanism proposed was a comparatively simple one, namely 50:50 gain/pain sharing up to 10% of the Target Cost with Jarvis' Management Fee limited by reference to the Target Cost (see TB 8/1364, 1366 and 1368). It is clear from two of the entries that the individual who put forward that offer on behalf of Jarvis was Mr Robson (see TB 8/1366 and 1368). It was not expressly stated in the Notes themselves that the "Target Cost" which was being referred to was Jarvis' final "Target Cost/Price" but that is, in my judgment, the fair inference to be drawn. It also seems clear from the second page of one of the Alstom notes that, after considering Jarvis' offer, at that time Alstom did not wish to accept it (see TB 8/1365).

Further correspondence/discussions followed, the detail of which I do not need to describe beyond noting –

(1) that after a meeting on 12th April 2002, Jarvis sent a first Adjudication Notice to Alstom on 15th April 2002 (see TB 8/1418 to 1425). At paragraph 2 of the Notice, Jarvis contended that it had "… commenced work pursuant to a contract agreed [with Alstom]";

(2) although an adjudicator (Mr Peter Chapman) was identified and the parties agreed that any future disputes would be referred to him, the first adjudication did not proceed to a decision (see TB 8/1480). Alstom and Jarvis endeavoured to reduce the differences between them but, by the end of August 2002, matters were once again coming to a head. Jarvis considered that the value of its works was under-certified to the extent of £1,618,253.95 (see letters of 27th August 2002 and 29th August 2002 at TB 8/1430 and 1433 to 1444). In the response to Jarvis' letter of 27th August 2002, Alstom (Mr Fossey, its Commercial Director) wrote on 28th August 2002 stating (inter alia) –

"… ***We both agree that the working contract is not the ITP [instructions to proceed] but the unsigned contract.*** *This contract has no limit of liability, Jarvis will be reimbursed its costs, providing, of course, they are substantiated in accordance with the requirements of the contract…*

As you are aware, the pain/gain arrangements of the subcontract are sharing Alstom's head contract pain/gain. Although we have had some movement in the Target Cost recently, the formula still produces the maximum pain of £1.5m with a proportionate share falling to Jarvis…" (TB 8/1431 and 1432 – my emphasis)

In the letter of 29th August 2002, Jarvis (Mr Robson, its Divisional Director) dealt with each of the disputed figures, arguing its case with some particularity. This was a lengthy letter but the only part of which needs to be specifically noted is the section under the headings "General, Target Cost" which appear on its tenth and eleventh pages –

Prior to completion of the Works we repeatedly requested an update of the target cost. The following letters are a small extract of the correspondence on this subject.

Our letter dated 20 December 2001 reference 81362/ALSTOM/sj/L/1135 gave a forecast of our target cost in the sum of £12,528,140.00 and requested an urgent update. Our letter dated 8 February 2002 reference 81362/Alstom/sj/L/1180 again requested an increase in the target cost to take account of variations at that time.

In recent months we have been concentrating on providing justification and substantiation of our costs on this project. This emphasis was at your behest following our previous emphasis on providing substantiation for increasing the target cost. We acted on your assurance that we would be paid actual costs…..

Since then we have been forced to resort to formal methods to obtain payment of monies expended on this Contract. We gave formal notice of suspension on 11 February 2002 following your failure to honour the valuation certificate. This was then followed by a Notice of Adjudication on 15 April 2002 which again was as a result of your wrongful set off.

We are of the opinion that taking account of variations executed since our letter dated 8 February 2002; the target cost will now be greater that the costs expended to date.

We will therefore be re-concentrating our efforts on substantiating the amended target cost figure and will be submitting our update in the very near future. We will then be pleased to enter further negotiations regarding a pain/gain mechanism, which, as you are aware was one of the items left in abeyance in our Contract Documents. (TB 8/1442 and 1443 – my emphasis)

A few days later Mr Robson replied to Mr Fossey's letter of 28th August 2002. In his response of 2nd September 2002, Mr Robson stated (inter alia) –

…… I do not accept that we have agreed to share with you the maximum pain of £1.5m within Alstom's contract, quite the opposite, since at least August 2001, I have refused to agree to such an arrangement. Will this be your next excuse not to pay us?.....

I am currently considering all the options open to me included once again serving notice of adjudication…(TB 8/1445 and 1446)

(3) Alstom issued a Payment Certificate No. 30 dated 19th September 2002. Jarvis disputed the amounts certified in a letter dated 27th September 2002 which included the following passage under the heading "Target Cost" –

We note from your letter dated 28 August 2002, that the unsigned Contract forms the Contract between Jarvis and Alstom. This document left the question of any pain gain mechanism to be agreed between the parties.

We also note from your letter that the "Contract has no limit of liability" and that "Jarvis will be paid its costs" provided that these are in accordance with the Contract.

In such circumstances the existence of a revised Target cost it may be argued as irrelevant in the absence of an agreed pain gain mechanism. We believe that the target cost is relevant in that in demonstrates that Jarvis actual costs are reasonable.

We enclose for your attention a copy of our letter dated 2 April 2002, again which received no meaningful response from yourselves. In this letter we confirmed our assessment of the projected Target Cost was £13,255,872.00.

This sum is considerably in excess of our current application in the sum of £12,840,423.00 currently claimed in our Application 31. This excludes additional works carried out since April 2002 for which we have received no formal instructions from yourselves.

These figures can come as no surprise to you as the Target Cost was regularly updated and sent to you for comment. To date we have received no comment from you with regard to the numerous updates sent to you since the commencement of this project.

and the letter concluded with the following statement –

> *… We consider that you have not administered this Contract correctly. We have no confidence that decisions made by you will be made in a fair and reasonable manner and believe that your decisions should be reviewed by an independent third party. You should take this letter as Notice that we will be proceeding to Adjudication.* (TB 8/1455 and 1456)

In response to this letter Alstom gave notification that, in the future it would "… be applying the pain/gain formula to interim payments made to Jarvis…" (see letter dated 30th September 2002 at TB 8/1457 to 1458).

(4) on 31st October 2002, Eversheds (acting on behalf of Jarvis) sent a second Notice of Adjudication to Alstom (see TB 8/1463 to 1479 and see also 1480 to 1492 for the notification to Mr Chapman and the Railtrack Adjudication Rules). In this second Notice of Adjudication, Jarvis dealt with the sub-contract in the following way-

…5 Following a two stage tender process Jarvis commenced work in about January 2000 pursuant to a contract agreed by the parties based upon the documents set out below ("the Contract"). Although the Contract is unsigned, Alstom agreed in a letter of 28 August 2002 that the working and operative contract is the unsigned contract.

6. The Contract consists of the following documents:

6.1 The Subcontract Agreement

6.2 The General Conditions of Subcontract published in 1997 by the Institution of Chemical Engineers, which may be modified or supplemented by any Subcontract's Special Conditions in Schedule B

6.3 The Subcontract Specification…..

6.4 The following Schedules:
Schedule A: *Main Contract particulars (which may include Special Conditions)*
Schedule B: Subcontract Special Conditions (if any) applicable to the Subcontract
Schedule C: Description of Subcontract Works
Schedule D: Site facilities, materials, services and other things to be supplied by the Contractor. Access to Site.

Schedule E: Price Rates and Charges.
Schedule F: Terms of payment
Schedule G: Times for completion
Schedule H: Documentation for approval
Schedule I: Take-over procedures
Schedule J: Performance tests and procedures
Schedule K: Liquidated damages:
(i) lateness in completion;
(ii) shortfalls an performance
Schedule L: Final documentation and manuals
Schedule M: Quality assurance system
Schedule N: Limitations on Sub-Subcontracting

7. By Clause 45.1 of the Contract, as amended, any party to the Contract can refer a dispute or difference (other than a matter as to which a decision is provided by the Contract to be final and conclusive) to adjudication in accordance with the Housing Grants, Construction and Regeneration Act 1996 and any adjudication shall be undertaken in accordance with the Railtrack PLC Adjudication Rules (March 1998 Edition v.1) ('the Railtrack Application Rules' a copy of which is supplied with this Notice)…… (TB 8/1465 and 1466)

(5) Alstom issued a Payment Certificate No. 31 dated 1st November 2002 which showed a deduction of £750,000 against the side heading "Jarvis Pain/Gain Share" and it also showed an additional contra-charge in the sum of £81,000. The certificate indicated on its face an overpayment to Jarvis of £733,245.53 (see TB 8/1494). The legitimacy of these deductions was challenged by Jarvis in its letter of 5th November 2002 (see TB 8/1497 and 1498).

13. The second adjudication progressed to a conclusion. At hearings which Mr Chapman convened, the parties were represented by the same Counsel who now appear before this Court. Mr Chapman gave a reasoned decision on 18th December 2002. In that decision, he dealt with what he called "the Pain/Gain issue" in the following way –

It is *beyond doubt – and not in contention – that the notion of a pain/ gain share was in the contemplation of the parties at the time when Alstom and Jarvis embarked upon discussions that finally resulted in the Contract being.* ***For a 'notion' to become a contractual term upon which significant liabilities may rely, a degree of certainty as to the operation and extent that I do not find present in the Contract as formed between the parties. To my mind, the parties were still negotiating the precise terms of the pain/gain arrangements at the time the Contract was formed and these negotiations were never concluded*** *– I suspect because it became evident to the parties that in reality it would at best be a pain/pain arrangement.*

At the second hearing, I was taken to numerous documents by Counsel from which I was to be asked to determine when the Sub-Contract was formed. As the Editors of Chitty Ed 28 point out, the exact time of the formation of a contract that is the subject of progressive negotiations is often difficult to determine. However, in this case, I am relatively confident in finding that the document sent to Jarvis and dated 30th August 2001 was the final agreement between the parties governing their commercial relationships in connection with the Sunderland Metro Project. The date of this document, i.e. 30th August 2001, is in my opinion, the date when sufficient certainty did exist as to the terms and conditions to which the parties were obliged to comply. All essential terms were expressed with sufficient clarity. ***I consider Mr Bowdery's equating of a pain/gain mechanism to a 'bonus' payment or a LAD provision to be compelling and I find that such a matter is a non-essential term and not fatal to the Contract formation if it is missing from the agreement.*** *The document issue was instigated by Alstom on or around the 30th August 2001 and constitutes the Alstom offer. Jarvis accepted this offer by its continued performance of the Contract.*

The Contract document*, which the parties agreed was a complete statement of the contractual rights and liabilities of the parties (Subcontract Agreement recital B),* ***when read objectively and plainly, does not indicate that there was agreement as to the precise terms of any pain/gain sharing agreement between the parties. The words expressed in Schedule E5 were no more than an agreement to agree and, as such, are of no contractual consequence. The deletion of certain words from the original text of Schedule E5 is telling as to what the parties had agreed was not their common intent.*** *The argument that the deletion was merely because the contract value proportions had changed from since 1999 did not sway my opinion as it would have been the simplest of*

amendments to change the ratio from 37% to a greater figure had this really been the intent of the parties. No additional words would have been required.

As for the ITP's, I do not consider detailed analysis of their status is necessary. Put simply, they were no more than interim and discrete agreements that limited Jarvis' expenditure pending the next ITP and the finalisation of the Contract proper and at that finalisation all ITP's ceased to have any significance.

*I am not persuaded by the argument for implied term as put forward by Alstom. For a term to be implied it has to fulfil a number of rules as set out in the judgment of the Privy Council i**n BP Refinery (Westernport) Pty Ltd v. Shire of Hastings [**1978] 52 ALJR 2. I find that these pre-conditions do not all exist in the present case, for example, I do not believe the implied term argued for is 'so obvious that it goes without saying'.*

Consequently, in my judgment there was no pain/gain agreement contained within the Contract upon which Alstom could rely upon to deduct sums from the Jarvis Applications.

Having reached this decision, I need not concern myself further about the validity or invalidity of Certificate 31 and the timing of its issue. (TB 11/1124 to 1125 – my emphasis)

As Mr ter Haar QC (who appears for Alstom) acknowledged, that although these proceedings are not formally appeal from Mr Chapman's decision, they are "in effect an appeal in reality" (see Transcript, Day 1, page 5, line 3). Whilst Mr ter Haar submitted that Mr Chapman had reached wrong conclusions for wrong reasons, Mr Bowdery QC (who appears for Jarvis and whose submissions Mr Chapman appears to have accepted) submitted that the Court would find it "difficult to improve upon the analysis provided by [Mr] Chapman".

14. The present proceedings were issued on 29th July 2003. The trial date of 23rd February 2004 was fixed at a Case Management Conference on 11th September 2003 when it was estimated that 8 days would be needed to deal with all issues. By the time of a Pre-Trial Review which was held on 6th February 2004, the parties had come to consider that it would be better to address liability issues only at the forthcoming hearing and the time estimate was reduced to 4 days. At that time, both parties envisaged that the witnesses, whose statements had already been served, would be called to give evidence. Alstom had submitted two signed witness statements, one from Mr Blakemore dated 20th January 2004 and one from Mr Irvine dated 16th January 2004. Jarvis had submitted one signed witness statement, from Mr Robson dated 16th January 2004. However, by the time that he came to open the case, Mr ter Haar had concluded that no witness evidence was necessary (see Transcript, Day 1 at pages 6 to 10). The admissibility of evidence was debated a little later in the day (see Transcript, Day 1 at pages 79 to 93). During that debate Mr ter Haar confirmed that, having heard what Mr Bowdery had had to say and thought further about the position over the short adjournment, Alstom did not intend to call any evidence. However, Mr Bowdery maintained his submission that there were certain issues in relation to which evidence was properly admissible and, in due course, Mr Robson was called. Approximately two thirds of the second day of the hearing was taken up with cross-examination and re-examination of Mr Robson. I had indicated during the course of the debate on Day 1 that, insofar as Mr Robson was used as a vehicle to introduce contemporary documentation that had passed between or was common to the parties, it did not seem to me that his evidence was likely to be of assistance (see Transcript, Day 1, page 84). Having read his witness statement and heard his answers in both cross-examination and re-examination, my views in that respect have been amply reinforced. However, in a number of other respects, where Mr Robson gave direct evidence concerning matters with which he had been personally involved after he joined Jarvis in January 2001, his evidence, which I accept, was of assistance.

(1) Mr *Robson explained that shortly after he joined Jarvis he was briefed about the project. He was advised that draft sub-contract documents had been received under cover of Alstom's Mr Blakemore's letter 14th December 2000 (see paragraph 27 below). The difference of view between Alstom and Jarvis concerning the type of pain/gain mechanism to be included as part of the proposed sub-contract was explained to him and, in particular, the Jarvis position was explained to him in the way that he summarised it at paragraph 17 of his witness statement –*

…… the Jarvis position on the incorporation of pain/gain into the sub-contract agreement was very clear to me:

- *Jarvis had agreed in principle on a pain/gain mechanism;*
- *Jarvis had not accepted Alstom's proposals on how this mechanism was to operate or be implemented; and*

- *Any proposed pain/gain mechanism should be inextricably* linked to the value of Jarvis' work. (TB 1/228)

As a result of the briefing(s) he received, Mr Robson understood that although the Sub-Contract Agreement had not been signed, Alstom and Jarvis were:

"working to the unsigned Sub-Contract [with] for example, the applications for payment and certificates… being issued in accordance with the unsigned sub-contract". (see paragraph 22 at TB 1/229)

(2) Mr Robson attended a meeting on 20th March 2001, the object of which was to review the then outstanding sub-contract matters and to provide an agreed programme to conclude the sub-contract. A document entitled "Notes/Action from meeting…" was prepared by Alstom and circulated on 22nd March 2001 (see TB 7/768 to 771 – see the citation at paragraph 30 below). An updated version of the document was prepared by Alstom and circulated on 30th April 2001 (see TB 7/818 to 823 – also cited at paragraph 30 below). At paragraph 28 of his witness statement, Mr Robson said of the meeting on 20th March 2001 –

I recall that at the meeting on 20 March 2001 Alstom was specifically asked to explain the arrangement as regards the pain/gain mechanism that was in place between Alstom and Railtrack, and Alstom's proposal as to how a pain/gain mechanism should operate as between Alstom and Jarvis. They were not able to do so. This is why the notes of the meeting….. indicate that further information on this issue was required from Alstom …….. (TB 1/230)

and, after referring to the Notes of that meeting and the notes of a Railtrack/Alstom meeting which took place on 28th March 2001 (again cited at paragraph 30 below), he said at paragraph 32 of his witness statement –

Alstom were uncertain about the arrangement they had with Railtrack, and therefore were not able to put any proposals to Jarvis [during the period March through June 2001]. (TB 1/231)

(3) *Dealing with the position following the publication of Mr Chapman's adjudication decision, Mr Robson stated at paragraph 56 of his witness statement, that Alstom had not made any deduction for "pain" but a substantial sum remained in dispute. Jarvis had made application for further sums but these had not been certified by Alstom (see TB 1/237).*

(4) Mr Robson explained the very simple pain/gain mechanism which Jarvis proposed in the course of discussions with Alstom ***viz.*** *50:50 on pain and gain measured against the "Target Cost/Price" and he put this into the overall context of the ongoing discussions between Railtrack and Alstom (see Transcript, Day 2, page 83 to 90 and 130). Mr ter Haar attacked the accuracy of this part of Mr Robson's evidence but, subject to the one caveat which I mention below, I accept what he said. In this regard, two particular points should be noted. First, on two occasions Mr Robson referred to his having written a letter to Mr Irvine (see page 84, lines 19 to 23 and page 90, lines 3 to 9). No bundle reference was give for this letter during his evidence (or later), and I am not aware of seeing it at any time. It is possible that such a letter was written or it is possible that Mr Robson was mistaken in his recollection that Jarvis put forward its suggested pain/gain mechanism in a letter. That brings me to the second point, subject to an apparent inconsistency between earlier and later answers as to whether Jarvis had proposed unlimited or limit pain sharing, the substance of Mr Robson's evidence concerning the pain/gain mechanism suggested in discussions with Alstom is amply supported by the various (Alstom) manuscript notes of the meeting on 19th February 2002 to which I have already referred (see paragraph 12 above). In those circumstances, in my judgment, it matters little if he was mistaken in thinking that this had been specifically addressed in a letter – the fact is, it was addressed in the way that Mr Robson said - albeit, he did not give details of the proposed pain cap – merely saying that "pain would be capped at a certain level" (see page 90, line 8).*

(5) Mr Robson explained that Jarvis was always confident that it could earn "gain" against "[its] own target costs" and that "right up until the Summer of 2001 Alstom [was] trying to convince [Jarvis] that [it was] into a gain situation" (see Transcript, Day 2, page 110).

(6) Mr Robson accepted that the suggestion made by Alstom, in the latter part of 2001, to abandon any "pain/gain" provision in the Sub-Contract was contingent on an agreement being reached with Railtrack to remove pain/gain from the main contract (see Transcript, Day 2, pages 137 to 140).

(7) Mr Robson accepted, as any commercial man in the industry would be bound to recognise, that:

"there is a world of difference commercially... between a pure cost reimbursable contract without any form of target cost or pain/gain arrangement, and a cost reimbursable contract which has an incentivisation mechanism built into it."

However, he did not accept that this was a case where there had been a fully reimbursable contract (see Transcript, Day 2, pages 141 and 142).

15. In Mr ter Haar's submission, when considering each of the limbs of Alstom's primary case, the only relevant/admissible documents are the Issue 3 documents which were submitted to Jarvis under cover of the letter dated 30th August 2001 (TB 7/1042 and 1043, TB 3 and TB 4) and the tender documents which Jarvis submitted to Alstom under cover of its letter dated 24th September 1999 (see TB 4/332 and TB 2A). Criticism was made of Mr Bowdery's wish to rely on other contemporary documents to be found in chronological bundles. Although I was given various different bundle references from time to time during the course of the case, in an attempt to differentiate clearly between documents which are agreed to be admissible and those where admissibility is in issue, I have endeavoured to refer to the copies in Trial Bundle 3 or Trial Bundle 4, rather than the copies in the chronological bundles, whenever admissibility is not in issue because an earlier document was included in Annex B1 of the Issue 3 documents.

THE FACTS

16. In the summer of 1999 when Alstom was minded to tender for the Sunderland Direct Project which Railtrack wished to let. Contact was made with Jarvis, the local rail infrastructure maintainer. In the early stages of tender preparation, there appears to have been some uncertainty as to the nature of the commercial relationship which might be created between Alstom and Jarvis for the purposes of the proposed work but this was quickly resolved. It was resolved prior to 24th September 1999 when Jarvis submitted its formal tender to Alstom (see paragraph 18 below). It seems that Railtrack had made it clear that any contract it awarded would be awarded to Alstom. The Amended draft of the Tendering Agreement, which was one of the documents Jarvis submitted to Alstom on 24th September 1999, referred to the parties' wish "…. to co-operate in the preparation, submission and negotiation of the tender for the Project" (Recital C). Furthermore, if Alstom was to be awarded the contract for the Project "on terms acceptable to both parties", it was said that "the parties wish to co-operate in the performance of the Contract" (Recital D – see TB2A/6). There is no doubt that Jarvis did in fact assist Alstom in the preparation of its tender by submitting "exclusive prices" for those parts of the works that they intended Jarvis to undertake if the tender was accepted (see TB 4/313).

17. By a letter dated 17th September 1999 Jarvis' Commercial Director Rail Projects (Mr Middleton) wrote to Alstom's Sub-Contract Manager (Mr Blakemore) in these terms-

We write with reference to your telephone conversation with our Mr Mick Martin earlier today.

We hereby agree in principle to develop and negotiate with yourselves the works contemplated on a partnering basis, which will incorporate a mechanism for "pain/gain" share arrangement.

This will be achieved by establishing cost rates for services provided to which a fee for overheads and profit will be applied. (TB 4/330 – my emphasis)

and by a letter dated 23rd September 1999 Jarvis' Operations Director Rail Projects (Mr Murdoch) wrote to Alstom's Mr Blakemore in these terms –

Following on from our meeting of Tuesday 21st September 1999, we have addressed those actions presented to us, and respond as follows:-

1) As requested, we have reviewed our rates in respect of plant, transport, portakabins, etc. This further investigation has only confirmed our comments at the meeting, that the rates are competitive, and are consistent with those negotiated with Railtrack, and as currently applied against the Level Crossing Partnership Contract, which is operated on an "auditable" open book basis. We are therefore unable to offer any reductions against these elements of our price.

2) I have discussed at length with our Commercial Director, your proposal for Jarvis to accept a subcontract, incorporating a pain/gain share payment structure. The proposal being that the Jarvis share of any pain or gain would be a product of the Jarvis subcontract price, expressed as percentage of the main contract price, which currently stands at approximately 40%.

I can confirm that we would be prepared to accept this proposal in principle, subject to agreeing a mutually acceptable mechanism for its administration and application.

I trust that we have interpreted your requirements correctly, however, should you require any further information or clarification, please do not hesitate to contact me. (TB 4/331 – my emphasis)

18. Under cover of a letter dated 24th September 1999, Jarvis' Mr Middleton put forward its formal tender to Alstom in the sum of just over £8.5m. This letter read –

We are writing in response to your request for Signalling and Telecommunications works at the above project. This letter and the documents herein form the basis of or offer to yourselves:-

Section 1 - Tender Agreement.

Section 2 - Itemised breakdown of our scope of works including material supply lists for telecomm and level crossings that are included within our offer.

Section 3 - The completed Contract Price Analysis for Pelaw to South Hylton and for Pelaw to Leamside. The prices within the CPA and our preliminaries build up are inclusive of 14.5% management fee and a further 0.75% to cover insurance's.

Section 4 - The completed Jarvis risk register, costed at optimistic, most likely and pessimistic.

Section 5 - A full and completed breakdown of Jarvis allowance for Project Management Site Establishment and Construction Plant.

Section 6 – A contract programme for the signalling works that reflects the outputs used in the production of our prices.

Section 7 – A description of the proposed methodology for performing the signalling and telecommunication work.

Section 8 – Completed Forms C and H sections of the tender evaluation data.

Section 9 – Jarvis Safety Case Information.

In acknowledging that Alstom's main contract conditions are based upon I Chem E Model form of Conditions of Contract for Process Plant, 1992 (Green Book), our subcontract tender is therefore based upon I Chem E Model form of Conditions of Subcontract, for Process Plant, Second Edition (Yellow Book).

Prior to award of contract we will need to agree mutually acceptable amendments to accommodate the details and scope of our subcontract.

However, for the avoidance of doubt, we would confirm the following:

- *All design and works undertaken by Jarvis shall be on the basis of reasonable skill, care and diligence*
- *Jarvis shall not be liable for any indirect, consequential or un-insurable losses, howsoever arising*
- *Jarvis' liability in respect of liquidated and ascertained damages shall be limited to no more than 7.5% of the Jarvis contract price.*
- *Our current risk register is exclusive of monetary allowance relating the following contractual and commercial risks, such items are deemed included by yourselves:-*
- *Monies not recoverable by insurance*
- *Terms of Payment*
- *Cap on liquidated damages*
- *We would like further clarification on your position relating to "scope creep", for our risk register items, we have regarded all scope creep items as sub-contractor generated changes that are developed during the course of the works to deliver the project. All Employer/Client imposed changes howsoever caused shall be considered as a variation and reimbursed accordingly, (ie. cost plus the appropriate management fee).*

We understand that you would like further dialogue relating to a "pain share gain share" agreement, we agree in principle with this idea based on the following understanding:-

1. Our Management fee is considered fixed against the scope of works defined in this document.

2. Any additional costs incurred against the risk register shall be reimbursed at our rates plus the appropriate management fee.

3. All scope creep or variation items shall be reimbursed at our rates plus the appropriate management fee.

4. The apportionment of risk and gain shall in principle be inextricably linked to the value of our works. This is subject to performance parameters being in place to protect each party's interests.

Our price for carrying out these works is £8,583,938.14 (Eight Million, Five Hundred and Eighty Three Thousand, Nine Hundred and Thirty Eight Pounds and Fourteen Pence) exc, VAT and exclusive of risk register costs (see section 4).

Whilst writing we would also like to confirm that a further 2.5% discount would be offered off both our Overhead Line Price and our Signalling Price if we were successful in securing both packages with Alstom.

We do hope we have interpreted your requirements correctly, in the meantime if you require any further information, please do not hesitate to contract the writer. (TB 4/332 to 334 – my emphasis)

To my mind, a difference between Mr Middleton's views on the pain/gain issue as they were expressed in the formal tender and Mr Murdoch's views in his letter dated 23rd September 1999 is obvious. I do not accept Mr ter Haar's submission that the two letters can be read consistently on the basis that it is inherently unlikely that Mr Middleton would put forward something different from that which his superior had proposed on the previous day. In my judgment, that is exactly what he did and it was he, not Mr Murdoch, who played a prominent role in the negotiations which took place over the months and years which followed.

19. It appears that Alstom submitted a tender to Railtrack on or about 30th September 1999. The "Partnership" theme to which Mr Middleton had referred in his letter of 17th September 1999 was espoused by Alstom in the tender (see TB 2/12, 13, 17 and 200). When addressing the commercial issue of "damages, losses and liabilities", Alstom stated that it wished to discuss and limit total liability. It was suggested that such a limitation would minimise cost and that Alstom felt –

… that in an alliance, the pain/gain models will provide sufficient stimulus for timely completion and any onerous additional safe guards will only result in additional costs. (TB 2/200)

It should, perhaps, also be noted that the Risk Register which Jarvis had submitted, as Section 4 of its tender, was subsumed into the overall Alstom Risk Register. It was the April 2001 revision of this overall main contract Risk Register which, in due course, was included in the Issue 3 documents (see Annex E4, TB 4/643 ff).

A meeting was fixed for 6th October 1999 to review tender progress and to consider (inter alia) contractual matters including "how we work the pain/gain share that [Railtrack] want [including liquidated damages]" (see TB 5/61). Manuscript notes of that meeting, which appear to be Alstom's notes (see TB 5/62 to 64), record very clearly the essential difference of view on the pain/gain issue –

JARVIS – Gain/Pain – limited to works under <u>their</u> control (run their own A/C)

…

Alstom want pain/gain on <u>overall</u> project – not as per Jarvis' share (see TB 5/63 and 64)

The formal notes which Alstom prepared and which were issued on 12th October 1999 (see TB 5/77 to 80) expressed the matter in terms which were perhaps less direct –

ALSTOM expressed the need for Jarvis to be have the same mutual objectives as ALSTOM, supported by the right contract arrangements. ***ALSTOM believe that the best arrangement is for Jarvis to share pain/gain/liabilities in the ratio of the contract values. Jarvis were concerned that they lacked control outside of their contract, and felt a Jarvis specific incentivisation model could be created.*** *ALSTOM explained the likely participation through the steering group, and the difficulties that further (currently 6 models in play) cost models would create. Jarvis are to reconsider.*

It was mutually agreed to explore whether there are better contract formats (currently I Chem E Yellow Book), more suited to a partnering type subcontract.

The contract negotiations are to be concluded. (TB 5/78 and 79 – my emphasis)

20. As had been envisaged in the Amended draft Tendering Agreement, Alstom and Jarvis co-operated with one another during the post-tender negotiations with Railtrack. Various documents which evidence that co-operation were included in Annex A1 of Schedule A to the Main Contract Conditions (see TB 3/55 ff) and many of these were also later included in Annex B1 of Schedule B in the Issue 3 documents (see TB 4/305 ff). I draw specific attention to the minuted discussion of the relationship between Alstom and Jarvis at the meeting with Railtrack on 17th November 1999 when both Alstom and Jarvis were in attendance. The material part of the minute (prepared by Faithful and Gould) reads –

Q. Actual costs of sub-contractors and affiliates will be reimbursed whether working on site or elsewhere?

A. Discussion followed as to the relationship between Alstom and Jarvis. They are partners but formally sub-contractors and have avoided putting mark ups on which would normally [be] 10 – 15% which is a big saving ……. (TB 3/187 and 188)

I have also drawn specific attention to the Agreement of Outstanding Tender Issues dated 13th December 1999 which Alstom sent to Jarvis on 17th December 1999, earlier in this Judgment. It was sent in order that it could be discussed at the next planned meeting (see TB 3/205 to 211 and TB 4/414 to 421 – the date of "17/11/99" stated on the fax cover sheet at page 414 was obviously erroneous).

21. Alstom and Jarvis met on 21st December 1999. The document entitled "Notes/Actions from [that meeting]" (TB 4/427 to 429) records that Alstom expected to receive a Letter of Intent from Railtrack before 24th December 1999. The expected letter was to instruct the Sunderland Direct Project, excluding the work referred to as "Leamside". Provision was to be made for the "seamless" introduction of the Leamside work during the implementation of the Project. Jarvis wished to receive a "letter to proceed" from Alstom prior to intended mobilisation on 10th January 2000. The numbered action points included –

ACTION 5: Gain/Pain model Jarvis – 10.01.00

Jarvis to confirm that they accept the model as advised

by Jim Musker by e-mail dated 23.12.99. (TB 4/428)

The e-mail itself was not included in Annex B1 of the Issue 3 documents but the spreadsheet which was attached was included (see TB 5/274 and 275; TB4/436). The pain/gain model was shown on the spreadsheet under the heading "Summary" –

	Leamside	Sunderland Direct
Alstom / RT Contract	11,003,114	7,354,317
Alstom Man Fee	2,572,611	1,464,975
Jarvis %	0.347	0.458
Jarvis Risk at P50		472,887
197,648		
Jarvis Target Price	4,460,084	3,623,638
Jarvis Risk at P80		173,275
20,284		
Jarvis GMP	4,633,358	3,848,023
Pain Gap Leve	5,083,455	TBA

On 4th January 2000 Jarvis (Mr Farmer) was addressing the matters which had been raised at the meeting on 21st December 1999. In an e-mail he asked Alstom to forward (inter alia), "Synopsis of Model Particulars for Alstom pain/gain share", ending his e-mail with an apology if anything he was requesting had already been sent (see TB 4/430). Apparently, the main matter which Mr Farmer was addressing at that time was the division of Jarvis' price between the Sunderland Direct Works and the Leamside Works (see TB 4/430 to 435). There is nothing in the documents later included in Annex B1 of the Issue 3 documents which would suggest that Jarvis did in fact positively confirm acceptance of the gain/pain model, which Mr Musker had forwarded, by 10th January 2000 or at all. In my judgment, the fair inference to be drawn is that the model was received by Jarvis; that Jarvis noted it as Alstom's current proposal; and that no comment on it was sent back to Alstom.

22. The works got underway in January 2000. Alstom issued an authorisation [or instruction] to proceed ("ITP") dated 17th January 2000 which authorised expenditure to a limit of £200,000. This first ITP included a

statement that the intention was to have a contract in place by 4th February 2000 (TB 4/438 and 439). Jarvis acknowledged the authorisation on 26th January 2000, making a number of comments on its terms (TB 4/440 to 447). So far as the date for having a contract in place was concerned, Jarvis said "acknowledged, subject to the timely resolution of actions arising from this letter". The main contract documents were signed in February 2000 but discussions continued between Alstom and Jarvis concerning their commercial relationship. Some degree of mutual irritation or slight tension is apparent in the documents which were exchanged in April 2000 (see TB 4/451 to 483) but, only two points of possible relevance to the matters now in dispute need be noted. First, the Jarvis team was engaged in calculating the "cost/price" which it intended to put forward to Alstom as the "target cost/price" to be agreed for its portion of the works (see, **e.g.** TB 4/460 and 462). Secondly, when Jarvis put forward its proposed "target/cost price" on 27th April 2000, concern was expressed "… with regard to the pain/gain share agreement ……" (see TB 4/472). The specific comments that were made were –

Jarvis have reviewed the pain/gain share model enclosed with the Alstom letter dated the 2nd February 2000. It appears to us that the model is still to be finalised.

The model appears to be very complex and therefore we have reservations with regard to the actual operation of the model. Jarvis would like for a working model demonstration to be issued using "best" and "worst" case scenarios and theoretical figures/calculations. This process should then remove any doubt as to the precise mechanism/working and implementation of the model. In addition, ***the model appears to only address the pain/gain share with respect to the main contractor(s) relationship with Railtrack and not sub-contractors of the main contractor(s)****.*

We must, therefore, inform Alstom that we reserve our position on this matter and standby on our previous comments that any pain/gain share should be based purely on those parts of the project that are directly in our control. (TB 4/480 – my emphasis)

Alstom's letter dated 2nd February 2000 was not included in Annex B1 in Issue 3 of the draft sub-contract documents. It is included in the chronological bundles (TB 5/345 to 376). The enclosed pain/gain share model was the earlier version of Mr Irvine's internal note (see TB 5/358 and 359).

23. A meeting was held on 3rd May 2000 at which the outstanding commercial issues were discussed between Alstom and Jarvis (see TB 4/484 to 486). The minutes of that meeting include at Item 3, under the heading "Gain/Pain" –

- ***Jarvis are in agreement in principle***
- ***Proposal: Jarvis = ALSTOM x 6***

  Gain/Pain Gain/Pain 17
- *Based on ratio of contract values (37%) as at 28 April 2000*
- *Jarvis to respond by 5 May 00* (TB4/485 – my emphasis)

There is nothing in the documents later included in Annex B1 of the Issue 3 documents which would suggest that Jarvis did in fact respond to Alstom's proposal by 5th May 2000 or at all. In my judgment, the first bullet point indicates that there had been agreement in principle that the sub-contract would have a term dealing in some way with the gain/pain issue but the second bullet point is to be read disjunctively. In other words, Alstom made a specific proposal but Jarvis did not signify its agreement to that proposal. Jarvis was to go away and consider the specific proposal, responding to it within the next two days. The minutes of the meeting were not produced until 10th May 2000, some five days after the response had apparently been expected. In my judgment, the fair inference to be drawn, assuming in Alstom's favour that the minute taker had not misunderstood what was said in regard to a response, is that no response or no formal response was made by Jarvis. Furthermore, for whatever reason, at the time Alstom did not follow upon the specific proposal with Jarvis in order to extract a positive response.

24. On 15th May 2000 Alstom sent to Mr Beavis of Jarvis copies of documents which related to the proposed "Alliance Gainshare and Charter" which had been discussed between Alliance members and which, if agreed, were to be "taken" to Railtrack. This document related only to possible "gain" sharing arrangements. (Its contents were not the subject to any detailed scrutiny at the trial but, on reading it, it is not immediately apparent how the proposals fit in with there being already finalised main contract terms.) Alstom invited

Jarvis' comments by 18th May 2000 (see TB 6/495 to 500) and, from the observations made by Mr Beavis in his project manager's reports for the period to 30th May 2000, it would seem that Jarvis informed Alstom that "the proposals as at 15th May 2000 [were] acceptable" (see TB 6/532 and 536). On 22nd May 2000 Alstom sent Jarvis copies of its observations on those proposals and the summary of all the responses (see TB 6/516 to 518, 520 to 526). On 8th June 2000 Alstom sent to Jarvis a second ITP, increasing the limit on expenditure from £200,000 to £700,000 (see TB 4/487 and 488).

25. Over the summer of 2000 there were discussions between Railtrack and Alstom/ Jarvis concerning proposed revisions to the "target cost/price" (see TB 6/539 to 621). The details of the discussions do not matter but the record shows that Alstom and Jarvis were co-operating in the exercise (see, **e.g.** TB 4/489 and 490) and that they were agreed that no sub-contract agreement would to be made until after the revised "target/cost price" had been set (see TB 6/600 and 601). Updated Alstom and Jarvis "base price compilations" were forwarded to Railtrack on 18th September 2000 (see TB4/491 to 520; Jarvis' figures can be seen at page 497 onwards; its revised "target cost/price" was £6,840,128 as shown at page 498).

26. On 6th October 2000 Alstom sent to Jarvis a third ITP. This was said to supersede the second ITP which had been issued on 8th June 2000 (see TB 4/523 to 525). This third ITP increased the limit on expenditure to £2,400,000. At paragraph 3 of that ITP it was said –

Matters to be resolved prior to finalising the Contract between us.
Agreement of target cost and risk register.
Final Issue Signature of Subcontract Agreement.
Once these matters are agreed it is ALSTOM's …….. intention that they will be contained in the Contract (TB 4/524)

27. There were ongoing discussions/exchanges concerning a proposed Sub-Contract agreement leading up to Alstom sending out draft Sub-Contract documents on 14th December 2000 (see RB 6/687 to 688). These documents included an Annex E5 to Schedule E in the terms cited below. During the course of those discussions/exchanges, in an e-mail of 10th November 2000 (see TB 6/664), sent after a meeting held on 8th November 2000, Mr Middleton stated that he considered "[Alstom's] final proposal/position [on the pain/gain issue] remained unclear". On 11th December 2000 Alstom's Mr Blakemore stated that he was awaiting (inter alia) pain/gain information (see TB 6/681). On 12th December 2000 he sent an internal e-mail to the project manager (Mr Musker) which read –

Subject: Jarvis Scope and Target Price

Jim,
David Wood has advised me that we do not have an agreed target price with [Railtrack].
I am about to use the £6,480,128.96 agreed figure with Jarvis in the subcontract and will require a requisition to support this figure in addition to the last one raised by the ITP up to the value £2.4m.
Please confirm that I can go ahead with this figure and therefore send a requisition for £6,480,128.96 stating clearly on the requisition that it replaces previous requisitions issued (please list the requisition numbers).
I propose that I suggest the following gain/pain mechanism which is based on the agreement obtained at the meeting between [Alstom] and Jarvis on the 3.5.00 in York:-

Jarvis = ALSTOM x 6

Gain / Pain Gain / Pain 17

Based on a ratio of contract values (37%) as at 28 April 2000.

Please see the attached schedule E annex E5:-

Do you agree with the above schedule. I know it has flaws in terms of our Pain Gain, however, please suggest any acceptable alternative?

(TB 6/682)

The attached Annex E5 to Schedule E of the proposed draft Sub-Contract documentation read –

Gain / Pain Mechanism

1.0 The Gain / Pain share shall use the basic definitions and principles described within the ITT – Section A, Binding 1, dated July 1999, Clause 61 Schedule of amendments to the Special Conditions and General Conditions.

2.0 The allocation of the Gain / Pain Share between the Contractor and Subcontractor shall be based on the principles agreed during the meeting dated 3rd May 2000, between the Contractor and the Subcontractor in York (see Annex B1 – Post Tender Amendments between the Contractor and the Subcontractor item 35).

Jarvis = ALSTOM x 6

Gain / Pain Gain / Pain 17

(Based on a ratio of contract values (37%) as at 28 April 2000.)

3.0 The gain shall be paid where the Agreed Final Actual Cost is less than the Agreed Final Target Price subject to 5.0 below.

4.0 Where the Agreed Final Actual Cost exceed the Agreed Final Target Price but is less than the Agreed Final Maximum Price, the excess shall be shared by the same percentages as detailed in 2.0 above.

5.0 The full amount of any gain shall be released in full providing Completion on time has been achieved (21st September 2001).

Should completion be up to one month late (1st October 2001) then any gain shall be reduced by one third.

Should completion be up to two months late (1st November 2001) then any gain shall be reduced by two thirds.

Should completion be over two months late then no gain shall be paid.

6.0 In summary, the Subcontractor shall be entitled to a share of any gain or excess in accordance with the formula set out in 2.0 above, providing the same position applies to the Contractor in the contract with the Employer. (TB 6/684 and 685)

and, on 14th December 2000 it was Mr Blakemore who signed the letter under cover of which the draft Sub-Contract documents were sent out (TB 6/687 and 688). He referred in that letter to the "pain/gain mechanism **proposal** … contained in Annex E5". (my emphasis) He asked Jarvis to review and confirm its acceptance of the document by return.

28. Although none of the documents to which I have referred in paragraph 27 above were included in the Issue 3 documents when they were sent out in August 2001, Jarvis' response to Alstom's letter of 14th December 2000 was included. The response came in a letter dated 11th January 2001 where Jarvis' Commercial Director (Mr Middleton) wrote -

You are aware that we have a number of queries on this document as outlined in the meeting in our York Office yesterday, we understand you are considering such matters and look forward to receiving your comments in due course.

In the meantime we attach a duly authorised copy of your facsimile dated 6th October 2000, which can now be included in the aforementioned Sub-Contract Agreement.

Should you have any further queries please do not hesitate in contacting the undersigned. (TB 4/526)

The areas of debate at the meeting held in Jarvis' York office on 10th January 2001 are apparent from the e-mail which Mr Blakemore sent to Mr Middleton on 12th January 2001 (see TB 6/698 and 699). He dealt with the pain/gain issue at item 7 as follows –

7. Pain / Gain percentage on [Jarvis] S/C only – Additional wording has been inserted in Annex E5 as follows:

at the end of clause 2, insert – "The allocation shall apply to the Subcontract only between the Subcontractor and the Contractor and shall be based on the agreed final Target Cost". (TB 6/698-9 – my emphasis)

Jarvis' "main comments" on the wording of the draft Sub-Contract documents were sent by Mr Jackson (Jarvis' site commercial manager) to Mr Blakemore on 31st January 2001 (see TB 6/718 and 719 – and see 716 for the pie charts). He dealt with the proposed "Schedule E5 Pain Gain Mechanism" by stating -

After the allocation relationship 2.0 we need to add in "The overall Alliance Pain/Gain is as detailed on the attached Pie Charts as agreed at the Alliance Board Meeting dated 11/9/00" … I have a copy of this at site, however it is in colour Barry Blakemore also has a copy dated 11/9/00. I have asked David Wood to send it to you and me. (TB 6/719)

29. On 9th February 2001 Mr Blakemore wrote to Mr Middleton about the Sub-Contract agreement. He said –

Further to my e-mail of 22nd January 2001, listing outstanding issues relating to the Subcontract I understand that we have addressed and agreed to the Engineering scope and responsibilities (point 3) and the words to be inserted in Schedule E., Clause 3.4 – Leamside (point 4).

We have remaining two outstanding points (The Collateral Warranty with Railtrack and the Parent Company contract Performance Guarantee and the Pain / Gain Mechanism), which I feel should be carried out in parallel with the signing of the Subcontract, both parties having a clear understanding and commitment to resolve both issues to conclusion within 30 days and the Subcontract can be varied accordingly. I can re-issue the Subcontract with a supporting letter inserted in the appropriate places.

The Collateral Warranty with Railtrack and the Parent Company Contract Performance Guarantee. This actions remains with yourselves. Please advise the position?

The pain / gain mechanism - I suggest that we have a further discussion and I shall arrange a meeting accordingly.

I will update the Subcontract to issue 2.0 and scope to issue 3, reflecting the changes agreed. I will send two fully numbered copies for you to sign under seal and return to the undersigned.

Please confirm your acceptance of the above proposal and I shall despatch copies accordingly. (TB 7/731 and 732)

Jarvis' reply came in a lengthy letter from Mr Middleton dated 14th February 2001.

With reference to your letter dated 9th February 2001 and our telephone conversation yesterday, my comments are as follows:-

I agree that this whole process has taken up a disproportionate amount of time, however, I believe this is due to the hybrid nature of the Contract. In an effort to finalise mattes I set out below what I understand to be the current status of the outstanding matters to be agreed between us. …..

Annex E5 Pain/Gain Mechanism

You are completely aware of our position on this matter in that any pain / gain arrangement would only apply to this Sub-Contract your e-mail dated 12th January 2001 confirms this.

We must also agree a cap on any pain arising from the operation of this Sub-Contract, we understand you have achieved this within the Main Contract. Obviously the status of the Risk Register impacts upon this issue. ……. (TB 7/736 to 738 – my emphasis)

30. Discussions/exchanges between the parties continued on an intermittent basis in the months that followed but little (if any) progress was made in resolving the outstanding issues. There was an important meeting on 20th March 2001 to which I have already referred when commenting on Mr Robson's evidence at paragraph 14(2) above. The "notes/actions from [that] meeting …" prepared by Alstom and circulated on 22nd March 2001 include the statement –

Annex E5 – Pain / Gain Mechanism

After a brief explanation ALSTOM to issue a copy of the Information on Pain / Gain together with detailed wording to support the Pie Charts.

Action David Wood

Action Jarvis to respond to the principles of Pain / Gain. (TB 7/771)

In an undated letter which is at TB 7/777 and 778, and which appears to have been sent in late March or early April 2001, Mr Middleton wrote to Mr Blakemore stating that he was awaiting pain/gain mechanism proposals. On 28th March 2001 Alstom had a commercial meeting with Railtrack. The minutes of this meeting were forwarded to Mr Robson of Jarvis. So far as the "pain/gain" issue was concerned, the minutes record that it was not discussed because it was "being addressed in other forums" (see TB 7/784).

On 5th April 2001, Alstom's Mr Wood e-mailed Mr Blakemore saying –

Action 8 Annex E5 – Pain / Gain Mechanism. At this point in time the mechanism is under review / negotiation, and therefore we need some words that will allow us to agree post contract, wording similar to those in our contract with Railtrack. (TB 7/790)

and, it was almost a month later before, on 30th April 2001, Mr Blakemore sent a collation of responses to the points which had been raised on 20th March 2001. This was done in an updated version of the earlier "notes/actions" document (see TB 7/819 to 823). In that response Alstom said –

Annex E5 – Pain / Gain Mechanism

After a brief explanation ALSTOM to issue a copy of the Information on Pain / Gain together with detailed wording to support the Pie Charts.

Action David Wood

Due to the changes in the Alliance members, a review of the mechanism is underway with Railtrack. WE suggest that words are entered into the Subcontract Agreement similar to the main contract to reflect the intention of the parties to agree a suitable pain / gain mechanism. ALSTOM shall advise the exact details as soon as available.

Action Jarvis to respond to the principles of Pain / Gain. (TB 7/822 – my emphasis)

In a letter of 21st May 2001 Jarvis stated again that it was awaiting Alstom's "pain/gain" proposals for comment (see TB 7/841 to 843). Things had not moved forward by the end of June 2001. Discussions were held on 28th June 2001 which Mr Musker summarised in an e-mail dated 29th June 2001 in the following way –

The Jarvis objective of the discussion was to resolve issues preventing signing of the contract plus Jarvis EOT claim.

Present:- Peter Middleton, Alan Robson, Bob Thomas, Steve Jackson, Barry Blakemore, Dave Wood and myself.

- ***Gain/Pain sharing and Appendix A materials are the only two contractual issues unresolved. Both can be recorded as reserved matters to enable the contract to be signed.***
- *We explained where we were up to in receipt of our David Holmes letter and 20 PMI's.*
- *We explained that we are going through the AFC process and needed their input.*
- *Hopefully ALSTOM come out of it with gain share*
- *We offered Jarvis the opportunity to look at our ALSTOM overall price build up and for Jarvis to convince themselves that ALSTOM is likely to earn gain share.*
- *We explained that we were hoping to achieve a 50/50 gain share with Railtrack now that there is no formal Alliance gain share.*
- ***Set a target for ALSTOM to agree 50/50 gain sharing and Jarvis to be convinced of ALSTOM likely to achieve gain share by end of July. Any later is meaningless as the "horse will be close to crossing the line", too late to participate in gambling.***
- *Jarvis have engaged a claims specialists (Peter Slater) for their EOT claim. We agreed to use him to help us prepare our own EOT claim.*
- *We discussed safety and quality*
- *Jarvis are still resource limited and Alan Robson took the action to look at it again.*
- ***Overall the meeting went well, and I think that Jarvis are likely to sign up to gain and pain sharing by the end of July.*** (TB 7/889 – my emphasis)

It should also be noted that during these months Alstom issued a fourth ITP dated 25th May 2001. This was said to supersede the third ITP which had been issued on 6th October 2000. The authorised expenditure was increased to £5,400,000. At paragraph 3 of this ITP it was said –

Matters to be resolved prior to finalising the Contract between us.

Final Issue Signature of Subcontract Agreement.

Outstanding items detailed on the Actions List, viz.

a) Action 5: Annex B2 – Collateral Warranty

b) Action : Schedule C; Annex C1 – Scope of Works, Clause 9

c) Action 8: Schedule E; Annex E5 – Pain/Gain Mechanism.

Once these matters are agreed it is ALSTOM's …….. intention that they will be contained in the Contract. (TB 4/534 to 536)

This ITP was countersigned by Mr Middleton on 29th June 2001 and returned to Alstom.

31. On 12th July 2001, Alstom's Mr Blakemore wrote to Jarvis in the following terms-

Further to our meeting of the 28th June, we have the following information with regards to ALSTOM's "Gainshare" position with Railtrack.

ALSTOM are now of the opinion that no incentivisation mechanism is likely to be agreed with Railtrack and suggest that reference to this is the Subcontract is removed including any reserved matters relating to the Subcontract.

Please confirm your acceptance to this proposal.

We are preparing to issue the revised issue 2.0 of the Subcontract earlier next week for signature. Please contact the undersigned if you have any queries …… (TB 7/899- my emphasis)

That letter obviously came as a surprise to Jarvis' Mr Middleton. He immediately telephoned to discuss it and he suggested a further meeting with Alstom (see TB 7/901). The proposed meeting was delayed because of holiday arrangements – see Mr Blackmore's letter of 13th July 2001 which concluded –

> *In the meantime if you could give some thought to the 'incentivisation' issue, it would be appreciated. As you will be aware ALSTOM have no firm indication from Railtrack that 'incentivisation' is still on the 'table'.* (TB 7/905)

and Mr Middleton's letter of 18th July 2001 (TB 7/935). On 30th July 2001, Jarvis (Mr Robson) wrote expressing concern at the company's perceived financial exposure (see TB 7/955 and 956).

32. The intended high level meeting appears to have been postponed until 23rd August 2001. The note of an Alstom internal review held on 21st August 2001, which also covers some post discussion events, gives an insight into the company's position on a number of issues relating to its relationships with (a) Railtrack and (b) Jarvis (see TB 7/998 to 1000). The note needs to be read in full but I cite below only the parts which directly address the outstanding pain/gain issue –

It was agreed that the proposed agenda for Thursday's meeting, namely Target Cost Pain/Gain share is a worthless exercise. Jarvis have yet to submit their prolongation claim that is a key element of the overall assessment of their FCAC [Final Cost Anticipated Completion]. Alstom need to have a level of comfort with Jarvis' FCAC before we can progress with confidence…

The issues considered for discussion are as follows:

……

- ***Pain/Gain – Jarvis need to understand that Alstom will not agree to a Pain/Gain arrangement unless we have confidence with Jarvis' figures. Validation of Jarvis' prolongation claim is a precursor to progressing discussions.***
- ***We do not declare to Jarvis our commercial position with Railtrack; whilst they may know our position they do not know our strategy.***
- ***Current Alstom/Jarvis subcontract position:***

  RT24 with I Chem E Yellow Book

  Pain/Gain principle in spirit but no commercial obligation to fulfil this requirement, particularly if we cannot agree a 'back to back' arrangement with Railtrack; this is the driver…

  Proposed agenda:

  ……

- ***Target Cost Pain/Gain position; cannot go forward until we have confidence in Jarvis' figures – key to achieving closure with Railtrack. Pain/gain split to review once Alstom have confidence in figures. Do we want to review the current pain/gain split for the balance of the works in excess of the original contract sum?...*** (TB 7/998 and 999)

33. Notes of the meeting which took place on 23rd August 2001 were promptly prepared by Jarvis and a copy was sent to Alstom (see TB 7/1014 to 1017). The notes show that the pain/gain issue was one of the matters to be addressed in the "long term" whereas the "finalisation of the Sub-Contract Agreement" was one of two items to be "addressed immediately". At Item 5 it was stated that Alstom would "supply [Jarvis] with [its] proposals on the outstanding contractual issue surrounding pain/gain by… 29th August 2001." At Item 6 it was stated that Alstom was to issue a revised draft Sub-Contract agreement by 30th August 2001 and that this would incorporate "the agreements reached over the past few months, leaving only the nexus materials and pain/gain proposals to resolve". A summary financial document giving details of a revised Jarvis target cost of £8,651,231.53 was prepared and this was included in the Issue 3 documents on 30th August 2001 (see TB 4/541). A fifth ITP was prepared, dated 28th August 2001, and this too was included as part of the Issue 3 documents (see TB 4/537 to 540). It was said to supersede the fourth ITP which had been issued on 24th May 2001. The authorised expenditure was increased up to the revised Jarvis "target cost price" figure of £8,651,231.53. The matters to be resolved prior to contract finalisation were dealt with as before (see paragraph 30 above) but, now only two were listed – one being the pain/gain mechanism. This ITP was countersigned by Mr Robson for Jarvis on 16th September 2001 (see TB 7/1034).

34. Alstom sent out the Issue 3 documents under cover of its letter dated 30th August 2001. In that letter, Mr Blakemore dealt with the pain/gain issue by stating:

> *Action 8 Annex E5 – Pain/Gain Mechanism remains unchanged pending the agreement to Action 4 from the meeting of the 23rd August. (I have proposed deletion of most of wording in the Subcontract with the exception of the principles of Pain/Gain in 1.0 Annex E5).* (TB 7/1043)

and it can be seen that paragraph 2 onwards of the Version 2 text of Annex E5 (which was a slightly modified version of the original proposed text which I have cited at paragraph 27 above) was transparently deleted. Paragraph 1 of the text was retained, and a new paragraph was added with the result that the effective text was that which I have set out at paragraph 7 above. When I come to deal with the contractual/construction arguments it will be necessary to consider also a number of the other terms of the Issue 3 documents (see paragraphs 48 to 50 below).

35. On 12th September 2001 Mr Middleton wrote to Alstom "looking forward to agreeing the final terms and conditions of the Sub-Contract by the end of the month" (see TB 8/1067) whilst Mr Robson wrote to Alstom in rather different terms. He noted that Jarvis was not yet in a position to sign the Sub-Contract Agreement, that payment was overdue and that the current estimate of the "target cost/price" was over £10.5 million. He concluded by proposing a further meeting (see TB 8/1076). Alstom's Mr Taylor responded to Mr Robson in conciliatory terms on 17th September 2001 (see TB 8/1096 and 1098). So far as the Sub-Contract Agreement's not having been signed he said –

> *Sub-Contract Agreement remaining unsigned – Both parties have been progressing the actions raised at our meeting 23 August 2001. All issues to be addressed by Alstom from the meeting have been responded to with the exception of the extension of time. This item has and is currently being actively pursued with Railtrack to ensure a meaningful response.* (TB 8/1096)

In his turn, Mr Robson then responded in a friendly way to Mr Taylor (see TB 8/1107).

36. Adopting Mr Taylor's expression in a letter of 10th October 2001, Alstom and Jarvis continued to "[try] to reach a conclusion to the [Jarvis] Target Cost" (see TB 8/1111 to 1113]. In this context, Alstom stated that it wished to establish an audit trail of all the costs which Jarvis had generated on the project. When this letter was written, Alstom had issued its Certificate No. 19 in which substantial deductions from the amount claimed by Jarvis in its Payment Application No. 20 were made. In his letter of 11th October 2001 (see TB 8/1115 to 1120), Mr Middleton asserted that the payment application was in compliance with the requirements of "Schedule F to the Conditions of Contract", that Alstom had "no right under the contract to make [almost all of the] deductions", that Jarvis had the "right to suspend works under Clause 39.4", and a right to refer the "dispute or difference… with regard to… [the] valuation of Certificate No. 20… to adjudication under Clause 45.1". Mr Middleton also maintained that Jarvis had contractual rights to have the completion date extended and the Target Cost revised. The letter concluded –

It is of considerable concern that at this late stage of the works the Contract is still not signed. Whilst there are a number of minor areas of differences between us, the main difference appears to be the basis of the Pain/Gain Mechanism included in Annexe E5 of Schedule E.

In view of the situation regarding your failure to extend the completion date it is arguable that in the absence of an agreed Pain/Gain mechanism we are entitled to be reimbursed all reasonable costs irrespective of whether or not a revised target cost has been agreed or not.

From the above it can be clearly seen that there are a number of critical issues which should be addressed at the very highest level within your Company. We would therefore suggest that following our joint meeting with Railtrack on Tuesday 16 October we should set out a clear basis upon which we may resolve our differences.

(TB 8/1117 – my emphasis)

On 12th October 2001, Mr Robson wrote to Mr Irvine expressing similar sentiments (see TB 8/1134 and 1135). This letter was followed by a telephone discussion, the substance of which was recorded in an exchange of further letters on 17th (Mr Robson) and 22nd (Mr Irvine) October 2001 (TB 8/1140 to 1144). In his letter Mr Robson said –

TARGET COSTS

You confirmed progress had been slow on your behalf increasing our target cost due to a lack of progress between yourselves and Railtrack. However, you had an assurance from Railtrack that this would be addressed immediately and in return you would address our target costs. A meeting has been arranged with your goodselves for Thursday 1st November by which time you will have substantially increased our Target Cost.

CONTRACT AGREEMENT

Due to the time that has elapsed there is little likelihood of us agreeing with you, and you agreeing with Railtrack a meaningful Pain/Gain mechanism. In the light of this, both parties need to go forward with a proposal to recover our costs plus overheads and profit, this item to be discussed at our meeting (01.11.01). (TB 8/1140 – my emphasis)

and in reply, to those sections of Mr Robson's letter, Mr Irvine said –

Target Costs

I do not recall agreeing to "substantially increase" your Target Cost by the time we next meet – however all PMI's agreed with Railtrack that relate to Jarvis scope will result in the corresponding increase in your Target Cost, and we shall continue to address prolongation costs.

Contract Agreement

Agreed. (TB 8/1142 – my emphasis)

37. On 23rd October 2001, Mr Irvine wrote to Railtrack in the following terms –

We have now progressed this contract near to completion and yet our contractual position with yourselves remains incomplete 20 months into the contract. Though we have made good recent progress on PMI's, a number still remain undecided or have no financial value assigned to them.

The original intention of the contract was to have an over-arching alliance agreement involving all the original members of the project on Sunderland Direct. As you know this has never been implemented because of change in the project membership, though I think we would agree that the spirit of alliance working has prevailed. ***Nevertheless, we are formally still trying to agree a target cost at a point when the project is near to completion, and a similar position exists in our relationship with Jarvis. The whole basis of target cost contracting is to set goals early in the project which by joint effort can be achieved for the benefits of all. Both Jarvis and ourselves have now concluded that the time to realistically enact a target cost contract has now passed and it is no longer the appropriate vehicle for the completion of Sunderland Direct.***

Alan Robson of Jarvis and myself have therefore agreed to a joint approach to yourself with the aim of establishing an emerging cost contract in place of the target cost arrangement still within the basic RT24 contract. We believe this to be the only approach which gives us a realistic contractual vehicle for the successful financial conclusion of this project…

(TB 8/1145 and 1146 – my emphasis)

The letter received an unsympathetic response from Railtrack on 31st October 2001 which included the following paragraph –

We have a contract with Alstom which is not a joint venture between yourselves and Jarvis. This contract is a partnering contract with a GMP this legal agreement is unaffected by the status of the alliance. (TB 7/1176)

38. Further meetings took place on 1st November 2001 (see TB 8/1199 to 1207 for Jarvis' Minutes) and 22nd November 2001. The discussion on 1st November 2001 resulted in the issuing of a sixth ITP dated 9th November 2001. By this ITP the authorised expenditure was increased to £9,500,000. The ITP was in similar terms to the earlier ITP's and it was countersigned by Jarvis on or about 12th November 2001 (see TB 8/1188 to 1190 and 1192). The Minutes of the meeting on 1st November 2001 show that the outstanding contractual issues were discussed in the following way –

1.0 Contract

1.1 Alstom had written to Mr Solomon of Railtrack, requesting a meeting to discuss various contractual issues. This had received a negative response. In addition to this, Mr Solomon had written with regard to Alstom's claim submission and had suggested that the claim was "spurious".

1.2 In view of this Alstom confirmed that they had carried out an internal commercial review where it had been suggested that a more contractual approach was to be adopted.

1.3 Alstom confirmed that in view of the large number of changes on the project and the fact that they considered time was at large. The contract had reverted to cost reimbursable contract.

1.4 This position had been tentatively broached with Mr Solomon who had rejected this argument and had confirmed that in his view the original contract was still in existence. Alstom confirmed that the basis of their contractual approach was as follows:

- ***The pain/gain mechanism, which formed the basis of their original offer, was no longer in operation.***
- ***As there was no longer an Alliance board, the original mechanism which operated the pain/gain recovery was no longer available.***
- ***Without a pain/gain clause in operation, Alstom's legal people had suggested that the contract had now moved on to a cost reimbursable contract.***
- ***There was still a variation process where extras to the contract were required to be separately identified. However, variations were no longer able to be sanctioned by the Alliance board. This resulted in the final decision being made by Faithful & Gould, which was causing major problems.***

1.5 Jarvis queries this on the basis that if the contract moved to cost reimbursable, what then would happen with the management fee – Cost could be interpreted as net cost – the fee and profit recovery may well be at risk if this method was considered. Alstom agreed to let Jarvis have a look at their legal opinion.

1.6 There was a general query over whether or not the employer could seek credit on a cost reimbursable contract. Jarvis confirmed that there did appear to be grounds where the client would not be required to pay for defects etc.

1.7 Jarvis confirmed that their own costing system was transparent and in the event that the contract moved towards this method of recovery, they were confident that all their costs could be substantiated.

1.8 Despite the attractiveness of this method of recovery of both Jarvis and Alstom, it was however unlikely that Railtrack would agree to this, especially under the current "political" climate.

1.9 Alstom considered that the strength of their argument was that their contract was with the Alliance board. In reality the Alliance board had never been formed and had in fact, never met. (TB 8/1199 and 1200 – my emphasis)

Mr Robson wrote to Mr Irvine on 5th November 2001 to confirm various of the matters raised at the meeting on 1st November 2001. In that letter he dealt with the issue of "contractual arrangements" in these terms –

Both parties are still of the opinion that it would be inappropriate to have a contract at this late stage with a pain/gain mechanism. Although there is reluctance on behalf of Railtrack to deal jointly with Alstom and Jarvis it was agreed that we still feel this is the best way forward and we should pursue this through our own individual contacts within Railtrack. (TB 8/1179)

Mr Robson wrote to Mr Irvine on 27th November 2001 (see TB 8/1214 and 1215) to confirm various of the matters raised at the meeting on 22nd November 2001. In that letter he dealt with the issue of "contractual agreement" very shortly, by recording that it had been agreed that he would "meet with John Meacock/Robin Gisby" [I believe these gentlemen were Jarvis' Railtrack contacts]. It seems that, at the meeting Alstom had stated that its legal department was "reviewing the contract to advise whether contractually [it could] proceed on the contract under a fully reimbursable philosophy" and that Alstom had said it would inform Jarvis of the advice given by 30th November 2001 (see TB 8/1221).

39. On 10th December 2001, Mr Irvine responded to Mr Robson's letter of 27th November 2001 (see TB 8/1232 and 1233). He dealt with the issue of "contractual agreement" by asking to be advised of any progress that had been made with Messrs Meacock and Gisby and by informing Mr Robson that Alstom would be meeting with Mr Solomon [one of its Railtrack contacts] on 14th December 2001. Also on 10th December 2001 Jarvis submitted an updated cost forecast in which it was stated that the adjusted "Target Cost/Price" should be increased to over £11.8m and that the authorised limit on expenditure needed to be raised to ensure that Jarvis would be paid for the work it had carried out (see TB 8/1234 to 1236). In response, on 11th December 2001 (see TB 8/1263), Mr Irvine stated that the limit on expenditure would be amended prior to 14th December 2001. A seventh ITP was issued on 13th December 2001 which Jarvis promptly countersigned (see TB 8/1275 to 1278 and 1289). By this ITP the authorised expenditure was increased to £10,250,000. Again, the ITP was in similar terms to the earlier ITPs.

40. Further updated "target cost/price" documents were submitted by Jarvis on 20th December 2001 (TB 8/1304 and 1305), 9th January 2002 (TB 8/1320 and 1321), 11th January 2003 (TB 8/1329 and 1330), 21st February 2002 (TB 8/1375 and 1376) and 2nd April 2002 (TB 8/1415 to 1417). In the last of those updates Jarvis was forecasting a final cost of just over £12.5m and stating that the revised "target cost/price" had risen to over £13.25m.

41. On 14th January 2002, Mr Robson met Mr Irvine to be told the outcome of Alstom's discussions with Mr Solomon (of Railtrack). What he was then told set the scene for the development of commercial dispute which I have already sufficiently described at paragraphs 11 and 12 above.

42. The amounts certified and paid by Alstom to Jarvis as the project proceeded were summarised in a table forming part of Jarvis' written submissions, where they were compared with the total expenditure authorised in seven ITPs that I have mentioned above in chronological sequence. The table showed –

Alstom Certificate No	**Total Certified £**	**Date**	**ITP Date and Value**
			17 January 2000 £200,000
	86,199		
2	**259,848**	**12 June 2000**	**08 June 2000 £700,000**
3	**393,353**	**30 June 2000**	
4	**455,002**	**31 August 2000**	
5	**555,095**	**5 October 2000**	**6 October 2000 £2,400,000**
6	**865,702**	**7 November 2000**	
7	**983,560**	**22 November 2002**	
8	**1,210,637**	**22 November 2002**	

9	**1,482,048**	**12 January 2001**	
10	**2,218,836**	**12 January 2001**	
11	**2,625,610**	**19 February 2001**	
12	**3,301,706**	**29 February 2001**	
13	**4,196,602**	**18 April 2001**	
14	**4,904,604**	**11 May 2001**	**25 May 2001 £5,400,000**
15	**5,411,933**	**20 June 2001**	
16	**6,069,509**	**31 July 2001**	
17	**6,740,338**	**30 August 2001**	**28 August 2001 £8,651,232**
18	**7,317,907**	**18 September 2001**	
19	**8,270,988**	**8 October 2001**	
20	**9,291,822**	**14 November 2001**	**9 November 2001 £9,500,000**
21	**9,625,466**	**14 December 2001**	**13 December 2001 £10,250,000**
22	**10,716,277**	**05 January 2002**	
23	**10,823,095**	**22 February 2002**	
24	**10,731,353**	**8 March 2002**	
25	**10,776,195**	**25 March 2002**	
26	**11,445,556**	**3 May 2002**	
27	**11,476,601**		
28	**11,349,974**		
29	**11,439,988**	**19 August 2002**	
30	**11,607,166**	**19 September 2002**	
31	**11,634,631**	**1 November 2002**	

43. **THE SUB-CONTRACT**

43. The Issue 3 documents, which both parties contend are the Sub-Contract documents were not sent out until 30th August 2001 (see paragraph 34 above). Both parties contend that a Sub-Contract which operated retrospectively to govern their commercial relationship came into existence at some time thereafter. When considering the primary cases it is only necessary to consider when and how an enforceable Sub-Contract came into existence, if it did indeed come into existence (see paragraph 22 of the Particulars of Claim at TB 1/14 and 15), in order to determine the alternative case pleaded by Alstom at paragraph 20 of the Particulars

of Claim (see paragraph 7 above). However, these matters might also be relevant to the parties' respective secondary cases.

44. Alstom's case is at paragraph 10 of the Particulars of Claim. Alstom contends that the Sub-Contract was concluded as follows –

(1) By a letter dated 31st January 2002 [cited at paragraph 11 above] ALSTOM offered to contract upon the terms of the unsigned Sub-Contract [the Issue 3 documents] subject to incorporation of a pain/gain mechanism referred to herein.

(2) The offer contained in the letter dated 31st January 2002 was accepted by Jarvis by the service by them on 15th April 2002 of a Notice of Adjudication [see paragraph 12(1) above] relying upon the terms of the unsigned Sub-Contract;

(3) Alternatively, the offer was accepted by Jarvis by the service by them of a second Notice of Adjudication dated 31st October 2002 [cited at paragraph 12(4) above];

(4) Alternatively at least after the date of the letter of 28th August 2002 [see paragraph 12(2) above], both parties have acted upon the basis that they are bound by the terms of the unsigned sub-contract and both parties are now estopped from denying that they are so bound. (TB 1/9)

Jarvis' case, which is at paragraphs 12, 13 and 14 of the Defence, can perhaps not unfairly be said to be a variant of the alternative described by Alstom at (4) above. What Jarvis said at paragraph 12 was -

Following a two-stage tender process Jarvis commenced work in about January 2000 pursuant to a contract agreed by the parties based upon the documents set out below ("the Contract"). Although the Contract is unsigned, Alstom agreed in a letter of 28 August 2002 that the working and operative contract is the unsigned contract.

What followed at paragraphs 13 and 14 made it clear that Jarvis was referring to the Issue 3 documents which it did not receive until the end of August 2001 (see again paragraph 34 above). Accordingly, as Mr ter Haar rightly observed in the course of argument, Jarvis did not in fact commence work in January 2000 "pursuant to …" those documents. However, although paragraph 12 was not expressed as clearly as it might have been, I think that, when read in context, the pleader's intention to allege agreement to retrospectively operating terms may be discerned.

45. In my judgment, if the position is considered from 30th August 2001 onwards, the facts set out in paragraphs 11, 12 and 35 to 41 (inclusive) show clearly that the parties did not agree a Sub-Contract before the works were successfully commissioned with Railtrack beginning to run services at 06:00 hours on 28th January 2002. Neither party pressed the other to sign the Issue 3 documents as they stood but, each was confident that, save for agreement to the "pain/gain mechanism" (finalisation of which was not necessary prior to signature in view of the wording of Annex E5 – cited at paragraph 7 above) and the conclusion of discussions concerning the appropriate revision of the "target cost/price", there was agreement to the terms upon which (in due course) they would formally be contracting. In practice, they were implementing those terms day to day.

46. Whilst I accept Alstom's submission that its letter of 31st January 2002 constituted an offer to conclude the Sub-Contract on the terms of the Issue 3 documents as specifically clarified in the letter itself **viz.** with the "pain/gain" mechanism being that which Alstom had consistently stated wished to see, in my judgment Jarvis did not accept that offer in the manner alleged **viz.** by serving either its first or second Notice of Adjudication, or at all. At the meeting on 19th February 2002, consistently with Jarvis' previous statements concerning the "pain/gain mechanism", that offer was quite unequivocally rejected (see the minutes cited at paragraph 12 above). It follows that the alternative case pleaded by Alstom at paragraph 20 of the Particulars of Claim (see paragraph 7 above) fails.

47. Although the parties kept the sub-contract negotiations open until some time in 2002, in my judgment there came a time when each accepted that negotiation had ceased and when each indicated to the other that it was prepared to be bound by the terms of the Issue 3 documents as they stood. In my judgment, given the sequence of events from September 2001 to February 2002, there was no continuing (or outstanding) offer on the part of Alstom to contract on the terms of the Issue 3 documents which Jarvis could accept by serving its first Notice of Adjudication (which positively asserted the existence of such a sub-contract). What there was at that time can fairly be described as a "stand-off" or "stalemate". However, by serving the first Notice of Adjudication, Jarvis effectively recognised that the negotiations had ended and it then offered to contract on the terms of the Issue 3 documents. At some stage, and according to each party's pleadings the letter of 28th

August 2002 is the relevant document, Alstom accepted that offer. Accordingly, in my judgment this is a case where, subject to the resolution of the issue raised at paragraph 22 of the Particulars of Claim, some months after all the works had been practically completed sub-contract terms were finally agreed to cover those works.

THE PRIMARY CASES

48. I have introduced the parties' respective primary cases at paragraph 7 above. Given the agreement to contract on the terms of the Issue 3 documents, what "pain/gain" agreement, if any, do they contain ? I have it in mind that Clause A of the Sub-Contract Agreement provided that "the following documents only and their annexes, if any, shall together constitute the sub-contract …." (see TB 3/5) and that Clauses B, C and D of the Sub-Contract Agreement provided as follows –

B. The Subcontract as hereinbefore defined constitutes a complete statement of the contractual rights and liabilities of [Alstom and Jarvis] in relation to the Subcontract Works and no negotiations between them nor any document agreed or signed by them prior to the date of the Subcontract in relation to the Subcontract Works shall hereafter be of any contractual effect

C. Both [Alstom and Jarvis] agree that they shall not be entitled to enforce or otherwise rely on any contractual term or condition which is not contained or incorporated expressly in this Subcontract. …..

D. [Alstom and Jarvis] hereby agree that any pre-contractual representations or warranties, whether made orally or in writing, shall be of no legal effect whatsoever, with the result that neither party shall be entitled to found any claims to damages in reliance thereon. (TB 3/6 and 7)

So far as payment was concerned, Clause 39.1 of the General Conditions provided –

39.1 [Alstom] shall pay [Jarvis] for the Subcontract Works and the total of the sums payable shall constitute the Subcontract Price. The sums payable shall be calculated in accordance with the provisions of Schedule E (Prices, rates and charges) and paid in accordance with the provisions of Schedule F (Terms of payment). (TB 3/40)

In Schedule E the Sub-Contract Price was to be "… determined by the application of the rules in this Schedule" and "… as set out in Annex E3 – "Target Cost Summary" (see Clauses 1.1 and 1.2 at TB 4/554). At Clause 3.1 of Schedule E it was provided –

3.1 [Jarvis] has agreed to participate in the Alliance Pain / Gain mechanism. The principles are based on details contained in the Post Tender Amendments in Schedule B – Subcontract Special Conditions, Annex B1 – Post Tender Amendments between [Alstom] and [Jarvis].

The percentages of the pain / gain mechanism are set out in Annex E5-Pain / Gain Mechanism. (TB 4/555)

Turning to the Annexures themselves, included within Annex E3 was a detailed "Target Cost Reconciliation" which showed a "Revised Target Cost as at 13th September 2000" in the sum of £6,840,128 (see TB 4/623 to 638). It would seem that significant increases in the scope of the Sub-Contract works had occurred over the year that had elapsed since Jarvis' original tender had been submitted and further development had been anticipated when that document was prepared. Included within Annexure E4 was a copy of the Main Contract Risk Register in the revised form in which it had been agreed between Railtrack and Alstom in March 2001 (see TB 4/645 to 652). Annex E5 dealt with the pain/gain mechanism itself – in terms which I have already set out (see TB 4/655 and 656 and see paragraph 7 above). It did not, in fact, contain "percentages" as Clause 3.1 envisaged it would.

On behalf of Alstom, Mr ter Haar drew attention to Annex B1 to Schedule B and to various parts of Schedule E, including, in particular, Clause 3.1 and Annex E5. On behalf of Jarvis, Mr Bowdery concentrated his attention on the second paragraph of Annex E5.

49. Schedule B contained the Special Conditions and/or Particular Conditions of the intended Sub-Contract. Annex B1 was described as being a "Schedule of Post Tender Amendments" and this was defined to mean "A Schedule of any amendments to the Sub-Contract expressly agreed between [Alstom] and [Jarvis]" (see TB 4/284). Understandably, in Clause 2.2 of Schedule B, the Schedule of Post Tender Amendments was the second document in the order of priority which was to "**apply in the event of conflict** ..." between the contents of the various sub-contract documents (see TB 4/285). Whatever the draftsman of the tender

documents may have contemplated, the parties did not in fact prepare a schedule of the amendments upon which they were agreed. The only "schedule" in Annex B1 was a chronological list of documents, unannotated copies of which then followed. In such circumstances, in my judgment, it is necessary to read through the documents as a whole, in chronological order, to ascertain what amendments to the proposed sub-contract documents had been agreed and remained agreed between Alstom and Jarvis. In my judgment, in a case such as this, evidence of the pre-contract negotiations (normally not admissible when the finalised document(s) are construed and expressly excluded by Clause B of the Sub-Contract Conditions) must be considered to the extent that the parties have chosen to include such material within the body of the Sub-Contract. On a fair chronological reading of all the entries in relation to proposals for a "pain/gain" mechanism which are to be found in the documents included in Annex B1, all (or almost all) of which I have included in my lengthy summary of the facts, what is found is –

(1) *Unequivocal agreement in principle to the incorporation of a "pain/gain" share term;*

(2) Jarvis being informed of the development of the main contract "pain/gain" scheme between October 1999 and December 1999 and Jarvis being informed of the later discussions between Railtrack and the Alliance members which seem to have focussed much more on "gain" than "pain". If Mr Irvine's updated internal note is correct (TB 7/1048 to 1050 and see paragraph 2 above), these discussions may have resulted in an amendment to the gain sharing provisions but pain sharing provisions either remained unchanged or, if they had not been regarded as finally agreed in December 1999, they were firmed up as being the agreement;

(3) Specific proposals were made by Alstom for the "pain/gain" share term which it considered should be included in the Sub-Contract but, there was no acceptance by Jarvis of those specific proposals. Within the scheduled documents Jarvis' reservations were most clearly expressed in the attachment to the e-mail of 27th April 2000 (see paragraph 22 above). Mr ter Haar put great emphasis on the terms of the minute of the meeting held shortly thereafter on 3rd May 2000 when Alstom repeated the proposals which had previously been made. However, there is nothing in the scheduled documents which shows Jarvis' subsequent agreement to those previously rejected and then repeated proposals. I reject the suggestion that the exchanges concerning the "Alliance Gain Share and Charter" (see paragraph 24 above) were Jarvis' positive response to those repeated proposals; and, I note that the ITPs that were issued in 2001, including the fifth ITP issued on 28th August 2001, state that the pain/gain mechanism was an outstanding item that needed to be resolved (see paragraphs 23, 30 and 33 above).

50. A significant part of Schedule E had been the subject of reconsideration/revision. It is apparent that the mixture of earlier text and later revisions did not result in the inclusion of a coherent text in the Issue 3 documents. What was in fact set out in Annex E5, which was the place where Clause 3.1 envisaged "the percentages" would be stated, were the passages which I have already cited at paragraph 7 above. For ease of reference, I set them out again below together with the wording of the earlier draft which had been made the subject of a pleadings-style transparent deletion –

1.0 The Pain/Gain share shall use the basic definitions and principles described within the ITT – Section A, Binding 1, dated July 1999, Clause 61 Schedule of amendments to the Special Conditions and General Conditions.

Details of the Pain/Gain Mechanism are to be reviewed and agreed in accordance with Action number 5 from the meeting dated 23rd August 2001. Once agreed by both parties the details will be added to the Subcontract Agreement as an amendment.

~~*2.0 The allocation of the Pain/Gain share between the Contractor and Subcontractor shall be based on the principles agreed during the meeting dated 3rd May 2000, between the Contractor and the Subcontractor in York (see Annex B1 Post Tender Amendments between the Contractor and the Subcontractor).*~~

~~*Jarvis = ALSTOM x 6*~~

~~*Pain/Gain Pain/Gain 17*~~

~~*(Based on a ration of contract values (37%) as at 28 April 2000).*~~

~~*3.0 The gain shall be paid where the Agreed Final Actual Cost is less than the Agreed Final Target Price subject to 5.0 below.*~~

~~*4.0 Where the Agreed Final Actual Cost exceed the Agreed Final Target Price but is less than the Agreed Final Maximum Price, the excess shall be shared by the same percentages as detailed in 2.0 above.*~~

~~*5.0 If the Final Target Price is exceeded then the Subcontractor shall be paid "proven" net cost only.*~~

~~*6.0 The full amount of any gain shall be released in full providing completion on time has been achieved (1st September 2001).*~~

~~*Should completion be up to one month late (1st October 2001) then gain shall be reduced by one third.*~~

~~*Should completion be up to two months late (1st November 2001) then the gain shall be reduced by two thirds.*~~

~~*Should completion be over two months later then no gain shall be paid.*~~

~~*6.1 The above completion dates are based on the agreed programme and shall be subject to any extensions granted hereto, or any such entitlement to an extension whereby an overall delay has occurred not caused by the Subcontractor. The completion dates shall be changed to reflect such amendments agreed between the Contractor and pro rata accordingly.*~~

(TB 4/655 and 656)

So far as Schedule E is concerned, three points are to be noted. First, it records that Jarvis had agreed "**to participate in the Alliance pain/gain mechanism…**" but when the two operative passages of Annex E5 are read together, it is clear that the method of participation had yet to be agreed. Secondly, the wording of both Clause 3.1 and Clause 1 of Annex E5 was inelegant. Clause 1 sensibly referred to definitions at Clause 61 of the Particular Conditions of the Main Contract (see TB 3/215 to 221) but there were no relevant principles to be found in Clause 61 – arguably they were to be found in Clause 62 and in the development of the tender proposals which was recorded in paragraph 5 of the Agreement dated 13th December 1999 (see paragraphs 4 and 5 above). Clause 3.1 was worded in a way that can fairly be said to be either premature or inaccurate – the drafstman assumed detailed agreements would be found at Annex B1 and Annex E5 when, in fact, such agreements had yet to be made. Thirdly, reference was made in the second paragraph of Annex E5 to the notes of the meeting of 23rd August 2001 to identify the time when the parties had reached the agreement to review/agree/and later add in the Pain/Gain mechanism. The notes of the meeting were not included in Annex B1 (or elsewhere in the Issue 3 documents). There were no documents post-dating the meeting which contained an agreement on the pain/gain mechanism; the only document post-dating the meeting included in Annex B1 which addressed the issue was the fifth ITP which included an express statement that "pain/gain" remained outstanding (see TB 4/537 to 540 – and see paragraph 33 above).

51. In my judgment, on a fair reading of Annex B1 and Schedule E, no inconsistency is to be found. The terms of the second paragraph of Annex E5 and the latest document included in Annex B1 **viz.** the fifth ITP (see immediately above) are manifestly consistent. When read fairly, whilst the documents in Annex B1 demonstrate unequivocal agreement in principle to the incorporation of a pain/gain share term, they clearly show that no agreement had been reached on the detail.

52. The parties did not in fact agree on a pain/gain mechanism after 30th August 2001 but, in due course, they did agree to be bound by the Issue 3 documents. Does that mean, as Mr Bowdery submitted, that Jarvis' sub-contractual financial entitlement is to be calculated in accordance with the payment provisions contained in the Issue 3 documents without any consideration of "pain/gain" issues ? Or, is the consequence, as Mr ter Haar submitted, that there remains a "difference" between Alstom and Jarvis which the Court is empowered to determine?

53. Mr Bowdery developed his submissions in this way – this was, he said, a case where there was nothing more than an "agreement to agree" on something which was, contractually, an inessential Sub-Contract term. No agreement was reached and, accordingly, that was the end of the matter. He referred to the oft cited observations of Bingham J (as he then was) and Lloyd LJ in **Pagnan SpA v. Feed Products Limited** [1987] 2 Lloyds Rep. 601 at 610/611 and 619. In the judgment of Lloyd LJ the principles to be derived from earlier authorities were conveniently re-stated. Those principles included – ….

(2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case.

(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed; see ***Love and Stewart v. Instone****, where the parties failed to agree the intended strike clause, and* ***Hussey v. Horne-Payne****, where Lord Selborne said, at p.323:*

'…The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, ***and without the settlement of which the parties had no idea of concluding any agreement.*** *(Lloyd L.J.'s emphasis).*

"(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled (see ***Love and Stewart v. Instone*** *per Lord Loreburn at p.476).*

(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.

(6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous. If by 'essential' one means a term without which the contract cannot be enforced then the statement is true; the law cannot enforce an incomplete contract. If by 'essential' one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by 'essential' one means only a term which the Court regards as important as opposed to a term which the Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge: "the masters of their contractual fate". Of course more important the term is, the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when the parties enter into so-called 'heads of agreement'…" ([1987] 2 Lloyds Rep at page 619)

Mr Bowdery relied particularly on the second, fifth and sixth of Lloyd LJ's principles, submitting that they were relevant to the facts and circumstances of this case. In his submission, the parties' enthusiasm for a pain/gain share arrangement ebbed and flowed as the project developed and it could not be said that a pain/gain arrangement was an essential requirement for either party. As he summed it up - the unsigned sub-contract could work and did work without a pain/gain agreement; it did so during the lengthy negotiations; and, during the latter part of 2001 both parties had contemplated moving forward without any pain/gain term forming part of their agreement. He suggested that in such circumstances, far from being fundamental, a pain/gain agreement should be considered an "inappropriate embellishment to this sub-contract". And, he submitted that when what the parties had left to be agreed was an appropriate pain/gain mechanism, it was unnecessary, unreasonable and beyond the Court's powers to intervene by determining and imposing a pain/gain mechanism. In this context, he relied upon the observation of Lord Ackner in **Walford v Miles** [1992] 2 AC 128. That was a case where Plaintiffs had agreed, "subject to contract" to purchase a company and the premises from which it traded. The Defendants decided to break off negotiations. The Plaintiffs alleged that, so long as the Defendants continued to desire to sell the business/property, they were legally bound to continue to negotiate with them in good faith. The House of Lords disagreed. The only speech was that of Lord Ackner who dealt with the general principles in this way -

"The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined "in good faith". However the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. Mr. Naughton, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question – how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an "agreement?" A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is

entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a "proper reason" to withdraw. Accordingly a bare agreement to negotiate has no legal content." [1992] 2 AC at page 138

54. Mr ter Haar developed his submissions that the Court had power to determine the amount of any "pain" to be borne or "gain" to be enjoyed by Jarvis in this way -

So far as material, Clause 45 of the Special Conditions provided –

45.1 Any party of this Subcontract can refer ***a dispute or difference*** *(other than matter as to which a decision is provided by the Subcontract to be final and conclusive) to adjudication in accordance with the Housing Grants Construction and Regeneration Act 1996…..*

45.3 Subject to the above ***any dispute or difference which arises between the parties*** *shall be referred to the High Court of England and Wales for resolution as business of the Technology and Construction Court ["TCC"].*

(TB 4/297 – my emphasis and my addition of the abbreviation)

This was the clause that gave the Court that power and it should be exercised by "applying the principles set out in Schedule B Annex B1 and the provisions of Schedule E" (see paragraph 53 of his written submissions).

Mr ter Haar submitted that because the sub-contract had been performed, this case was properly analogous with **F&G Sykes (Wessex) Limited v. Fine Fare Limited** [1967] Lloyds Rep 53. In that case the Court had declined to hold that the parties' failure to reach agreement on an important matter – the numbers of fowl to be supplied after the end of the first year of a long term supply contract – had the result that there was no binding contract after the end of the first year. The contract contained an arbitration clause which provided in very wide terms for references to be made in respect of any "differences" which might arise. As Lord Denning MR succinctly summed the matter up –

The provision that figures were to "be agreed" does not nullify the contract. It can be made certain by reasonable figures being ascertained by an arbitrator. [1967] 1 Lloyds Rep at page 58

and, as Danckwerts LJ put it (after he had read the arbitration clause) –

The word "differences" seems to me to be particularly apt for a case where the parties have not agreed: Viscount Dunedin said, in the case which was quoted to us of May and Butcher, Ltd. v. The King [1934] 2 K.B. 17n: "… a failure to agree… is a very different thing from a dispute." But it seems to me that the word "difference" is particularly apt to describe that situation… the [terms] of this arbitration clause… seem to me to be sufficiently wide to cover a difference of the kind which has arisen in this case. The arbitrator has jurisdiction to decide the matter referred to him as to what is a reasonable amount for the defendants to have given notice of and which the suppliers should be in a position to supply… [1967] 1 Lloyds Rep at page 60.

55. Mr ter Haar reminded me that in **Sudbrook Trading Estate Limited v. Eggleton** [1983] AC 444, the majority of the House of Lords had rejected the submission that option clauses in leases, which gave the tenant the right to purchase the reversion if notice was given within a specified period, constituted nothing more than unenforceable "agreements to agree". The purchase price in each of the option clauses was identically worded, save that minimum prices varied – *… at such price not being less than [£12,000] as may be agreed upon by two valuers one to be nominated by the lessor and the other by the lessee and in default of such agreement by an umpire appointed by the… valuers*

The tenant gave the required notices and nominated its valuer. The landlords refused to nominate a valuer with the result that the price fixing machinery could not operate. The majority of the House of Lords overruled earlier Court of Appeal authorities which precluded the Courts' stepping in where the parties had agreed on a particular price fixing machinery. The majority held that, in essence, the option contracts provided for the tenant to purchase the reversion at an objectively fair and reasonable price; that the machinery for fixing that price was a subsidiary and non-essential term of the contract; and, that on the breakdown of the agreed machinery for establishing the price, the Court could undertake the necessary inquiries. Lord Fraser of Tullybelton explained this matter in this way – *I recognise that the logic of the reasoning which had led to the courts' refusing to substitute their own machinery for the machinery which has been agreed upon the parties. But the result to which it leads is so remote from that which parties normally intend and expect, and is so inconvenient in practice, that there may in my opinion be*

some defect in the reasoning. I think the defect lies in construing the provisions for the mode of ascertaining the value as an essential part of the agreement. That may have been perfectly true early in the 19th century, when the valuer's profession and the rules of valuation were less well established that they are now. But at the present day, these provisions are only subsidiary to the main purposes of the agreement which is for sale and purchase of the property at a fair or reasonable value. In the ordinary case parties do not make any substantial distinction between an agreement to sell at a fair value, without specifying the mode of ascertaining the value, and an agreement to sell at a value to be ascertained by valuers appointed in the way provided in these leases. The true distinction is between those cases where the mode of ascertaining the price is an essential term of the contract, and those cases where the mode of ascertainment, though indicated in the contract, is subsidiary and non-essential: see Fry of Specific Performance, 6th ed. (1921), pp. 167, 169, paragraphs 360, 364. The present case falls, in my opinion, into the latter category. Accordingly when the option was exercised there was constituted a complete contract for sale, and the clause should be construed as meaning that the price was to be a fair price… ([1983] AC at page 483E-G)

56. **Sudbrook** was not a commercial contract but the basic principle could be seen to have been applied in a number of commercial cases to which I was referred. They were the decision of the Privy Council in **Queensland Electricity Generating Board v. New Hope Collieries Pty Ltd** [1988] 1 Lloyds Rep 205, the decision of the Court of Appeal in **Didymi Corp v. Atlantic Lines and Navigation Co Inc** [1989] 2 Lloyds Rep 108 and the decision of the Court of Appeal in **Mamidoil-Jetoil Greek Petroleum Co. S.A. v. Okta Crude Oil Refinery** [2001] EWCA Civ 406: [2001] 2 Lloyds Rep 76.

57. The **Queensland Electricity** case concerned a 15 year coal supply contract between the Respondent Colliery and the Appellant Electricity Board. The price was agreed for first 5 years with the agreement containing base prices which were adjustable by reference to "escalation" and "price variation" provisions. For sales/purchases after the first 5 years the general terms of the agreement were to continue but the base price and the price variation provisions were to be agreed. The agreement contained a comprehensive arbitration clause for the resolution of disputes or differences. It was argued by the Board that, after the first 5 years, the agreement constituted an unenforceable "agreement to agree". The argument was rejected. In giving the Advice of the Privy Council Sir Robin Cooke noted that the terms of the agreement indicated that it was intended by the parties to have legal effect for more than the first 5 years. He continued –

"… What other reasons could there be for making such elaborate provisions, emphasising its long term nature? At the present day, ***in cases where the parties have agreed on an arbitration or valuation clause in wide enough terms, the Courts accord full weight to their manifest intention to create continuing legal relations. Arguments invoking alleged uncertainty, or alleged inadequacy in the machinery available to the Courts for making contractual rights effective, exert minimal attraction…*** *…..*

In accordance with the approach adopted in those cases, their Lordships have no doubt that here, by the agreement, ***the parties undertook implied primary obligations to make reasonable endeavours to agree on the terms of supply beyond the initial five-year period and, failing agreement and upon proper notice, to do everything reasonably necessary to procure the appointment of an arbitrator. Further, it is implicit in a commercial agreement of this kind that the terms of the new price structure are to be fair and reasonable as between the parties. That is the criterion or standard by which the arbitrator is to be guided.*** *If there are cases where the true meaning of the contract is that the arbitrator is to aim, not at objectively fair and reasonable terms, but merely at some result which appeals to him subjectively, they must be rare indeed and the present is certainly not one of them. The statements of basic intention in the recitals and in Cl. 9.1, together with the detailed pricing provisions for the first five years, supplement the ordinary implication of a fair and reasonable test. They lay down broad guidelines as to the object to be achieved; and how the system has worked during the first five years is likely to provide the arbitrator with much help in determining what is fair and reasonable for later periods.* ([1989] 1 Lloyds Rep at page 210 – my emphasis)

58. In **the Didymi**, the Court was concerned with the enforceability of a clause in a charter-party which provided for the hire charges to be equitably increased or decreased in the event that the vessel's speed and/or fuel consumption varied from certain stipulated values. The owners claimed entitlement to increased hire charges. Although the charter-party contained an arbitration clause, High Court proceedings raising preliminary points of law, were commenced. The charterers argued (inter alia) that the clause in question did

not constitute a concluded agreement capable of enforcement. In the Commercial Court, Hobhouse J rejected that argument saying –

"… [the provision] contains what are clearly intended to be words of obligation: "Owners shall be indemnified"; "such increase to be calculated". This is not tentative: it is a liability which is capable of calculation. If the legal effectiveness of this provision is to be attacked it must be because, in truth, the liability is not capable of calculation or assessment and therefore is too vague or too uncertain to be the subject of a legally enforceable obligation… …..

However,… I do not consider it right to categorise the provision as merely an agreement to agree. The words of a contract are used objectively to state the intention of the parties to the contract. They may do so skilfully or clumsily, but the function of the Court is to extract from the words used their objective intention. The words of this paragraph do not disclose an intention merely to require an agreement. The words "to be mutually agreed" are directory or mechanical and do not represent the substance of the provision…" (see [1988] 2 Lloyds Rep at page 111)

and, in dismissing the appeal, Bingham LJ (as he then was) said –

"… I ask this question: Does the provision in issue in this case relate to an essential term of agreement or to the existence of any contract at all, or does it relate to a subsidiary and non-essential question of how a contractual liability to make payment according to a specified objective standard is to be quantified ? I consider that this provision falls plainly in the second category.

The substantial provision in sub-cl. (4) is that the – … Owners shall be indemnified by way of increase of hire, such increase to be calculated…

The procedure for calculation is in my judgment a matter of machinery, and I conclude that there was here a binding obligation to which effect can be given as a matter of contract." ([1988] 2 Lloyds Rep at page 115)

He also accepted the owners' secondary submission, based on the **Sykes** case, that any defect in the provisions was cured by the arbitration clause which enabled any lack of agreement to be overcome (see again, page 115 of the report).

59. **Mamidoil** was the most recent of the cases cited. A long term (10 year) contract for the handling of crude oil was considered. The handling fee was fixed for the first 2 years of the contract. The parties then agreed fees for further periods up to the end of 1999. As a result of changed ownership/control the Refinery wished, if it could, to put an end to the contract when the period over which the agreed price applied expired. Although the contract contained an arbitration clause, a number of legal issues were raised in High Court proceedings. The Refinery argued that the 10 year term was a maximum term for which the contract might last but, the continuation of the contract beyond the initial period for which the handling fee had been fixed was dependent on agreement(s) being reached as to the handling fee. The counter-argument was that this was a 10 year fixed term contract and, in the absence of agreement on the handling fee after the end of the initial period, a reasonable fee was to be fixed. The judgment of the Court of Appeal was given by Rix LJ. Between paragraphs 50 and 68 of the judgment, he undertook a helpful review of many of the earlier authorities (but I note that neither **Queensland Electricity** nor the **Didymi** featured in this review) which I have read and noted. I too was specifically referred to the majority of those authorities in the course of argument but I see no need to cite them in the Judgment. After completing his review Rix LJ stated his conclusions in this way –

"69. In my judgment the following principles relevant to the present case can be deduced from these authorities, but this is intended to be in no way an exhaustive list:

Each case must be decided on its own facts and on the construction of its own agreement. Subject to that:

Where no contract exists, the use of an expression such as "to be agreed" in relation to an essential term is likely to prevent any contract coming into existence, on the ground of uncertainty. This may be summed up by the principle that "you cannot agree to agree".

Similarly, where no contract exists, the absence of agreement on essential terms of the agreement may prevent any contract coming into existence, again on the ground of uncertainty.

However, particularly in commercial dealings between parties who are familiar with the trade in question, and particularly where the parties have acted in the belief that they had a binding contract, the Courts are willing to imply terms, where that is possible, to enable the contract to be carried out.

Where a contract has once come into existence, even the expression "to be agreed" in relation to future executory obligations is not necessarily fatal to its continued existence.

Particularly in the case of contracts for future performance over a period, where the parties may desire or need to leave matters to be adjusted in the working out of their contract, the Courts will assist the parties to do so, so as to preserve rather than destroy bargains, on the basis that what can be made certain is itself certain. Certum est quod certum reddi potest.

This is particularly the case where one party has either already had the advantage of some performance which reflects the parties' agreement on a long term relationship, or has had to make an investment premised on that agreement.

For these purposes an express stipulation for a reasonable or fair measure or price will be a sufficient criterion for the Courts to act on. But even in the absence of express language the Courts are prepared to imply an obligation in terms of what is reasonable.

Such implications are reflected but not exhausted by the statutory provision for the implication of a reasonable price now to be found in s. 8(2) of the Sale of Goods Act, 1979 (and, in the case of services in s. 15(1) of the Supply of Goods and Services Act, 1982).

The presence of an arbitration clause may assist the Courts to hold a contract to be sufficiently certain or to be capable of being rendered so, presumably as indicating a commercial and contractual mechanism, which can be operated with the assistance of experts in the field, by which the parties, in the absence of agreement, may resolve their dispute." ([2001] 2 Lloyds Rep at pages 89/90 – my emphasis)

When he turned to consider the facts of the case itself, he said –

73. In my judgement, the 1993 contract should be viewed as a contract for a fixed period of 10 years and a term should be implied that in the absence of agreement reasonable fees should be determined for the period after 1994……

(v) The contract does not expressly state that the fee after the end of 1994 is "to be agreed". It is simply silent as to what is to happen in that period. Therefore, this case is simply not presented with the difficulties which arise, in the face of "to be agreed" language, where it is uncertain whether there is any contract at all. It cannot be said as was said in May and Butcher v. The King, that the statutory implication of a reasonable price, or an implication that the fee should be such reasonable fee as the arbitrator may decide, is excluded by express agreement that the parties were to agree the figure.

(vi) There is no evidence that the resolution of a reasonable fee would cause any difficulty at all. On the contrary, the evidence is the other way… In the absence of evidence to the contrary, I would infer that it was perfectly possible to derive from the agreements of price and price increases over the years objective criteria for working out a reasonable fee. ***Thus, although it is true to say that the contract itself contained no mechanism or guidance (other than the arbitration clause) as to how a reasonable fee would be derived. I do not consider that the contract should fail on that ground. Contractually derived criteria or guidance may be of assistance in finding an implied term for a reasonable price: but the authorities indicate that the Courts are well prepared to make the implication even in their absence.***

(vii) I do not consider that the additional issues as to the length of any period of price revision or as to quantity discounts, raise any different problems. In practice agreement was made for one or two years. I see no difficulty in an arbitral tribunal or Court finding that that was a reasonable period for which to fix the fee. The discount for throughput above a certain figure is simply another factor of price. Again, it gave the parties no difficulty over the years.

(viii) ***The presence of an arbitration clause was not relied on as a particularly strong point by Mr Howard. But I do not think that it is without its effect. It is a contractual mechanism for resolving "any dispute… which cannot be amicably resolved". It involves the parties' autonomous choice of their tribunal. It seems to me to be apposite to deal with a lacuna which, in common with other contracts which have to provide for future events, commercial practicalities lead parties to leave unresolved at the time of contract…***" ([2001] 2 Lloyds Rep at pages 91/92)

60. Having considered the parties' respective submissions, in my judgment Mr ter Haar's submission that this is a case where there is a "difference" as to the pain/gain mechanism which the Court is empowered to determine, is correct. I give my reasons for accepting that submission at paragraphs 61 to 64 below. However, I do not agree that, when determining the "difference", the Court is constrained to the extent that Alstom apparently

contemplates at the end of paragraph 21 of the Particulars of Claim **viz.** "… applying the principle set out in Schedule B Annex B1 and the provision of Schedule E [of the Issue 3 documents]" (see TB 1/13 – and see further at paragraph 70 below).

61. This is not a case where uncertainty arising from the parties' inability to agree on an essential term has prevented the conclusion of a contract. In other words, it is not a case of the type which the House of Lords had to consider in **Walford v. Miles** (supra) where one party had exercised its right to withdraw from negotiations "… at any time and for any reason". Although in this case the negotiations were unusually protracted, eventually Alstom and Jarvis did agree to contract in the terms of the Issue 3 documents. Those documents contain pain/gain provisions in terms which (to my mind) are far from tentative; the words used include words of obligation.

The Issue 3 documents contained an unequivocal agreement to participate in pain/gain sharing to an extent and in a manner which had yet to be agreed. In my judgment, the commercial cases to which Mr ter Haar referred and which I have specifically cited above indicate the principles which are to be applied in a case such as this. Once parties have contracted, the commercial considerations which need to be weighed are quite different from those which fall to be considered when negotiations are broken off before a transaction is agreed or before performance of a project is commenced. When the very different factual contexts of **Walford v. Miles** and the **Queensland Electricity** cases are taken into account the observations of Lord Ackner and the observations of Sir Robin Cooke can both be accepted.

In this case by Clause 45.3 of the Special Conditions of the Sub-Contract, the parties expressly gave the TCC power, in terms more usually found in an arbitration clause, to determine any "differences" as well as any "disputes" which might arise (see paragraph 54 above for the text). In this regard, I respectfully adopt the final paragraph observations which are to be found in paragraph 69 and the further observations in paragraph 73(viii) of Rix LJ's judgment in **Mamidoil**. These observations are, I think, equally applicable where the parties have chosen a Court as their preferred final arbiter.

In my judgment, it is the reasoning of Sir Robin Cooke and not that of Lord Ackner that should apply in this case **viz.** when agreeing to be bound by the Issue 3 documents, Alstom and Jarvis undertook implied primary obligations to make reasonable endeavours to agree on the pain/gain provisions by which Jarvis would participate in some way in the Main Contract pain or gain. Neither party could thwart the agreement by refusing to negotiate in good faith and/or by refusing to allow an Adjudicator or a TCC Judge to resolve the matter. It is implicit in the agreement that the standard by which the Adjudicator or TCC Judge is to be guided is fairness and reasonableness as between the parties. If each party has negotiated in good faith but neither has been persuaded to accept the other's view and there has been no compromise, the Adjudicator or Judge is the person who is entrusted to decide what would be a fair and reasonable mechanism which should apply. If one party refuses to negotiate, the other has an effective remedy because the Adjudicator or Judge can be invited to consider the facts/matters/arguments which it wishes to put forward, together with whatever facts/matters/arguments the previously reluctant party may elect to bring forward at that stage, before deciding what would be a fair and reasonable mechanism which should apply. Quite obviously, in performing such a task, the Adjudicator or Judge may have to choose between a number of possible solutions, each of which could be said to be fair and reasonable but, that is something which he (or she) has been specifically empowered to do by the parties. It was the parties themselves who decided to contract on the terms of the Issue 3 documents, rather than refraining from contracting unless and until they had reached agreement on the particular outstanding issue(s)

62. In this case, from the outset there was agreement in principle that the Sub-Contract terms would include a pain/gain provision. This agreement was reaffirmed on every occasion when the matter was under serious consideration including (a) its specific reaffirmation in Annex E5 at the end of August 2001, (b) when the seventh ITP was issued on 13th December 2001 which showed the pain/gain mechanism as an outstanding item which remained to be resolved (and it is to be noted that Jarvis' Mr Middleton promptly countersigned that document), (c) at the meeting held on 19th February 2002 - although Jarvis stressed that the mechanism had never been agreed (i) its own minute of that meeting very clearly recognised a continuing agreement in principle and (ii) Alstom's manuscript notes of that meeting record Jarvis' proposals for a pain/gain mechanism which it then put forward for agreement (see paragraph 12 above) – and, (d) as late as 27th August

2002 Jarvis stated it remained willing "to enter further negotiations regarding a pain/gain mechanism" (see paragraph 12(2) above).

In the course of his submissions, Mr Bowdery placed great weight on the various statements made by Alstom on and after 28th June 2001, all of which I have included in my summary of the facts at paragraphs 30 to 38 above. However, when each of those statements is considered in the overall context they do nothing to undermine the point made in the previous paragraph. Furthermore, the commercial realities were readily acknowledged by Mr Robson during the course of his cross-examination – see Transcript, Day 2, pages 137 to 140 to which I have referred at paragraph 14(6) above.

63. Whilst, as I have said, agreement in principle existed from the outset, it is equally true to say that practically from the outset – see manuscript notes and typed minutes of the meeting of 6th October 1999 to which I have referred at paragraph 19 above - there were different views as to the manner in which effect was to be given to it. Was it to be dealt with in the manner Alstom favoured **viz.** a direct proportion of whatever "gain" Alstom might achieve or whatever "loss" Alstom might suffer being passed on ? Or, was it to be dealt with in the manner Jarvis favoured **viz**. a formula based on and referable to the sub-contract value which would, so Jarvis thought, give it greater control over its own destiny ? If I approach the matter by asking myself the rhetorical question posed by Bingham LJ in the **Didymi** (rather than concentrating on the Advice of the Privy Council in **Queensland Electricity** as I did at paragraph 61 above), my answer to that question is this –

the provision(s) in issue in this case relate to subsidiary/non-essential questions; the procedure for calculation of the gain or pain is a matter of machinery. If the Courts (or an arbitrator) can determine the reasonable numbers of fowl which a supermarket chain could require and which the suppliers should be able to supply (**Sykes**), new base prices and new price variation provisions for coal to be supplied to an electricity generator (**Queensland Electricity**), an equitable increase in a charter-party hire rate in the light of variation in speed and/or fuel consumption (**the Didymi**) and appropriately revised handling fees for crude oil movement (**Mamidoil**), I can see nothing to prevent the Court considering and resolving the difference or differences between these parties concerning the precise mechanism by which, in some meaningful way, Jarvis should participate in the scheme of gain sharing or pain sharing which was agreed as part of the Main Contract. In my judgment, as I have already said at paragraph 61 above, in a case such as this, agreement in principle carried with it an implication that the terms of participation should be fair and reasonable as between the parties; and, that constitutes a sufficiently objective basis upon which an Adjudicator or TCC Judge can act.

64. It is significant that the Sub-Contract works have been carried out and completed. As in the **Didymi**, the dispute in this case has arisen after the contract has been performed. This point again links directly back to the points made in paragraph 61 above. In my judgment, in such cases the Courts should seek to give effect to the incompletely/imperfectly expressed intention of the parties if that can reasonably be done. I would respectfully echo, as Mr ter Haar urged that I should, the words of Sir Robin Cooke – *"… arguments invoking alleged uncertainty, or alleged inadequacy in the machinery available to the Court for making contractual rights effective exert minimal attraction"* (see paragraph 57 above).

65. Although I believe that Mr Chapman was right to conclude that the pain/gain deduction which Alstom had made from monies otherwise due could not possibly be justified at the time he was considering the matter, his reasoning rules out any possibility of any pain/gain deduction ever being justified. My analysis of the parties' legal rights/obligations differs in a number of respects from Mr Chapman's (see paragraph 13 above for the relevant part of his decision). Mr Chapman decided that, although "the notion of a pain/gain share was in the contemplation of the parties…" their failure to reach agreement "… as to the precise terms of any pain/gain sharing agreement" meant that there was never anything more than "an agreement to agree… of no legal consequence". For the reasons I have endeavoured to explain, I respectfully take a different view. In my judgment, there was more to the parties' pain/gain understanding that a mere "notion" and their failure to agree on "precise terms" was not fatal. However, having identified a difference which the parties themselves were unable or unwilling to settle, Alstom needed to refer the difference to adjudication, or to the High Court for final determination, before a precise or specific right to adjust Sub-Contract payments to reflect pain (or gain) could become established.

66. How should the "difference" between Alstom and Jarvis as to pain/gain mechanism be resolved ? At paragraph 21 of the Particulars of Claim (TB 1/14) Alstom contends that the Court should apply *"… the*

principle set out in Schedule B Annex B1 and the provisions of Schedule E [of the Issue 3 documents]". No alternative approach was contemplated by the pleader. At paragraph 31 of the Defence (TB 1/91) Jarvis disputes the necessity for or the appropriateness of the Court's making any determination. The pleader did not contemplate the possibility that the Court might take a different view. He did not go on to plead a positive alternative case.

67. So far as Alstom's pleaded case is concerned, my views on "… the principle set out in Schedule B Annex B1 and the provisions of Schedule E [Issue 3 documents]" are apparent from paragraphs 49 to 51 above. Whilst the documents in Annex B1 contain the pain/gain mechanism which Alstom consistently put forward (see paragraphs 11, 19, 23 and 27 above) it was a mechanism which Jarvis consistently rejected (see paragraphs 12, 19, 22, 28 and 29 above). Given Alstom knew of Jarvis' opposition to its proposals for directly proportional participation in the overall main contract pain/gain mechanism on 6th October 1999 (if not earlier), that Alstom took a calculated risk when it proceeded to conclude its contract with Railtrack knowing of Jarvis' views, that Jarvis has consistently maintained its opposition to those proposals and that Alstom was content to leave matters unresolved when the Issue 3 documents were prepared (and with its own proposals transparently struck through) it must be right to conclude that Alstom was genuinely willing to consider some different basis for Jarvis' participation. In all the circumstances of the case I do not think the Court should now determine that the Sub-Contract should contain this particular pain/gain mechanism.

    In any event, Alstom's suggestion that the level of Jarvis' participation should be linked to the final account figures, rather than the tender figures, does not seem to me to be particularly fair or reasonable. Alstom and Railtrack fixed the maximum main contract "pain" by reference to the tender figures. There was no suggestion that the figure itself should be adjusted upwards or downwards depending on the levels of the adjusted "Target Cost/Price" and "Gross Maximum Cost/Price" when compared with the "Final Cost/Price". The cost/price levels at which "pain" might begin to be felt were variable but the potential maximum amount of pain to be suffered was not. Accordingly, if (contrary to my views) it were to be held that Jarvis' participation in pain sharing should be calculated as a simple proportion of whatever pain Railtrack became entitled to inflict, and which Railtrack did inflict under the terms of the Main Contract, the fair and reasonable proportion to be passed on should be 6/17. This was the proportion Alstom proposed in May 2000 and again in December 2000. This would place Jarvis at risk of being required to contribute (a) £88,235.29 towards the £250,000 which Alstom stood at risk of having to pay if the "Final Cost/Price" came in at £500,000 above the adjusted "Target Cost/Price" and (b) a further £441,176.47 towards the £1,250,000 which Alstom stood at risk of having to pay if the "Final Cost/ Price" came in at the pain cap level (**i.e.** £1,250,000 above the adjusted "Target Cost/Price" plus £500,000). The total of these two pain component figures is £529,411.76. Before passing away from this aspect of the case, it is convenient to mention that Alstom did not involve Jarvis in the negotiations and the commercial compromise it made. Accordingly, as I have already indicated at paragraph 9 above, in my judgment, neither what was said in the course of the negotiations between Railtrack and Alstom that lead up to the "Contract Amendment Agreement" of May 2003 nor the Agreement itself can bind or in any way adversely affect Jarvis.

68. The fundamental issue which Jarvis raised at the meeting on 6th October 1999 (see paragraph 19 above) and again in the position paper which formed part of the package of documents submitted to Alstom in April 2000 (see paragraph 22 above) and which it continued to raise thereafter (see **e.g.** paragraph 29 above) was simply this – its share of any pain or gain should be based on or related to the "cost/price" of the parts of the works for which it was itself directly responsible. In my judgment Jarvis' unwillingness to accept risk in respect of Alstom's own performance and/or other subcontractor's performance could not be said to be an unreasonable stance for a major sub-contractor to take. Certainly in late 1999, 2000, 2001 and the early part of 2002 whilst Alstom continued to advocate its preferred alternative, Alstom did not ever suggest that Jarvis was taking an unreasonable stance. I also take note of the following facts which indicate to me that Alstom was genuinely willing to consider the different basis for Jarvis' participation which it (Jarvis) had put forward. First, during 2000 Alstom and Jarvis were agreed that their Sub-Contract would not be concluded until after a revised "Target Cost/Price" for Jarvis' work had been set. Secondly, in August 2001 Alstom considered that a Sub-Contract should be concluded including a term that agreement on the precise terms of the pain/gain mechanism was postponed (see paragraphs 30 to 34 above). Thirdly, later in 2001 and into 2002 it seems clear that (for whatever reason) Alstom and Jarvis decided to concentrate their attention on establishing "Final

Cost/Price" and less attention was given to the updating of the "Target Cost/Price". Fourthly, having left the matter in abeyance for so long, it was not until the early part of 2002 when it became clear that Railtrack was likely to maintain what both Alstom and Jarvis regarded as a relatively "hard line" that they refocused their attention on their unresolved position as between themselves. It was then, in February 2002, that Jarvis made an offer to agree a pain/gain mechanism in very precise or specific terms **viz.** 50:50 sharing of pain or gain, with the pain being limited to a maximum of 10% of the adjusted Sub-Contract "Target Cost/Price" and with its Management Fee limited to the amount recoverable by reference to that adjusted "Target Cost/Price" (see TB 8/1364 to 1369 and see paragraph 12 above). That offer was not accepted by Alstom at the time and Alstom has not subsequently stated that an offer of that sort would be acceptable. However, it is also right to say that Alstom has yet to suggest any other mechanism which could be applied if, contrary to its oft stated preference, Jarvis' participation in any pain or gain is to be calculated by reference to the Sub-Contract figures.

69. Had Alstom at any stage proposed or counter-proposed a specific mechanism for pain/gain sharing which had acknowledged or accepted this fundamental issue which, from October 1999 onwards Jarvis has been consistently raising, the Court would probably have been able to consider alternative proposals – I say that because, in my judgment, Jarvis' proposals fall within the range of fair and reasonable proposals which the parties might have agreed; and, in all probability any proposals made by Alstom would also have deserved serious consideration. However, given the absence of any such proposals or counter-proposals and in the light of the way each party has elected to present its case in these proceedings, the options presently open to the Court are –

(1) to decide now upon the fair and reasonable mechanism by which, in my judgment, Jarvis should participate in the Main Contract pain (or gain) sharing; or

(2) to invite the parties to consider/reconsider their respective positions in the light of the indications which I have now given and the fact that I have rejected major parts of each of their pleaded cases.

I do not think it would be appropriate for me to proceed on basis (1) without first inviting the parties to address me in relation to (2) above. In my view, the parties should be afforded the opportunity to agree upon a mechanism which each of them would consider fair and reasonable. In the alternative, if no agreement is reached, either or both parties should have the opportunity to make further (brief) submissions, before I determine the difference for them. If agreement is not reached, once I have heard and considered any further submissions that either party wishes to make (and the other's response thereto), I would expect to issue a short addendum to the judgment determining the outstanding difference for them.

70. What is the extent of the material which the Court should consider before making its determination ? In his submissions, Mr ter Haar appeared to suggest that the inquiry should be a narrow one – with attention being given only to those documents included in the Issue 3 documents. Whilst I accept that orthodox principles need to be applied when the Issue 3 documents are construed – (so that, for example, evidence of prior negotiations must be restricted to the documents which the parties elected to place in Annex B 1 to Schedule B - and possibly other documents expressly referred to in those documents which might also need to be read to understand something mentioned in a scheduled document - alterations made during the negotiations cannot be compared with earlier wording and subsequent acts or statements cannot be taken into account) – I can see no reason for similarly restricting the materials considered when, as in this case, the Court is invited to determine an unresolved difference. In my judgment, the Court should be fully informed of the background to and/or the development of the "difference". The Court should be able to consider the arguments which the parties themselves developed during the course of their negotiations, the reasons why negotiations broke down or were not pursued, the reasons why the arguments were left in abeyance and not brought to a head and any and all potentially relevant further matters raised during the course of the proceedings. The Court has to determine what is the pain/gain mechanism which is to apply in this retrospectively operative Sub-Contract. Given the views I have expressed at paragraphs 67 and 68 above, in my judgment, in the circumstances of this case, the mechanism will be one which relates directly to Jarvis' Sub-Contract parameters but, given that the intention was for Jarvis to participate in a Main Contract pain or gain, the existence of such a pain or gain must be a built in precondition of Jarvis becoming entitled or liable to potential participation. Given what I have already said at paragraph 69 above, I decline to express any further views at this stage.

THE SECONDARY CASES

71. Should the Court of Appeal be persuaded to take a different view of the primary cases, the parties' respective secondary cases, which I have introduced at paragraph 8 above would have to be decided. The premise of each party's secondary case is the absence of an enforceable Sub-Contract with the consequence that Jarvis must be entitled to be paid on a Quantum Meruit basis for the works it undertook at Alstom's request and for Alstom's benefit. It is common ground that there must be such an entitlement in those circumstances and, it is also common ground that the starting point for calculation of any Quantum Meruit must be the rates/prices etc. which were intended to be included in the Sub-Contract (which both parties anticipated would be made). These rates/prices had been used when interim payment applications were prepared by Jarvis and they had been the basis for consideration/approval by Alstom. Should the sum thus calculated then be adjusted to take into account pain or gain ? In Mr Bowdery's submissions, no adjustment would be appropriate. In Mr ter Haar's submission, there should be an adjustment which reflected the arrangements which Alstom had wished to see included in the Sub-Contract. The parties developed their cases in written submissions which were submitted after the oral closing arguments had been completed.

72. In my judgment, Alstom's pleaded secondary case fails because the factual basis for this claim is not made out. The allegation made in paragraph 22 of the Particulars of Claim is that the Issue 3 documents "lacked a complete or workable statement as to the Sub-Contract price which was and is an essential and necessary term of the Sub-Contract. In the premises the sub-contract is unenforceable" I do not accept Mr ter Haar's submission that, in the absence of the pain/gain term for which Alstom contend, the Sub-Contract would lack an essential term, namely a complete or workable statement as to the Sub-Contract price. On this aspect of the case, in my judgment, the facts which I have summarised at paragraphs 30 to 40 above are inconsistent with a finding that a pain/gain term was an essential component of the Sub-Contract price. Unhesitatingly, I prefer Mr Bowdery's submission that a "pain/gain mechanism" constituted an "inessential" Sub-Contract term in the sense that the Sub-Contract could operate without it.

    If, contrary to my to my conclusion, it were to be held that the Sub-Contract is unenforceable for the reason stated at paragraph 22 of the Particulars of Claim then, save in the two respects which I mention below, the facts alleged by Alstom in support of the allegation that Jarvis' entitlement was to payment on a Quantum Meruit, are made out. At paragraph 7(2)(b)(ii) of the Particulars of Claim the original Main Contract "gain" term is not correctly described – see paragraph 5 above for the term which was then proposed/agreed. Paragraphs 7(4) and 8 of the Particulars of Claim contain an incomplete statement of the parties' understanding over the period that Alstom's tender was being negotiated with Railtrack and when the contract was made between Alstom and Railtrack. The pleader fails to acknowledge the important fact that the basic difference concerning the method by which Jarvis should participate in pain/gain sharing, was already identified - see paragraphs 17 to 22 above for a fuller statement of the facts. When Alstom contracted with Railtrack it may have hoped that, in due course, Jarvis would come to accept pain/gain participation in the terms it had proposed but, there was no such "understanding" with Jarvis upon which Alstom could reasonably be said to have "relied". In my judgment, Alstom's claim that the Quantum Meruit calculation should take into account its preferred "pain/gain" mechanism because it contracted with Railtrack at a time when it was relying upon an understanding with Jarvis that Jarvis would participate in pain/gain sharing in that way, fails on the facts.

73. Given my findings at paragraph 72 above and the fact that Jarvis' pleaded secondary case represents Mr Bowdery's ultimate fall back position, it is unlikely that Quantum Meruit remuneration will ever need to be calculated. However, in case it does, I conclude by briefly stating my conclusion concerning the possible relevance of the parties' established agreement in principle and disagreement as to the mechanism for achieving Jarvis' pain/gain participation.

    I do not accept that a quantum meruit basis of remuneration would recognise and take into account pain/gain participation in the manner or to the extent that Mr ter Haar submitted it should. However, I do not accept Mr Bowdery's submission that no account at all could ever be had to the overall financial result which Alstom achieved under the Main Contract with Railtrack. In my judgment, when computing the amount that should reasonably be paid, the rates/prices upon which the parties themselves had agreed, would be the obvious and only starting point. Notice should be taken that those rates were intended to be established as sub-contract

rates/prices in a sub-contract which would provide for the sub-contractor's participation in pain/gain sharing. In my judgment, the law of restitution is possessed of flexible principles which permit the Courts to achieve substantial justice in any given case. In this case, I can see no reason why factual and/or expert evidence would not be admissible to address the following issues if either or both were raised. If Jarvis were to seek remuneration on an effectively risk free basis, it might be thought that adjustments should be made to some or all of the rates/prices to make appropriate allowance for the fact that the original rates/prices had taken into account the possibility of gain and the risk of pain. Alternatively, it might be thought that some appropriate adjustment should be made to the total "final cost/price" calculated on the basis of the original rates/prices to reflect any financial gain or detriment to Alstom arising from the manner in which Jarvis had performed the works. Assuming, as Alstom alleges it has suffered the maximum Main Contract pain, arguably the value of Jarvis' work to Alstom might be less than it would have been if no pain had been suffered. On the other hand, if Alstom had been in receipt of some significant gain, it would seem to me equally arguable that the value of Jarvis' work would be greater. The facts would need to be investigated in detail to see the part which Jarvis had played in the overall works and the extent to which its performance had impacted on the overall performance (see generally the observations of Slade and Bingham LJJ in **Crown House Engineering v. AMEC Projects Limited** (1989) 48 BLR 37 at pages 54 and 57 to 58).

CONCLUSION

74. Alstom claimed a declaration in the following terms –

A declaration that the Sub-Contract between the Claimants and the Defendants contained an agreement to share "pain and gain" as contended in paragraphs 19 or 20 or 21 above alternatively that the price to be paid to the Defendants for the work done by them is to be calculated taking into account a share by the Defendants of the "pain" suffered by the Claimants under the contract between the Claimants and Railtrack PLC."

(TB 1/17)

In view of my findings, a modified declaration will be appropriate – the parties are invited to consider the form of the declaration they would wish to see in view of my conclusions that –

(1) at some time in 2002, Alstom and Jarvis concluded a Sub-Contract in the terms of the Issue 3 documents;
(2) by Clause 45.3 of the Special Conditions of the Sub-Contract, Alstom and Jarvis agreed that any "differences" which might arise should be finally resolved by the Court;
(3) whilst Jarvis unequivocally agreed that the Sub-Contract should include a mechanism by which it would participate in "pain/gain sharing", no agreement has been reached between Alstom and Jarvis as to that said mechanism;
(4) Alstom was and is entitled to invite the Court to determine this outstanding difference but the Court considers it appropriate to invite further submissions from the parties before making its determination.

Mr Roger ter Haar QC appeared for the Claimant instructed by Lovells
Mr Martin Bowdery QC appeared for the Defendant instructed by Eversheds