JUDGMENT : HIS HONOUR JUDGE PETER COULSON Q.C: TCC. 9th December 2004.

[1] INTRODUCTION

1. Pursuant to a Claim Form issued on 23rd May 2003, Birse Construction Limited ("Birse") sought the sum of £810,165 from the Defendants, McCormick (UK) Ltd ("McCormick") pursuant to the terms of a building contract between the parties dated 14th September 1995 ("the Contract"). The terms of the Contract obliged Birse to construct a Dry Facilities Consolidation Project at McCormick's premises at Haddenham, in Buckinghamshire ("the Work"). The Contract Sum was £4,003,487. Fluor Daniel Limited ("Fluor") were the Managing Contractor and acted as agent for and on behalf of McCormick in the implementation of the Contract.

2. The vast bulk of the Work had been completed by November 1996 and, as a result, on 15th November, Birse were able to compromise their claim for the direct costs of all Changes to the Work in the agreed sum of £952,870. Just the previous day, on the 14th November 1996, Birse had made a formal claim for additional Site Establishment costs to reflect the delay and disruption to the Work and their additional time on site. This claim document, which was expressly excluded from the settlement of 15th November, relied on 29 separate events, each of which had occurred between November 1995 and November 1996. Between November 1996 and the summer of 1997, Birse attended to various snagging and other completion works on site and Fluor did not issue their Notice of Acceptance of the Work under the Contract until the 3rd September 1997. Further factual background is set out at paragraphs 78-92 below.

3. Birse's Amended Particulars of Claim ("APoC") in this action was based upon their claim document of 29th April 1997, which was in turn a resubmission of their original claim of 14th November 1996, referred to above. The APoC still has, at its heart, the same 29 events, although the sums claimed in consequence have been significantly reduced from those indicated in November 1996: the total claim is now £546,764. Following applications by Birse to reamend their Particulars of Claim, His Honour Judge Richard Seymour Q.C. ordered that there should be a trial of certain Preliminary Issues to determine whether or not the Birse claims were statute-barred. His order was dated 16th July 2004, and two Preliminary Issues were set out as a schedule to that order.

4. By the time the Hearing in respect of the Preliminary Issues came on before me on 18th October 2004, the emphasis of Birse's claims had changed, such that the second of the Preliminary Issues set out in the Schedule to the order of 16th July, and their application to re-amend, had become redundant. In its place, Mr Furst Q.C. who appeared on behalf of Birse, put forward a new pleading and two related Preliminary Issues. After some consideration, Mr Nissen, who appeared on behalf of McCormick, accepted that both the new pleading and the new Issues raised matters which he could address at the Hearing. The scope of this Judgment is therefore limited entirely to the three Preliminary Issues recorded as having been agreed by the parties and the Court on 19th October 2004, and set out below.

[2] THE PRELIMINARY ISSUES

5. The Preliminary Issues agreed by the parties and the Court on 19th October 2004 were as follows:

Preliminary Issue 1:

Upon the assumption that:

a) any or all of the events ("the events") in paragraph 8 of the APoC occurred;

b) the events constitute additions, deletions or revisions to the Work and thereby constitute Changes as defined in the first sentence of Article 14.1 of Part III of the Contract but subject always to any other terms of the Contract; and/or

c) the events give rise to an entitlement to amend the lump sum for Site Establishment pursuant to Article 8.3 of Part II of the Contract using the rates set forth in Attachment 14.2 to that part, subject always to any other terms of the Contract;

are the Claimant's claims at paragraphs 9.1 to 9.4 APoC statute barred pursuant to the Limitation Act?

Preliminary Issue 2

Was Fluor obliged to fairly and properly assess and/or estimate and/or agree Birse's entitlement in response to Birse's claims submitted on 14th November 1996 and/or the 29th April 1997?

Preliminary Issue 3

If it was, and upon the assumption that:

(i) Birse's claims are not defeated by the time limits in Articles 14.2, 14.3 and 17, Part III (or elsewhere); and

(ii) McCormick by itself or through Fluor failed to fairly and properly assess and/or estimate and/or agree Birse's entitlement on 13th August 1997 and/or on or after 2nd September 1997;

are the claims at paragraph 9.5 APoC statute barred pursuant to the Limitation Act?

6. It will be seen that these Issues fall into two distinct categories. Preliminary Issue 1 is concerned with the accrual of Birse's cause of action under the Contract in respect of their claim for additional Site Establishment costs. That is principally an issue that turns on the construction of the Contract itself. Preliminary Issues 2 and 3 are concerned with whether or not Birse have a separate cause of action for breach arising out of an alleged failure by Fluor (as agents for McCormick) fairly and properly to assess and/or estimate and/or agree their contractual claims and, if so, when such a cause of action accrued. I shall therefore deal with each of these two areas of the case in turn. Paragraph 7-77 below are concerned with Preliminary Issue 1. Paragraphs 78-112 below are concerned with Preliminary Issues 2 and 3.

[3] THE LAW RELATING TO THE ACCRUAL OF A CAUSE OF ACTION UNDER A CONTRACT FOR WORK OR SERVICES

7. The date of the accrual of a cause of action for sums due under a contract for work or services will usually depend on the terms of the contract itself. But it is important to note that the starting point for any consideration of this question is the established principle that, in the absence of any contractual provision to the contrary, a cause of action for payment for work performed or services provided will accrue when that work or those services have been performed or provided. In such circumstances, the right to payment does not depend on the making of a claim for payment by the party who has provided the work or services. In ***Coburn v Colledge*** [1897] 1 QB 702, the well-known decision of the Court of Appeal upon which both Birse and McCormick sought to rely in the present case, a solicitor carried out work for a client, which work was completed on 30th May 1889. The solicitor's bill was sent out on 12th June 1889 but it did not reach the client, who was by then in Australia, until 1891. On his return to England in 1896, an action was brought against him by his solicitor. That action was commenced on 12th June 1896. The claim was dismissed by the trial judge as being statute barred, the cause of action having accrued when the work was done and not at any later date. In the Court of Appeal, the solicitor argued that, because he had to comply with Section 37 of the Solicitors Act 1843, he had no right of action for his costs until a month had elapsed from the delivery of that signed bill of costs. It appears that, if that submission was right, and the cause of action only accrued a month after the delivery of the bill, the action was not statute barred because, by then, the defendant was beyond the seas and the relevant limitation period did not begin to run.

8. The Master of the Rolls, Lord Esher, rejected the argument that linked the accrual of the cause of action to the making of a formal claim for payment. He said: *"In the case of a person who is not a solicitor and who does work for another person at his request on the terms that he is to be paid for it, unless there is some special term of the agreement to the contrary, his right to payment arises as soon as the work is done; and thereupon he can at once bring his action. Before any enactment existed with regard to actions by solicitors for their costs, a solicitor stood in the same position as any other person who has done work for another at his request, and could sue as soon as the work which he was retained to do was finished, without having delivered any signed bill of costs or waiting for any time after the delivery of such a bill. Then to what extent does the statute alter the right of the solicitor in such a case, and does the alteration made by it affect or alter the cause of action? It takes away, no doubt, the right of the solicitor to bring an action directly the work is done, but it does not take away his right to payment for it, which is the cause of an action. The statute of Limitations itself does not affect the right to payment, but only affects the procedure for enforcing it in the event of dispute or refusal to pay. Similarly, I think, Section 37 of the Solicitors Act, 1843, deals, not with the right of the solicitor, but with the procedure to enforce that right. It does not provide that no solicitor shall have any cause of action in respect of his costs or any right to be paid until the expiration of a month from his delivering a signed bill of costs, but merely that he shall not commence or maintain any action for the recovery of fees, charges or disbursements until then. It assumes that he has a right to be paid the fees, charges and disbursements, but provides that he shall not bring an action to enforce that right until certain preliminary requirements have been satisfied."*

9. Lord Esher also addressed in detail what was meant by, and involved in, a cause of action: *The definition of 'cause of action' which I gave in* ***Read v Brown*** *22 QBD 128 has been cited. I there said that it is 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court.' The language I used obviously means this: the plaintiff in order to make out a cause of action must assert certain facts which, if traversed, he would be put to prove."*

   As a result, Lord Esher concluded: *"Applying that to a case like the present, when the plaintiff had completed the work, under the old course of pleading, alluded to by my brother Lopes, he could have brought his action, declaring for money payable for work and labour done at the request of the defendant; and, if the defendant made no answer to that claim, he would have been entitled to recover. The defendant could not have demurred to the plaintiff's declaration, which would have shewn a perfectly good cause of action, and, unless the defendant set up something to defeat the claim, the action would have been maintainable. Therefore, as soon as the solicitor had done the work, he could have maintained his cause of action for work and labour. The defendant might plead that no bill of costs had been delivered, but that would only be by way of answer to a case which constituted a good cause of action. For these reasons, I think that the cause of action in this case, to use the language of the statute of Anne was, 'given, accrued, fallen or come' the moment that the work which the plaintiff was retained to do was completed".*

10. Lord Justice Lopes agreed. At page 708 of the same report, he said: *"If the defendant intended to raise any defence on the ground of non-delivery of a signed bill of costs, he must plead that such a bill had not been delivered. The delivery of the bill formed no part of the plaintiff's cause of action. Upon proof of the work had been done, prima facie, the plaintiff was entitled to recover. It was for the defendant to set up by his pleading that no bill had been delivered. How, then, can it be said that the cause of action is not complete before the delivery of the signed bill? If that were so, it would have been necessary for the plaintiff to allege in his declaration that such a bill had been delivered. No one ever heard of a declaration in such a form….if the plaintiff's contention is correct, the solicitor may abstain from delivering his bill for 20 years and then at the end of that time he may deliver it and sue after the expiration of a month from its delivery. It seems to me that that would be a very anomalous and inconvenient result."*

11. ***In Reeves v Butcher*** [1891] 2 Q.B. 509, the Plaintiff lent money to the Defendant for a period of 5 years. The agreement required the Defendant to pay interest at quarterly intervals during that 5 year period, and that any default in making such payments would allow the Plaintiff to call in the principal. No interest was ever paid. The

action to recover both principal and interest was not brought promptly but was commenced within 6 years from the end of the Contract term of 5 years. The Court of Appeal upheld the original decision that the Defendant had a complete limitation defence on the grounds that the cause of action accrued once the Defendant failed to make the first quarterly interest payment. Lindley L.J. said: *"… the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought."*

12. I was also referred to ***Sevcon Ltd v Lucas C.A.V. Ltd*** [1986] 2 All E.R, 104, where the House of Lords held that an action for breach of patent accrued upon an infringement, despite the fact that, at the date of the infringement in question, the patent had merely been applied for and not yet granted and therefore, pursuant to the Patents Act then in force, such infringement was not at that time actionable.

13. At page 467, letter F of the Report, Lord Mackay of Clashfern rejected the argument that this result would give rise to unfairness: *"The appellants contend that the conclusion which, for the reasons which I have set out, appears to be the correct one, would lead to results which offend the policy of Parliament as manifested in the Limitation Act as a whole. They submit that the exceptions, for example, for those under disability, show that Parliament did not intend time to run where a person was not in a position to pursue his claim. However, the true principle as illustrated in the cases to which I have referred is that time runs generally when a cause of action accrues and that bars to enforcement of accrued causes of action which are merely procedural do not prevent the running of time unless they are covered by one of the exceptions provided in the Limitation Act itself."*

14. Accordingly, applying those principles to this case, Birse have to demonstrate that there was some vital component of their right to payment for additional Site Establishment costs which, if an action had been brought before the 23rd May 1997, would have been absent or missing. They also need to show that the missing ingredient would have allowed McCormick in those circumstances to argue that the cause of action was incomplete and therefore doomed to fail. Moreover, given that those elements of the Work which are the subject of Birse's claim in these proceedings had all been performed prior to 23rd May 1997, the general principle in ***Coburn v College*** is against Birse, and they need to identify and rely on a provision of this Contract which provided that the right to payment for additional Site Establishment costs accrued at a date which was later than the date of the performance of the Works themselves, and which was on or after 23rd May 1997.

[4] THE STRUCTURE OF THE CONTRACT

15. The Contract entered into between the parties on 14th September 1995 consisted of the following documents:
    a) Contract Signature Document
    b) Part I – Technical
    c) Part II – Commercial Terms
    d) Part III – General Terms
    e) Part IV – Special Terms
    f) Exhibits A through E
    g) Health & Safety Plan
    h) Specifications, drawings, attachments and other documentation.

    There was no precedence clause of the kind commonly utilised in home-made, complex contracts of the sort with which we are concerned in the present case, pursuant to which, in the event of conflict, one Contract document is given precedence over another. Instead, Article 1 of the Contract Signature Document provided that all the documents listed in paragraph 14 above: *"…are deemed to be self explanatory, one with another. However, in cases of express conflict between the documents listed above, then the most onerous interpretation of Contractor's [Birse's] responsibilities shall apply and Contractor shall be so obligated to comply therewith. Upon the discovery of any such conflict, the Contractor shall notify Managing Contractor [Fluor] immediately and Contractor shall comply with Managing Contractor's resolution of the conflict."*

16. The preamble to the Contract Signature Document defined the role of Fluor as Managing Contractor: it was "to act as Company's [McCormick's] agent in respect of the Project (as hereinafter defined) and to exercise on Company's behalf and in the Company's name all or any rights which may exist or arise for the benefit of the Company under this Contract, without prejudice to the Company's right to exercise such rights on its own behalf." Article 2.0 of the same document referred to Fluor as "acting as agent for and on behalf of Company in the implementation of this Contract."

17. Having identified the structure of the Contract, and the documents which make it up, I shall now turn to consider some of the individual terms. Rather than set them out simply in the order in which they appear in the Contract documents, and then analyse them in a later part of this Judgment, I shall set out the relevant Articles in groups, by reference to their subject matter, and then analyse the nature and effect of that group of Articles before going on to consider the next group. It is hoped that, in this way, the parties will be able to see more easily my conclusions as to the proper construction of this Contract.

[5] THE CONTRACT WORK SCOPE

18. Article 3 of the Contract Signature Document provided:

    "SCOPE OF WORK

    Except as otherwise expressly provided elsewhere in this Contract, Contractor shall supply all services, materials and items of expense necessary to perform, and shall perform, the following:-

CIVIL AND BUILDING WORKS

(hereinafter referred to as "Work").

said Work and the performance time schedules being more particularly described in Part I – Technical, Section 1.0, for or in connection with the Dry Facilities Consolidation Project

(herein referred to as "Project").

19. The document entitled 'Part I – Technical' set out the work scope in detail. Section 1 of Part I summarised the scope of work, and Sections 2-8 contained detailed descriptions of the work to be performed and the standards with which Birse had to comply. Mention should be made of Clause 6.0 of Part 1, which required the Contractor to perform the Work "in strict compliance with the Contract schedule milestones". These milestones, set out in Exhibit E, provided three 'overall milestone dates' (Contract Award; Start Work on Site; and Completion of the overall Work); and 19 'key interim milestones' with dates ranging from 2nd October 1995 to 12th July 1996. Essentially, the Contract schedule milestones at Exhibit E were akin to a binding Contract Programme.

[6] THE CONTRACT PRICE

20. Article 4 of the Contract Signature Document provided:

*"**CONTRACT PRICE***

Contractor's full compensation for complete performance by Contractor of the Work and compliance with the terms and conditions of this Contract (hereinafter referred to as 'Contract Price') shall be set forth in Part II – Commercial Terms.

*Total Contract Price **£4,003,487** (exclusive of VAT)."*

21. Article 1 of the Contract document entitled 'Part II – Commercial Terms' ("the Part II document") provided:

"CONTRACT PRICE

Shall mean the total amounts due to Contractor for full and complete performance of the Work, as described in Part I to the Contract, compliance with all terms and conditions of this Contract, as described in the Signature Document, and payment by Contractor of all obligations incurred in, or applicable to, Contractor's performance of the Work, including, but not limited to all taxes, duties, fees and insurances.

The Contract Price shall be the sum of the following Lump Sum and Unit Price portions. The individual Lump Sums and Unit Prices are deemed to cover the compensation relative to performance of the work described in the preamble to each Lump Sum or Unit Price, except to the extent that the Contract Price shall cover all compensation to perform the Work even if specific work activities or requirements are not detailed in the preambles to each Lump Sum or Unit Price.

1.1 Lump Sums for Mobilisation

The Lump Sum for Mobilisation shall be the Lump Sum set forth in Attachment 14.1.1 – Preliminaries.

1.2 Lump Sums for Demobilisation

The Lump Sum for Demobilisation shall be the Lump Sum set forth in Attachment 14.1.1 – Preliminaries.

1.3 Lump Sum for Site Establishment

The Lump Sums for Site Establishment shall be the sum as set forth in Attachment 14.1.1 – Preliminaries.

1.4 Work Units - Executed Work

The Work Unit – Executed Work portion of the work shall be the total of the prices as detailed in Attachment 14.1.2 – Work Units – Executed Works."

22. Attachment 14 was made up of a number of different sections. Attachment 14.1 was entitled 'Contract Price Summary'. This showed that the Contract Price of £4,003,487, was made up of £468,263 by way of Site Preliminaries, and £3,535,224 in respect of the costs of actually carrying out the Work. Attachment 14.1.1 provided a brief breakdown of the Site Preliminaries of £468,263, being £204,463 for mobilisation, £2,500 for demobilisation, and £261,300 for the Site Establishment costs themselves. The Site Establishment costs figure of £261,300 was itself the subject of a breakdown in Attachment 14.2, although this simply demonstrated that the indirect labour element of the figure was £222,855 and the temporary buildings element was £38,445. Attachment 14.1.2 provided a detailed breakdown of the price for carrying out the work itself, namely £3,535,224. Accordingly, Attachment 14 was the sum of each of the four figures that made up the Contract Price, referred to in Article 1 of Part II as Mobilisation, Demobilisation, Site Establishment, and Executed Work.

23. It is clear from these provisions that this Contract was intended to operate, and did operate, as a Lump Sum Contract: in other words, if the Work was completed without any Changes whatsoever and on time, Birse would have been paid £4,003,487, and not a penny more or less. It is right to observe that some possible alternative payment mechanisms were referred to in passing in the Contract. For instance, there were one or two provisions, such as Articles 2.15.1 and 2.15.4 of the Part II document, which envisaged at least the possibility that some parts of the Contract Price might be provisional and that the work which was the subject of those provisional figures would be re-measured on completion. As another example of this tendency within the Contract, Article 34.5 of the Part III document appeared to embrace the possibility of a 'cost-plus' or 'cost reimbursable' arrangement, with the Contractor's invoices including details of all costs and expenses incurred, such as "equipment time slips" and "time sheets". However, it is clear that there was no detailed mechanism that would have allowed either a re-measurement or a 'cost-plus'/'cost reimbursable' arrangement to work in practice, and the provisions set out at paragraphs 20-22 above plainly and unarguably provided for a Lump Sum Contract Price in respect of the

entirety of the original Contract Work. At the Hearing, neither party argued for any alternative basis. Accordingly, I have no hesitation in concluding that this Contract provided that the Contractor would be paid a Lump Sum Contract Price for carrying out the Work.

[7] INSTALMENT PAYMENTS OF THE CONTRACT PRICE

24. The Contract provided that the Lump Sum Contract Price would be paid in instalments. Article 6.0 of the Part II document provided:

"PAYMENT FOR WORKS PERFORMED

Payment shall be made in the sequence detailed under this section. All amounts shall be paid less a reduction of 5% for retention.

6.1 Mobilisation

The Lump Sum for Mobilisation shall become payable via the relevant Milestone Payment Schedule item in Part II Attachment 3 when Contractor has mobilised all necessary labour, plant and initial material requirements including all temporary facilities in order that construction can commence and all submissions as detailed in the Preamble to this item have been made and accepted by Managing Contractor.

6.2 Demobilisation

The Lump Sum for Demobilisation shall become payable via the relevant Milestone payment schedule item in Part II, Attachment 3 when Contractor has demobilised all labour, plant and temporary facilities from the Work Site and restored the Work Site to the condition existent prior to mobilisation. Prior to payment of Demobilisation, all work shall be complete and Contractor shall hold Managing Contractor's approved notice of Acceptance.

6. 3 Site Establishment

The Lump Sum for Site Establishment shall be payable via the relevant Milestone Payment Schedule Item in Part II, Attachment 3 in equal monthly instalments based on the Schedule of Work on the Work Site set forth in Article 6.0 of Part I providing Contractor has complied with the requirements of Preamble set forth in Clause 8.0 of this section.

6. 4 Works Units – Executed Work

The Lump Sum for Direct Work shall be paid in accordance with the Milestone Payment Schedule as detailed in Part II, Attachment 3.

The Unit Price Portion shall be paid in accordance with progress calculated against the Unit Prices listed in Proposal Form 14.3.

6. 5 Retention

Retention monies shall become payable in accordance with Article 39.0 of Part III to the Contract.

25. It is clear that Article 6.0 of the Part II document was intended – at least primarily - to relate to the payment of the Lump Sum Contract Price. The four categories at Article 6.1-6.4 above were designed to cross-refer to the four constituent elements of the Lump Sum Contract price set out in Article I of the Part II document (paragraph 21 above) and quantified in Attachment 14.

26. The key document repeatedly referred to in Articles 6.1-6.4 is the Milestone Payment Schedule at Attachment 3. This document was set out as follows:

MILESTONE PAYMENT SCHEDULE

PAYMENT SCHEDULE WEEK-ENDING	MILESTONE	LUMP SUM
1.	Mobilisation	£261,486.00
2.	Completion of Sub-Base to Access Road	506,735.00
3.	Process Building – Completion of Reinforced Concrete Foundations	452,103.00
4.	Process Building – 50% Completion of Ground Floor Slab	364,465.00
5.	Process Building – 50% Completion of First Floor Slab	557,601.00
6.	Process Building – Completion of First Floor R.C. Columns	530,697.00
7.	Process Building – Completion of Second Floor Slab	597,811.00
8.	Process Building – Completion of Second Floor Blickwork	529,666.00
9.	Completion of all contract works	202,923,00
	Total Contract Value	£4,003,487.00

27. Accordingly, it can be seen that this was a true Instalment Contract, involving the use of agreed, fixed, pre-set stage payments. In the typically trenchant words of Hudson's Building and Engineering Contracts, 11th Edition, at paragraph 4-023, such an arrangement is commended as "highly desirable for any well-advised owner, since if properly weighted they can operate as a much more effective and uncontroversial incentive to diligent progress

than any system of liquidated damages for delay." In this case, once the particular Milestone date had been achieved, the specific sum identified in the Schedule (being an identified part of the Lump Sum Contract Price) was payable. The only exception to this was that, pursuant to Article 6.5, retention monies at 5% were deducted from each of these payments.

28. Both parties accepted that one part of Article 6.3 was unhappily expressed. Having provided that the Site Establishment element of the Lump Sum Contract Price would be payable via the Schedule set out in Attachment 3 (paragraph 26 above), the Article continued with the words "in equal monthly instalments based on the Schedule of Work on the Work Site set forth in Article 6.0 of Part 1". This appears to be a reference to the Contract schedule milestones in Exhibit E, referred to in paragraph 19 above. These words make no sense in Article 6.3 as it stands because, if the Site Establishment elements of the Lump Sum Contract Price were going to be paid in accordance with the Milestone Payment Schedule, they could not, at one and the same time, be paid "in equal monthly instalments" and/or in accordance with the Contract schedule milestones in Exhibit E, which were essentially included for programming purposes. The two Schedules cannot be read together; they provide for different events to be achieved by different dates. The lump sum for Site Establishment has to be paid in accordance with one Schedule or the other: it cannot be both. Since every other part of the Lump Sum Contract Price was to be paid by reference to the Milestone Payment Schedule, I can only conclude that it was that Payment Schedule which was to govern the payment of the Site Establishment element of that Lump Sum as well. Any other result would be contrary to common sense. It therefore seems to me that the rogue words "in equal monthly instalments based on the Schedule of Work on the Work Site set forth in Article 6.0 of Part I" appearing in Article 6.3 of the Part II document were intended to indicate some sort of possible alternative to the Milestone Payment Schedule, but this was not, in the event, an alternative that was referred to anywhere else in the Contract. I therefore find that those words are of no effect. In reaching this conclusion, I take comfort from the fact that neither Counsel argued to the contrary and that, in his Closing Submissions, Mr Furst Q.C. expressly accepted that the Site Establishment element of the Lump Sum Contract Price would be paid in accordance with the Milestone Payment Schedule at Attachment 3 (paragraph 26 above).

29. For completeness, I should also note that the second sentence of Article 6.4 is, as Mr Furst Q.C. put it in Opening, "a bit of a nonsense". Mr Nissen essentially agreed with that, because, as he pointed out, Unit Prices related to Changes only, and there simply was no Unit Price portion of the Lump Sum. He said that the second sentence "did not apply." Whilst both Counsel agreed, therefore, that the second sentence of Article 6.4 could be safely ignored, it is another example of the existence, within this Contract, of provisions which hint at other ways in which the work could possibly have been priced and paid for, which were not, in the end, applicable.

[8] INVOICING AND PAYMENT OF THE CONTRACT PRICE

30. Article 4.0 of the Part II document was concerned with invoicing. It provided that the Contractor would submit invoices in accordance with "Milestone achievement" to McCormick, c/o Fluor, marked for the attention of the Project Accountant, Mr D. Lewis. The reference in Article 4.1 to "Milestone achievement" was plainly a reference to the Milestone Payment Schedule dates identified in Attachment 3.

31. As to the payment of such invoices, Article 34.4 of the Contract document entitled 'Part III – General Terms' ("the Part III document") provided: *"Company shall make payment within 30 calendar days from receipt by Managing Contractor of an invoice presented in accordance with the requirements of this Contract. Managing Contractor shall advise rejection of an unacceptable invoice within 14 calendar days of receipt."*

Therefore, once a Milestone date in Attachment 3 had been reached, Birse could send Fluor an invoice and, provided it was not rejected by Fluor, that invoice was then payable by McCormick within 30 days of its receipt by Fluor.

[9] SUMMARY IN RESPECT OF LUMP SUM CONTRACT PRICE

32. Accordingly, the provisions of the Contract in respect of payment for the Work were straightforward. The Lump Sum Contract Price was broken down into four constituent figures, of which three (mobilisation, demobilisation, and Site Establishment) formed one composite sum of £468,263, whilst the principal part of the Lump Sum Contract Price, namely the cost of actually carrying out the Work itself, was £3,535,224. The total Lump Sum was to be paid in accordance with the fixed, pre-set instalments set out in the Milestone Payment Schedule at Attachment 3; once one of those Milestones had been achieved, an invoice would be sent off by the Contractor, Birse, and the relevant amount paid within 30 days. Since the precise amount of the payment to be made on the achievement of any given Milestone date was agreed in advance as part of the Contract itself, and was set out in the Milestone Payment Schedule at Attachment 3, there was no need for any interim valuations, certificates, or assessments, or any of the other paraphernalia of the interim accounting process required by the standard forms of building and engineering contracts. They were simply not necessary, a saving of effort and cost which is identified as one of the specific benefits of a fixed stage payment system at paragraph 4-023 of Hudson.

[10] CHANGES

33. Pursuant to Article 14.0 of the Part III document, Fluor were entitled to order additions, deletions and/or revisions to the work and there was a detailed procedure to be followed in the event of any such change.

"CHANGES

14.1. Managing Contractor shall have the right, at any time the Work is in progress, to order additions, deletions and/or revisions to the Work. (Hereinafter referred to as "Change/s"). Contractor will be advised of such

Change/s by receipt of an approved for construction drawing or a written authorisation to perform specific work and Contractor shall immediately proceed to perform the additional and/or revised Work in strict accordance with and subject to all terms and conditions of this Contract. The provisions of this Contract shall apply to all Changes. Contractor will be advised of the names of Managing Contractor personnel authorised to issue Changes to the Work.

14.2 If Contractor believes that any information received from Managing Contractor in the form of additional and/or revised information drawings, specifications, exhibits or other written notices from Managing Contractor, any instruction or interpretation by Managing Contractor, or any occurrence meets the criteria for Change/s that affects either (i) Contractor's cost for performing Work or (ii) the Schedule of Work, Contractor shall, within five (5) working days, notify Managing Contractor in writing and, if Managing Contractor agrees, Managing Contractor will issue a written authorisation in accordance with section 14.1 set forth above.

14.3 Contractor shall submit to Managing Contractor within five (5) working days after receipt of an approved for construction drawing or a written authorisation, a detailed take-off with supporting calculations and pricing for the change together with any adjustments in the schedule required for the performance of Work as changed. Pricing shall be in accordance with the pricing structure of this Contract and shall clearly define increase, decrease or no change in payment under this Contract. Where applicable prices are not included in the Contract new prices shall be determined on the basis of extrapolation or interpolation against similar existing prices.

14.4 Contractor shall not perform Changes in the Work in accordance with this Article 14 unless Managing Contractor has issued written authority to proceed with the Change, such authority being in the form specified in section 14.1 above.

14.5 After Managing Contractor and Contractor agree on the financial effects of a Change, Managing Contractor shall incorporate each such Change into a written amendment setting forth the agreed adjustments to the Contract Price. The adjustments, once made, shall not be renegotiable.

14.6 Payment of approved Changes in the Work shall be made in accordance with the provisions of Article 34.0 but invoices in respect of Changes may not be presented until a fully authorised amendment has been issued by the Managing Contractor and signed by the Contractor.

14.7 Notwithstanding the provisions of this Article 14 there shall be no change to Contract Price or Schedule of Work by reason of any Change should Contractor fail to provide Managing Contractor with the written notice of a change, and/or quantification thereof as required by Sections 14.2 and 14.3 herein, within the time periods stated.

14.8 There shall be no adjustment to Contract Price or Schedule of Work should Contractor proceed with a Change to the Work on the basis of any instruction that is not in accordance with Section 14.1.

14.9 In the event that the Managing Contractor and the Contractor cannot reach agreement on the extent of an authorised Change to the Contract Price or Schedule of Work, or if Managing Contractor does not accept Contractors assertion that a Change in the Work has occurred and Contractor maintains such an assertion, Contractor shall comply with the Article 17.0 entitled "Claims". Contractor shall proceed with the work if officially instructed to do so.

14.10 The following shall not constitute changes to the work:-

a) Instructions, interpretations, decisions or acts by Managing Contractor which are:

i) to achieve compliance with the Contract by Contractor, or

ii) to correct errors, omissions, poor engineering, defective workmanship or other failure of the Contractor to comply with Contract;

b) Delay in the performance of Contractor's work or any additional work caused by Contractor.

c) Any work performed by Contractor resulting from comments by Company and/or Managing Contractor requiring incorporation in documents submitted for approval by Contractor to the extent that such comments are consistent with the Contract."

34. Other detailed provisions as to how the Change mechanism would operate in practice were set out in Exhibit A to the Part III document. This Exhibit was entitled 'Contractor Co-Ordination Procedure'. Section 5 was headed 'INSTRUCTIONS TO CONTRACTORS' and Section 5.3 read as follows:

"Contract Work Orders/Authorisations

Managing Contractor will issue to Contractor a Contract Work Authorisation defining changes to the Work and the payment basis. Contractor will proceed with the work (unless instructed otherwise on the CWA) and within five working days shall submit to Managing Contractor the completed Contract Work Order with the requisite pricing details.

These changes may include:

- added or deleted Work

- *revised drawings or specifications*
- *modified conditions for performance of work or unforeseen field conditions*
- *revised schedule*
- *authorisation of overtime*

- *revised requirements for Managing Contractor or Contractor furnished materials, equipment of services*
- *alteration or removal of completed Work.*

…

The Contract Work Order (CWO) is the written agreement signed by the Contractor and Managing Contractor, which records the agreed costs of the Contract Work Authorisation. CWO shall have the same number as the applicable CWA.

Managing Contractor will periodically consolidate CWO's into Contract Amendments. The CWO is a provisional agreement and not an authority for payment. It is, however, the basis for preparation of a Contract Amendment which is the only authority for payment."

35. Accordingly, the procedure was that Fluor would issue to Birse a CWA and, unless the CWA instructed otherwise, Birse were obliged to proceed with the work that was the subject of the CWA. Within 5 days of receipt of the CWA, Birse had to submit a completed CWO which, if agreed, would set out the agreed costs of a CWA. Even then, the CWO was a provisional agreement and would not itself trigger a right to payment; that would only accrue once the CWO had been 'consolidated' by Fluor into a Contract Amendment.

[11] QUANTIFICATION OF VALUE OF CHANGES

36. The quantification of the financial value of any Change was, according to Article 14.3, to be "in accordance with the pricing structure of this Contract". More information as to precisely how this would operate in practice was set out in the Part II document, and in particular:

Article 2.15.5

"The Unit Prices set forth in Attachment 14.3 shall be used for additions and deletions to the Work."

…

Article 3.0

"PRICING FOR CHANGES IN THE SCOPE OF WORKS

3.1 Payment for changes to the Work and additions to the Work shall be in accordance with Article 14.0 entitled Changes of Part III to this Contract

3.2 … all changes shall be calculated using the Unit Prices set forth in this Part II. Whenever there are changes to the Work for which no Unit Prices have been provided in this Contract, then Unit Prices shall be derived wherever possible by interpolation or extrapolation against similar Unit Prices set forth in this Contract. Said new rates shall not become payable until they have been incorporated into the Contract by amendment. The said new Unit Prices shall be mutually agreed between Managing Contractor and Contractor and incorporated into this Contract by amendment."

…

Article 8.0

"ATTACHMENT FORMS – PREAMBLES

… Attachments 14.2, 14.3, 14.4, 14.5.1 and 14.5.2 shall be used only for changes as defined in Article 14.0 of Part III to the Contract."

Article 8.9:

"UNIT RATES FOR CHANGES

The Unit Prices set forth in Attachment 14.3 shall be used to value changes in the Work when instructed by Managing Contractor. Contractor shall not be reimbursed the cost of any changes caused due to Contractor's own error."

37. Attachment 14.3 provided a list of rates referred to as Unit Prices or Unit Rates, which related to each element of the Work, and which could then be utilised to calculate the value of any additional or varied work. Given that the Unit Prices/Rates in Attachment 14.3 did not relate to or cover Site Establishment costs (because the figure for such costs in the Contract was the total of a number of separate Lump Sums, as set out in paragraph 22 above), I think Mr Nissen is right to submit that the proper valuation of Changes would not include anything other than the Unit Prices/Rates, and would not therefore include any valuation by reference to the Lump Sums in Attachment 14.2, which was the Attachment dealing with Site Establishment costs. Thus, the valuation of Changes would not include a valuation of any Site Establishment element. Attachments 14.4 and 14.5 were concerned with overtime premiums and day work and are immaterial for present purposes.

[12] PAYMENT FOR AGREED CHANGES

38. If a Change was agreed as a matter of principle, and if the financial consequences of that Change were agreed in accordance with the procedure set out above, then, as per Article 14.5 of Part III, set out in paragraph 33 above, the agreement was enshrined in a written amendment to the Contract, setting out "the agreed adjustments to the Contract Price". More detailed provisions in respect of the amendment mechanism were set out in Exhibit A to the Part III document, at Section 6.0:

"Contract Amendment

Managing Contractor shall on a monthly basis incorporate CWO's into a Contract Amendment. The Contract Amendment is the only document by which the Contract may be changed or supplemented. It is the only authority for payment for Changes.

Other items that may be included in an amendment are:

o adjustment of a provisional Contract Price based upon revised scope of work quantity estimates (unit price or time rates contracts)

- *addition of new unit prices or time rates*
- *exercise of options provided for within the Contract*
- *suspension or termination of work*
- *demobilisation or remobilisation of the Contractor*
- *incorporation of claim resolution*
- *incorporation of back charge agreements*
- *change in the rights and/or obligations of the parties to the Contract which both Managing Contractor and Contractor agree are necessary.*

Managing Contractor will prepare all Contract Amendments…"

A standard form Amendment document was included at Exhibit A, Attachment A, which expressly provided for an amendment to the Lump Sum Contract Price.

39. There was considerable debate during the Hearing as to the mechanism for the actual payment of agreed Contract Amendments, but it does not seem to me that the question gives rise to any serious difficulty. As set out in Article 14.6 of Part III (paragraph 32 above) payment for Changes which were the subject of "a fully authorised amendment" was to be in accordance with Article 34.0 of the Part III document. Parts of Article 34.0 were irrelevant to the actual mechanism of payment but Article 34.4 (paragraph 30 above) was obviously directly applicable. Therefore, once a Contract Amendment had been agreed in respect of a particular Change, the Contractor would invoice for the additional sum set out in the Amendment and it would be paid within 30 days from the date that the Managing Contractor (Fluor) received the invoice from the Contractor (Birse). Mr Nissen also made the point that there was not, and was not intended to be, any coincidence of timing between the Milestone Payment dates and the dates that invoiced Contract Amendments would fall due to be paid. That must be right: they operated entirely independently of one another.

[13] DISPUTED CHANGES

40. If a Change was disputed in principle, or if the extent or quantification of such a Change was not agreed, then the procedure set out at paragraphs 38 and 39 above could not apply. In that event, the situation was governed by Article 14.9 of the Part III document, set out at paragraph 33 above. That provided that the Contractor, Birse, still had to proceed with the work "if officially instructed to do so" and had instead to follow the procedure for making Claims pursuant to Article 17.0 of the Part III document.

41 Article 17.0 of the Part III document provided as follows:

"CLAIMS

17.1 Subject to the provisions of Article 14.0, Contractor shall give Managing Contractor written notice within five (5) working days after the happening of any event which Contractor believes may give rise to a claim by Contractor for an increase in Contract Price, or in time for performance of the Work. Within ten (10) working days after the happening of such same event, Contractor shall supply Managing Contractor with a statement supporting Contractor's claim, which statement shall include Contractor's detailed estimate of the change in Contract Price and/or Schedule of Work together with all substantiating documentation.

Company shall not be liable for, and Contractor hereby waives, any claim or potential claims of Contractor of which Contractor knew or should have known, and which was not reported by Contractor in accordance with the provisions of this Article. Any adjustments in Contract Price or time for performance of the Work shall not be binding on Company unless expressly agreed in writing by the Company or Managing Contractor, and any such adjustments in Contract Price so agreed in writing shall be paid to Contractor by Company. No claim hereunder by Contractor shall be allowed after final payment is made pursuant to provisions set forth in Article 43.0."

42. It will be noted that this Article placed a particular burden on the Contractor to notify the Managing Contractor within five days of the happening of any event that that event might give rise to a claim, and a further five days to provide a supporting statement and an estimate of the financial consequences of that event. Prima facie, therefore, it would seem to follow that the Managing Contractor also had a relatively short time to accept or reject the detailed claim that had been made in accordance with this procedure. If the claim was rejected, then a dispute would exist between the parties. If the Managing Contractor failed to respond to the claim at all, then, again, it seems clear that, in a relatively short space of time, a dispute would have arisen (or be deemed to have arisen) between the parties as to that particular claim.

[14] CLAIMS FOR ADDITIONAL SITE ESTABLISHMENT COSTS

43. The Contract contained different provisions relating to a claim by the Contractor for additional Site Establishment costs. The entitlement did not arise under Article 14 of Part III but under the last bullet point of Article 8.3 of Part II. This provided that: *"In the event of additional time spent on Work Site to perform the Work or increase in Site Establishment Resources to perform the work and Managing Contractor agrees that these are due to effects other than those within the responsibility of the Contractor, the lump sum for site establishment shall be amended using the rate set forth in Attachment 14.2."*

44. Accordingly, this part of Article 8.3 envisaged a situation whereby claims for additional Site Establishment costs on the part of the Contractor might be triggered by any delaying or disrupting event which was not the Contractor's responsibility. This provision therefore gave rise to potential claims for additional Site Establishment costs which were not confined to the ordering by Fluor of Changes to the Work; it would cover all events beyond the responsibility of Birse which caused them to incur additional Site Establishment costs. This was another reason

why, so it seems to me, the Contract dealt separately with the entitlement to claim Changes and claims for Site Establishment costs.

45. Article 8.3 envisaged that, if the claims for additional Site Establishment costs were agreed, the element of the Lump Sum Contract Price relating to Site Establishment would be amended accordingly. Thus, although the entitlement provisions were different, it seems to me that the mechanism within the Contract for payment of agreed claims for additional Site Establishment costs was the same as for the Contractor's agreed claims for Changes: both would require an agreed amendment to the Contract, and specifically, to the Lump Sum Contract Price, which would then be due for payment. Both would be in the standard form at Exhibit A, Attachment A. I see no reason to distinguish between the effect of Article 8.3 of Part II which provided for the agreed amendment of the Lump Sum in the Contract in respect of Site Establishment, and Articles 14.1 – 14.10 of Part III, which provided for an amendment to the Contract which would expressly incorporate "agreed adjustments" to the Contract Price. They both required a formal Amendment, in the standard form, against which an invoice could then be raised.

46. It seems to me that payment of any amendments to the Lump Sum in respect of Site Establishment would be made in accordance with the Article 34.4 invoicing procedure, referred to in paragraph 31 above. In other words, following the agreement and issue of a Contract Amendment, Birse would send Fluor an invoice for the agreed amount of the amendment, which would in turn fall to be paid in 30 days.

47. Mr Nissen contended in his Opening Submissions that any amendments to the Lump Sum for Site Establishment would fall to be paid pursuant to Article 6.3 of the Part II document. As set out above, my primary view is that it is unnecessary to invoke Article 6.3; that the mechanism for payment of any agreed amendments to the Lump Sum would be as set out in paragraphs 45 and 46 above. But if I am wrong about that, I consider that any agreed amendments to the Lump Sum for Site Establishment would have been paid pursuant to Clause 6.3 and the Milestone Payment Schedule. Mr Furst Q.C. disagreed with that, and asked rhetorically: "How is it to be paid? Do you change the Milestone? If so,when? How?" But it seems to me that these questions ignored the simple fact that, on this hypothesis, the amendment to the Lump Sum for Site Establishment would already have been agreed; all that would remain was an agreement as to precisely how it should be paid. If the parties had agreed the amount of payment, they could easily agree when the payment should be made. That could have been added to the written Contract Amendment. But, under Article 6.3, the default position (in the absence of agreement) would plainly have been that payment of the agreed adjustment to the Lump Sum for Site Establishment would fall due on the next Milestone date after the issue of the relevant Contract Amendment.

48. Article 8.3 does not deal with the situation if the claim for additional Site Establishment costs is disputed, either in principle, or as to extent/quantification. However, it seems to me that, if there was such a dispute, the Claims procedure set out in Article 17 of the Part III document, and outlined in paragraph 41 above, would again apply. Certainly the words of Article 17 are not restricted to claims in respect of Changes only; they are wide enough to include any disputed claims, including disputed claims for additional Site Establishment costs under Article 8.3. Therefore, to make such a claim, Birse would have to follow the same 'five-day plus five-day' procedure identified in Article 17 (paragraph 41 above). Accordingly, my observations in paragraph 42 above would also be applicable, namely that any claim for additional Site Establishment costs made in accordance with Article 17 and either rejected or not responded to promptly by the Managing Contractor, would at that point give rise to a dispute between the parties in respect of that claim.

[15] FINAL PAYMENT AND RELEASE

49. Article 39 of the Part III document provided as follows:

"39.1 Company shall not be obligated to make final payment, which shall include the release of retention, to Contractor until the following requirements have been accomplished to the satisfaction of Managing Contractor:

a) Contractor has delivered to Managing Contractor a Release Certificate satisfactory to Managing Contractor that Contractor has fully performed under this Contract and that all claims of Contractor for the Work are satisfied upon the making of such final payment, that no property of the Company and/or Managing Contractor or property used in connection with the Work is subject to any unsatisfied lien or claim as a result of the performance of the Work, that all rights of lien against Company and/or Managing Contractor property in connection with the Work are released (including without limitation, if Managing Contractor requests, releases of lien satisfactory in form to Company executed by all persons who by reason of furnishing material, labour or other services to Contractor for the Work are potential lienors against Company and/or Managing Contractor's property), and that Contractor has paid in full all outstanding obligations against the Work; and

b) Contractor has delivered to Managing Contractor satisfactory proof that all costs have been satisfied and paid, that there are no unsatisfied claims for injuries or property which Managing Contractor is not reasonably satisfied are covered by insurance, and that no other indebtedness exists in connection with the Work for which Contractor is responsible; and

c) Contractor has delivered to Managing Contractor any and every document, receipt, statement of account, affidavit or assurance which Managing Contractor requires as necessary or appropriate and is within Contractor's possession, responsibility or control to ensure immunity to Company and/or Managing Contractor from any and all liens and claims for which Company and/or Managing Contractor might be or become liable; and

d) Contractor has delivered to Managing Contractor assignments to Company and/or Managing Contractor from Contractor (and from each assignee, if any, to whom Contractor with Managing Contractor approval assigned any part of the Contract and whose assignment is in effect at the time of final payment under the Contract) of any refunds, rebates, credits, or other amounts, including any interest thereon, accruing to or received by Contractor to the extent that said items are properly allowable as costs for which Contractor has been reimbursed by Company; and

e) Contractor has delivered releases to Managing Contractor discharging Company and/or Managing Contractor from all liabilities, obligations, and claims arising out of or under the Contract; and

f) Managing Contractor has issued to Contractor a notice of Acceptance of the Work".

It is Article 34.2 that provided the actual mechanism for the final payment. It stated that: *"Upon Acceptance of the Work the retention monies due to Contractor shall be paid provided that Contractor shall have furnished Managing Contractor with a Release Certificate."*

50. In other words, the key ingredients relating to the administrative completion of this Contract were as follows:

50.1 A Notice of Acceptance of the Work, issued by the Managing Contractor to the Contractor;

50.2 A Release Certificate issued by the Contractor to the Managing Contractor;

50.3 Agreement by the Managing Contractor that all the Contractor's work has been fully performed and that all claims are satisfied upon the making of the final payment.

50.4 Payment of the retention monies to the Contractor.

Of course, if and to the extent that the Contractor was not happy with the proposed final payment, then the Contractor may not issue a Release Certificate (save perhaps in a form unacceptable to the Managing Contractor) and the retention monies would continue to be held by McCormick.

51. Mr Nissen made the point, I think rightly, that these provisions are very different to the usual Final Account provisions in standard form building and engineering contracts. The emphasis here is upon the various administrative tasks which the Contractor has to complete before he is paid the retention monies. There is nothing in these Articles about reviewing previous payments, or the making or renewing or formalisation of claims for additional monies by the Contractor. Mr Furst Q.C. argued that, at this stage, but not before, the Contractor had an implied right to seek all sums that it said were due under the Contract, but there is nothing in the words of Article 39 (or Article 34.2) which supports this contention.

[16] SUMMARY IN RESPECT OF CHANGES AND CLAIMS

52. The Articles of the Contract set out above reveal a contractual regime, which, although a little convoluted, was relatively simple and easy to operate. The emphasis at all times was upon agreement between Contractor and Managing Contractor and consequential amendments to the Contract itself to reflect such agreement. The Articles were not always willing to embrace even the possibility of disagreement between the parties, so the provisions dealing with the situation when Changes or claims were not agreed are relatively brief. However, it seems clear to me that Article 17 of the Part III document expressly anticipated that formal claims for Changes or additional Site Establishment costs would be made by Birse when their agreement was not possible.

53. Prima facie, therefore, Birse's cause of action in respect of each of their individual claims (whether for Changes or for additional Site Establishment costs) accrued once the relevant event triggering the claim had occurred; the two steps within the overall ten-day period in Article 17.0 had been taken by Birse; and Fluor had either rejected the claim or had, at the very least, failed promptly to respond to it. As I have said, given the short period in which Birse had to make their claim (ten days from the happening of the relevant event), it seems to me that Fluor would have themselves to respond to such claim promptly, and inactivity on their part beyond a relatively short response period would be deemed a denial of the claim made.

54. The prima facie position outlined above would have this additional attraction: that the cause of action – the right to payment - would accrue, if not precisely when the work was done, then certainly within a relatively short period of the relevant event that triggered that right. To that extent, therefore, it seems to me that such a position is broadly consistent with the principles in Coburn v Colledge, and Reeves v Butcher, above.

55. In the present case, it is agreed that each of the 29 events which give rise to Birse's claim in these proceedings had occurred by 14th November 1996, which was also the date of Birse's formal claim for additional Site Establishment costs under the Contract. As previously noted, it appears that, although the Notice of Acceptance of Work was not provided until September 1997, the works carried out between November 1996 and September 1997 were of a snagging/completion nature and are not – and have never been - the subject of any of Birse's claims.

56. Accordingly, on this prima facie analysis, Birse's causes of action under the Contract in respect of each of the 29 events would have accrued in late November/December 1996. Such claims would, therefore, be statute-barred. I accept that causes of action in respect of some of the claims may perhaps have accrued before November 1996 but it is unnecessary for me to analyse that point further since, giving Birse the benefit of the doubt and identifying the cut-off date as late November/December 1996, this would still result in the position where, prima facie, their claim under the Contract was statute-barred. Accordingly, the key question then becomes: Is there some reason why this prima facie analysis is incorrect? Is there anything else in the Contract which provided that a

cause of action was not complete until the happening of some later event, after November/December 1996, which would mean that Birse's cause of action was not, in fact, statute-barred? I consider that point in paragraphs 57-76 below.

[17] BIRSE'S CASE ON PRELIMINARY ISSUE 1

57. Mr Furst Q.C., who put together an extremely lucid and thoughtful set of Opening and Closing Submissions at the Hearing, argued that, for these purposes, the most significant part of the Contract was Article 34.1 of the Part III document. It is appropriate therefore to set that out in full:

"INVOICING AND PAYMENTS"

34.1 Unless otherwise provided in this Contract, Company shall pay to Contractor, for performance of the Work, partial payments as the Work progresses as follows:

At the end of each calendar month, or other periodic 'close-out' date specified by Managing Contractor, Contractor shall submit to Managing Contractor progress payment work sheets to demonstrate the work performed by Contractor. Progress payment shall be based on the work agreed between Contractor and Managing Contractor to have been completed in accordance with the measured progress in the various parts of the Work. After agreement between Contractor and Managing Contractor, Contractor shall submit an invoice based on the progress payment worksheets. Agreement as to the measurement and quantities of work performed shall be made by certification of the invoice by Contractor. In the case of disagreement, Managing Contractor's estimate of the value of all Work performed hereunder shall be conclusive and Contractor waives any and all entitlement to interest in the event of progress or monies being disagreed by Managing Contractor that has subsequently found to have been due and payable. Company shall pay Contractor ninety-five percent (95%) of the work certified and agreed by Managing Contractor less the aggregate of all payments previously made to Contractor."

58. Mr Furst Q.C. argued that, as a result of that provision, any and each of Birse's claims for Changes or for additional Site Establishment costs which were disputed by Fluor would be the subject of a "conclusive" estimate of its value whilst the Works themselves were being performed, and could not, during the currency of the Contract, be pursued, even if Birse disputed that estimate. He submitted that the conclusive nature of Fluor's decision would survive up to completion of the works when, he said, following the provision of a Notice of Acceptance of work under Article 39, Birse would finally be able to mount a challenge to Fluor's hitherto conclusive decision, by refusing to accept or put forward a Release Certificate which did not encompass the entirety of their claims, including those rejected at an earlier stage by Fluor.

59. In this way, Mr Furst Q.C. submitted that Birse's cause of action in respect of either Changes or additional Site Establishment costs did not accrue until the Final Payment Certification and Release Procedure set out under Article 39, and in particular, until the commencement of that process by Fluor's issue of the Notice of Acceptance of the Work. Only then, it is submitted, did Birse have a right to payment to disputed Changes and/or additional Site Establishment costs; any attempt to commence litigation or Arbitration before that date would have been met with the unassailable contention from McCormick that the cause of action could not have accrued until after the issue of the Notice of Acceptance of the Work. For these reasons, it was argued that Birse had no right to be paid their additional Site Establishment costs until September 1997, and that their claim under the Contract in these proceedings was not therefore statue-barred.

60. I have come to the firm conclusion that I must reject Birse submissions for a variety of separate reasons. Each of those reasons is set out at paragraphs 61-76 below.

Applicability/Necessity of Article 34.1

61. First, I note that the entirety of Article 34.1 was only incorporated into this Contract at all if a regime to pay Birse for their performance of the Work was not "otherwise provided" in the Contract. In other words, this provision is only relevant if the Contract does not elsewhere set out a payment regime. As a result of my analysis of the relevant Articles, at paragraphs 15-56 above, it is plain beyond doubt that this Contract did provide for such a payment regime. There is a mechanism for the payment of the Lump Sum Contract Price; there are Contract Amendment mechanisms – with a right to invoice and be paid - for Changes and additional Site Establishment costs; and there is a procedure (Article 17.0) to follow in the event that any claims for Changes and/or additional Site Establishment costs are disputed. Accordingly, I do not believe that there is any answer to the simple proposition, advanced by Mr Nissen, to the effect that Article 34.1 is, on its face, of no application at all because that for which it purports to provide is already "otherwise provided" in the Contract.

62. Secondly, it is clear that Article 34.1 envisages a complex interim valuation regime whereby Birse would submit to Fluor "progress payment work sheets to demonstrate the work performed" which would then have to be agreed and certified. As the Article makes plain, if it was applicable, it would involve the detailed measurement and evaluation of the progress and quantities of all work performed during the relevant period. The Article would cover everything, in particular the Contract Work which was the subject of the Lump Sum Contract Price. Such a traditional mechanism is completely contrary to the payment regime set out in Article 6.0 of the Part II document, and the Milestone Payment Schedule at Attachment 3 (paragraphs 24-27 above) which made plain beyond doubt that the Contract Sum was to be paid by pre-set, pre-agreed instalments. Progress payment worksheets, valuations, certificates and the like, which are the product of a standard interim payment mechanism, were simply irrelevant to a Contract of this sort. Therefore, even if the words "unless otherwise provided in this Contract" had not been present, I would still have found that this provision, being at odds with the rest of the detailed payment

mechanism set out in the Articles analysed above, was of no effect. I would have had no difficulty in so doing because, as noted in paragraph 23 above, this Contract was something of a composite document which contained references to potential alternative payment mechanisms which were not, in the event, followed through into any meaningful contract provisions. Thus I have, for example, ignored Article 34.5 of Part III because it appears to relate to a potential 'cost plus' arrangement which was not the subject of any detailed provisions and was, of course, contradicted by the clear words of Article 6.0 of Part II.

63. It is only fair to note, in this connection, that Mr Furst Q.C., in his Closing Submissions, properly accepted that Article 34.1 "looks as if it is better suited to a measurement and value contract… it is not as we would draft it." He sought to draw some of the sting from this accurate summary by contending that Article 34.1 was concerned, not with payment for the original Contract Work, but only for Changes which, he said, included Site Establishment costs. But there is nothing in the words of Article 34.1 which limits its application in this way; on the contrary, Article 34.1 is not qualified at all. Therefore, it seems to me that Article 34.1 either applied to the Contract Work, as well as Changes (with all the difficulties which Mr Furst Q.C. acknowledges) or it does not apply at all. In my judgment, the latter is the only proper answer to that question of construction.

64. Another way of reaching the same result, namely the conclusion that Article 34.1 is of no application at all, would be by reference to the fact that Article 34.1 is one of the Part III Articles, and is therefore designated and described as a "General Term". Article 6.0 is one of the Part II Articles, and is therefore described as a "Commercial Term". Where, as here, there is a conflict between two contract terms, it is a rule of construction that the specific (in this case the "Commercial") term should usually override the general term: see paragraph 6.04 of Lewison's 'The Interpretation of Contracts', Third Edition. Whilst this point usually arises in situations where there are hand-written or typed amendments to a standard form, there is no reason in principle why the rule should not be equally applicable to terms which the parties have themselves labelled 'General' on the one hand, and 'Commercial' on the other.

65. Thirdly, even if – contrary to my conclusions - Mr Furst Q.C. was able both to rely on Article 34.1 and to limit its applicability to Changes and claims for additional Site Establishment costs only, he could still only get his argument off the ground if he could show that there was no other mechanism for payment in respect of Changes or additional Site Establishment costs. But there was: Paragraphs 38-39 above recite the provisions containing the mechanism for the payment of agreed Changes, and paragraphs 45-47 deal with the provisions relevant to the mechanism for payment in respect of agreed additional Site Establishment costs; in both cases, Article 17 (paragraph 41 above) provided the procedure if either type of claim was not agreed.

66. The only reason put forward by Birse in support of the contention that Article 34.1 related to the payment of agreed Changes was the reference in Article 14.6 to Article 34.0. I do not consider that that was a reference to Article 34.1 for three reasons. First, Article 14.6 was concerned with payment (of agreed amounts) whilst, if Article 34.1 related to anything at all, it was to the process of valuation/assessment, i.e. a stage in the sequence well before the mechanics of payment of an agreed sum. Secondly, it is clear that the reference to Article 34.0 in Article 14.6 cannot be construed as meaning every part of Article 34.0, if a particular part of the Article is irrelevant to payment. For instance, as previously noted, it could not be a reference to Article 34.5, because that Article is redundant in any event. In my judgment, Article 14.6 was referring only to those parts of Article 34.0 which concerned payment, and importantly, whilst that excluded Article 34.1, it included Article 34.4 (Invoicing). Thirdly, it is clear that the procedure for dealing with and evaluating Changes (paragraphs 36 and 37 above) had nothing whatsoever to do with any system of 'partial payments' which is what Article 34.1 purported to provide for.

67. In respect of Birse's claims for additional Site Establishment costs, there is not even a contractual link (of the sort noted in paragraph 66 above) on which Birse can rely in support of the contention that Article 34.1 was required to provide for the payment of such agreed claims. As a result, Mr Furst Q.C. was obliged to attack the perceived alternative, Article 6.3 of Part II, as being neither relevant to nor workable for the payment of such claims, in order that Article 34.1 could come back in as a sort of last resort. For the reasons set out at paragraphs 45-47 above, my primary conclusion is that Article 6.3 was not necessary for the payment of additional Site Establishment costs. However, if I am wrong about that, I am entirely satisfied that Article 6.3 could have been utilised for that purpose, for the reasons identified in paragraph 47 above.

68. Accordingly, for these three separate reasons, set out in paragraphs 61-67 above, it is my firm conclusion that Article 34.1 was simply inapplicable and/or unnecessary and of no effect. However, if I am wrong about that, I consider that Article 34.1 did not in any event have the effect for which Mr Furst Q.C. contended, and my reasons for that conclusion are set out in paragraphs 69-74 below.

Proper construction of Article 34.1

69. If Article 34.1 had been applicable, what mattered about it was Fluor's "estimate of the value of all Work performed", because it was that quantative estimate which was said by Birse to be conclusive. The Article did not address the position if claims, made under Article 17 were not agreed by Fluor. I certainly do not read Article 34.1 as providing that Fluor's decisions (when responding to such a claim) as to whether or not a particular element of work was or was not a Change under Article 14 of Part III, or whether a particular delay was or was not the responsibility of Birse under Article 8.3 of Part II, were in some way conclusive. There is nothing in Article 34.1 which provided for such a result, and it seems to me that it would need very clear words for Fluor's rejection of the validity of Birse's claims to be somehow "conclusive". Such a provision would have been a very different

thing from a provision that made decisions conclusive that concerned solely Fluor's quantification of the work actually carried out. There is nothing in Article 34.1 that referred to or related back to claims under Article 17 (or claims under Article 14 or Article 8.3) nor is their anything which purported to make the Article 17 claims the subject of a "conclusive" decision by Fluor under Article 34.1.

70. Further, I do not consider that Article 34.1 was concerned with or relevant to claims for additional Site Establishment costs in any event. As we have seen, claims for such additional Site Establishment costs were different in nature to claims for Changes and were only recoverable under Article 8.3 of the Part II document. They would have been calculated by reference to Attachment 14.2. In my judgment, it is not possible to read Article 34.1 as relating in any way to the making and/or consideration and/or evaluation of claims for additional Site Establishment costs under Article 8.3, and the consequential amendment of the Lump Sum for Site Establishment, let alone to construe the 'conclusivity' of the Fluor estimate as somehow preventing Birse from pursing its (disputed) claims for such costs.

Conclusivity

71. Now, let us assume that I am wrong about all of the previous points and that Article 34.1 does somehow apply to claims for Changes or additional Site Establishment costs. Even in that event, I am firmly of the view that there was nothing in Article 34.1 which would have made Fluor's "estimate of the value of all Work performed" conclusive for the entire period that the Work was carried out or longer, depending on when the Notice of Acceptance was issued. There was no express provision to that effect in Article 34.1. Why would it be necessary to imply or infer any such provision? It seems to me that if Article 34.1 was relevant at all, it was simply providing that Fluor's estimate would be conclusive unless and until it was challenged in Court or in Arbitration. That it is the natural reading of these words; that the estimate was to be conclusive in the same way as an adjudicator's decision is conclusive and was therefore the last word on a particular point in dispute until that point was taken to Court or to Arbitration. Accordingly, even if Article 34.1 was somehow relevant to Birse's claims, it did not prevent a right to payment/cause of action from accruing before the Notice of Acceptance of Work was issued. There is nothing in Article 34.1 which provided to the contrary. There is no mention in Article 34.1 of the 'conclusivity' continuing until the happening of a particular event, such as the issue of the Notice of Acceptance of Work. Indeed, if it seems to me that the words "subsequently found to have been due and payable" support the conclusion that any estimate by Fluor could be challenged at any time, without delay or qualification, in Court or in Arbitration.

72. Another way of putting this same point is to ask the question: what is there in this Contract that would have prevented Birse from commencing litigation or Arbitration in respect of a disputed Change or claim for additional Site Establishment costs before the issue of the Notice of Acceptance of Work? The answer, in my judgment, is nothing. Not only was there no contractual link between the conclusivity of the Managing Contractor's estimate on the one hand, and the Notice of Acceptance of the Work on the other, there was also no link in the words of the Contract between Article 34.1 and the generality of Article 39 of the Part III document. I therefore conclude that there is no reason to conclude that the "conclusivity" only came to an end when the Notice of Acceptance of the Work (as opposed to any other or earlier date) was provided.

73. Mr Furst Q.C submitted that the conclusivity of the Managing Contractor's estimate should be linked to the word "progresses" in the introductory words of Article 34.1 and that therefore the estimate was conclusive whilst the Work "progresses" but not thereafter. That is a strained construction of Article 34.1: it might be said the other way that the conclusivity was not expressly qualified <u>at all</u>, although Mr Furst Q.C recognised that some qualification or limit was plainly required. But even if (which I do not accept) that he is right, there is still nothing in Article 34.1 that provided that the conclusivity lasted until the administrative issue of a piece of paper (the Notice of Acceptance) the date of which may be wholly unconnected to the date on which the Work actually ceased to progress. Even on the agreed facts here, we know that by November 1996, the Work had progressed sufficiently far for Birse to settle all their claims for Changes; that therefore could equally well be taken as the date that the Work ceased to progress for the purposes of Article 34.1.

74. Birse's case as to conclusivity also depended to a large degree on the submission that, once the Notice of Acceptance of Work had been issued, then (but only then), pursuant to Article 39 of the Part III document, did they have an implicit right to insist on payment for all past claims. Mr Nissen argued that there was nothing in Article 39 (or Article 34.2) which necessitated that implication; there was, as he put it, "no magic in the final payment". As foreshadowed in paragraph 51 above, I agree with that submission. I do not consider that there was anything which Birse could have done about disputed claims after the issue of the Notice which they could not have done before such a Notice was issued.

Wider Commercial Considerations

75. Standing back from the precise words of the Contract for a moment, I consider that Birse's argument is contrary to both commercial common sense and the authorities which I have outlined earlier in this Judgment. It would be perfectly possible, on a project of this sort, for there to be a legitimate delay in the provision of a Notice of Acceptance of the Work. There may, for instance, be a perceived structural problem with the foundations which threatens the whole building but which only became apparent towards the end of the Work. Sorting out the legal and financial responsibility for such a problem might take months, if not years. During that time there would, for obvious reasons, be no question of there being a Notice of Acceptance of Work. On Birse's case, whilst those months and years went by, they would not be able to commence proceedings in respect of claims for Changes or additional Site Establishment costs, even though the events on which those claims were based happened long

before and were wholly unconnected with the reason for the delay in the issue of the Notice of Acceptance of the Work. It seems to me that such a result would be uncommercial and any construction which led to it should be avoided if at all possible. It is not an attractive construction of the Contract as a whole. In the words of Lopes L.J. in ***Coburn v College***, describing a similar contention, it would be "a very anomalous and inconvenient" result. For all the reasons set out above, it is not a construction which I am tempted to adopt.

76. Finally, I consider that Birse's argument based on Article 34.1 is generally contrary to the payment structure and regime envisaged by the Articles of the Contract which I have set out above. The Contract required Birse to act promptly on the happening of any event which might give rise to a claim. It would be wholly inconsistent with those provisions to argue that, on the one hand, Birse had to notify Fluor almost immediately of any event which might conceivably give rise to a claim, but on the other to say that such a claim – if disputed - was not actionable until months or years later, when a Notice of Acceptance of the Work was eventually issued by Fluor.

77. Accordingly, for each of these reasons, I reject Birse's submissions on Preliminary Issue 1. For the reasons which I have given, I consider that the answer to Preliminary Issue 1 is Yes. I now turn to Preliminary Issues 2 and 3 to see if there is another way in which Birse can put their claim which is not statute-barred.

[18] FACTUAL BACKGROUND FOR PRELIMINARY ISSUES 2 AND 3

78. Work began on site in early October 1995. By the 29th November 1995, Birse had made a written claim in respect of a two week delay caused by additional drainage requirements within the ground floor slab. Mr Nicholas Sherman, who was the Senior Project Surveyor for Birse and gave evidence before me, accepted in cross-examination, by reference to his manuscript notes on the letter, that he knew that Birse would have to produce a critical path analysis and to summarise their costings in order to advance this claim under the Contract.

79. By the start of January 1996, there were already a dozen CWA's/ CWO's. On 3.1.96, Birse provided CWO 13 in respect of replacement concrete which included an amount for additional Site Establishment costs. Those Site Establishment costs were deleted from the CWO because Fluor considered that they should be the subject of a separate claim, and made plain to Birse that claims for Changes and claims for additional Site Establishment costs were to be dealt with separately under the Contract.

80. Also on 3.1.96, Birse provided CWO 15, which was their claim for "alteration and delay costs" arising out of those drainage revisions which had been the subject of the written claim on 29th November. This claim was advanced by calculating a weekly site establishment figure from Attachment 14.2 of the Contract and applying it to the two week period which was the subject of the claim. Again, Fluor dismissed that element of the claim on the basis that a CWO was not the appropriate place for a claim for additional Site Establishment costs. Mr Sherman accepted that, in dealing with this CWO, Fluor made it plain to him that a prolongation claim should not be included within the CWO. He also accepted that there was no occasion thereafter when prolongation was in fact included by Birse within a CWO. It seems to me, therefore, that after this, both parties correctly operated the Contract, which had different provisions relating to Changes, on the one hand, and claims for additional Site Establishment costs, on the other.

81. At the meeting on the 29th January 1996, Birse reported that there was a 3½ week slippage to the programme and they said that that delay would be pulled back to three weeks. They also said that they would provide a detailed breakdown of the delays. They said that they had a strong case for additional costs "due to reasons discussed". The minutes of the meeting record that Fluor responded to this by saying that they were not able to evaluate the validity of such a claim on the basis of verbal discussions and they "requested Birse [to] supply full detailed backup fully substantiating their statements". Birse confirmed that such a submission would be made in February 1996. Mr Sherman accepted in cross-examination that Birse considered that they were entitled to make this claim and that, as such, it would be paid under Article 8.3 of Part II of the Contract (paragraph 43 above).

82. Birse's first proper delay claim was made on the 12th February 1996. This claim document included the claim for delay due to alterations to the under-slab drainage, which had first been notified on 29th November 1995. The claim sought an overall extension of time of three weeks. It also included a claim for additional Site Establishment costs relating to that three week period.

83. On the 28th February 1996, in writing, Fluor rejected Birse's claim for a three week extension of time "and all costs related to that claim". Mr Sherman accepted in evidence that, on the basis of these events, from a relatively early stage in the Contract, Birse had pursued a claim for additional Site Establishment costs independently of the CWO/CWA process; had made their claim shortly after the events that had given rise to it, and had had their claim rejected.

84. In the Spring of 1996 Birse were continuing to pursue claims for additional preliminaries in respect of other matters, including a claim in respect of a freight lift. These claims were rejected by Fluor although, as Mr Sherman said, between May and July 1996 he was generally continuing to push Birse's claims for additional Site Establishment costs.

85. On 17.7.96, Mr Sherman made a "Claim Action List", which was a note of the things which he believed to be necessary for the preparation of what he admitted was "a wide-ranging claim" on behalf of Birse. This was the beginning of a process which concluded with the Birse claim document of 14th November 1996. Accordingly, as Mr Sherman accepted, from around about June/July 1996, Birse were intent on making a formal claim for delay and additional Site Establishment charges, and had begun work on that document.

86. In September 1996, it appeared that Birse were indicating to Fluor that their formal claim document would be available in early October 1996. On the 20th September there was a discussion of the forthcoming claim and Fluor stated: *"…that all cost associated with the time related items remained in dispute and would be further discussed at a later date … Birse confirmed that they were also considering potential claim for extension to time and additional works as was considered necessary to complete the contract. [Fluor] requested outline details, Birse responded that it was too early at this stage and that initial indications were that a preliminary submission would be made early October 1996."*

Mr Sherman confirmed in his cross-examination that this was a reference to the claim document that Birse had been working on since June/July 1996. In relation to the reference to Fluor's request for "outline details", Mr Terence Davis, Fluor's Chief Contracts Engineer, who was at the meeting, said in his written statement that, whilst he could not remember exactly what had been discussed, "when contractors wanted to submit a formal claim, I would ask for a succinct but comprehensive claim document containing references to the relevant articles of the contract, details of the additional money being sought referenced to specific events together with evidence to substantiate the claim." He therefore thought that this was probably what was being referred to in the Minutes.

87. On 11th November 1996 there was a meeting between Mr Elkington, a quantity surveyor with Birse, and Mr Terence Davis, in which an advance copy of the Birse claim was shown to Mr Davis. The formal claim document itself was provided on the 14th November 1996. At one stage, there was a suggestion that the Birse claim document was in a particular form because of a request by Mr Terence Davis of Fluor. In my judgment, there was no evidence of that: the most that can be said (as Mr Elkington accepted) is that Mr Davis asked to see the claim document before it was formally provided, and that was achieved at the meeting on 11th November. What Mr Davis probably requested on the 20th September was no more than the information that Birse should have been providing in any event. Indeed, on their case, it was what they had been in the process of preparing for some months. I therefore find that the Birse claim of the 14th November 1996 was the document which they had been preparing since June/July 1996; that it was in a form which they chose; and that it contained the material that, at that time, they considered was appropriate. Mr Elkington expressly confirmed in his cross-examination that the 14th November claim document could properly be described as Birse's formal claim and that both the timing of it, and the decision to make it at all, were down to Birse. That accorded with the evidence of Mr Kingsnorth, to the effect that, in his view, Birse "were always entitled to put forward any claim they liked."

88. The following day, on the 15th November 1996, all of Birse's claims in respect of the Changes were settled. However, that settlement expressly excluded the claim for additional Site Establishment costs, as set out in the claim document of 14th November.

89. On the 25th November 1996, Fluor responded to that claim by saying that they would issue a formal response to the claim within the next 14 days. However, that did not happen and, by February 1997 Mr Sherman admitted that he was getting frustrated at the lack of response from Fluor, and Mr Elkington said that he had expected a response from Fluor by this stage. Although it appears from the documents that Mr Terry Davis (or possibly others) at Fluor had prepared a detailed written review of Birse's claim, this was not completed, nor was it passed on to Birse. Instead, on 11th February 1997, Fluor wrote to Birse to say that: *"Due to the nature of these outstanding works we would advise that we do not intend to progress or review your claim submission or enter into negotiations/discussions with you until the outstanding works are satisfactorily completed."*

Naturally, Birse were disappointed that Fluor had not dealt with any of their detailed claims. Mr Kingsnorth said that he thought that Fluor's stance was not unreasonable, due to the existence of outstanding work on site.

90. Following internal changes within the Birse organisation, Mr Robert Heath was appointed in early 1997 as Commercial Director with responsibility, amongst other things, for closing out this Contract. Mr Heath told me that he considered that the sums claimed in the November 1996 claim document were too high, and he also had other criticisms to make of it. He did, however, say of it that "it was supposed to cover everything we knew at that time". Following a meeting with Mr Brian Davies, the Fluor Project Manager, on 7th March 1997, at which Mr Heath promised to resubmit the claim in a lower figure, Mr Heath asked Mr Sherman to revamp it. It also seems that at this meeting, Mr Davies said something to the effect that, in Fluor's view, the claim document was insufficiently detailed. It took longer than anticipated to revamp the claim and the claim was eventually "resubmitted" (Mr Heath's word) to Fluor on the 29th April 1997. Mr Sherman also expressly accepted that this was not a new claim but a resubmission of the original claim of 14th November 1996. He said that effectively "it provided further and better particulars; we broke it down as required". He agreed that, in conceptual terms, it was the same claim as that of 14th November 1997; and that it was based on the same 29 events. However, in his view, it did "a better job" on cause and effect. He said that the changes to the financial part of claim "fell out" of the revamp on causation.

91. On the 17th June 1997, Fluor wrote in respect of the April claim to say: *"The preliminary results of our initial evaluation indicate that the majority of your claimed items are either unjustified and/or remain significantly in excess of what we would have considered to be reasonable and appropriate for the events and excessive delays to the Project caused by yourselves. In this respect we are now finalising our evaluation of your submission and advise that it is not our intention to discuss this further with yourselves until you have satisfactorily completed all your outstanding work-scope items on site. Therefore in the interim period we must formally advise that your claim is rebutted as it presently stands."*

Notwithstanding this stance, it appears from some of the internal documents that Fluor were again assessing the Birse claim: for instance, manuscript notes relating to a meeting on 24.6.97 suggested that Fluor thought a part of the claim might be justified but that any assessment would be at a figure far less than Birse were claiming.

92. On the 13th August 1997 Fluor rejected the vast majority of the claim in a detailed Rebuttal document. This identified a proposed settlement figure of £99,323, but this sum was not accepted by Birse. On the 3rd September 1997, Fluor sent Birse a qualified Notice of Acceptance of Work. On the 12th September 1997 Fluor indicated to Birse a potential claim for liquidated damages in the amount of £495,635.78. After that things went much more slowly. On the 11th December 1997, Birse sent Fluor a detailed reply to Fluor's Claim Rebuttal document of 13th August, and a response to their proposed counterclaim. In the first part of 1998 there was some correspondence between the parties but on the 23rd July 1998 Birse wrote to Fluor to complain that *"we have still not received any response to our claim submission despite supplying all additional request information 16 weeks ago."* Thereafter, it appears that little or nothing happened relating to this claim until the commencement of the proceedings on the 23rd May 2003.

[19] PRELIMINARY ISSUE 2: DID FLUOR OWE A DUTY TO FAIRLY AND PROPERLY ASSESS AND/OR ESTIMATE AND/OR AGREE BIRSE'S CLAIMS?

93. Preliminary Issues 2 and 3 arose out of an amendment to the APoC produced by Mr Furst QC, on behalf of Birse, on the second day of the hearing on Preliminary Issues. Helpfully, Mr Nissen did not oppose the application to amend and was able to address the points that arose in consequence. The new pleading provided as follows:

"9.4A Fluor was obliged to fairly and properly assess and/or estimate and/or agree Birse's entitlement in response to Birse's claim submitted on the 29th April 1997 by virtue of the fact that:

(i) It was appointed by McCormick as its agents for and on behalf of McCormick in the implementation and administration of the contract;

(ii) It was obliged to agree with Birse the price or cost or addition to the Contract Price arising from Changes and in any event it was obliged to amend the lump sum for Site Establishment if it agreed that additional Site Establishment costs were due to effects other than those within the responsibility of Birse (Articles 3.2, 8.3, Part II; Articles 14.2, 14.5, 14.9, 17.1, 34.1 Part III);

(iii) In seeking to reach agreement as aforesaid Fluor, by necessary implication, was obliged to consider all facts and matters either known to it or put forward by Birse in support of an adjustment to the Contract Price and/or an amendment to the lump sum fairly, properly and in accordance with the terms of the contract in order to arrive at a fair and proper assessment and/or estimate for the purposes of reaching agreement with Birse;

(iv) Fluor, from in or about September 1996 and thereafter, accepted that Birse were entitled to put forward a claim and led Birse to believe that such a claim would be fairly, properly assessed and estimated for the purposes of seeking agreement with it. Birse will rely on the meeting held on the 20th September 1996 (see paragraph 3.7 of the Minutes), the meeting on the 11th November 1996, Fluor's letters of the 25th November 1996, the 11th February 1997, the meeting on the 7th March 1997, 15th April 1997, 17th June 1997 and 13th August 1997;

(v) In the premises Fluor were obliged to fairly and properly assess and/or estimate and/or agree Birse's entitlement in response to Birse's claim submitted on the 29th April 1997 either pursuant to the terms of the contract referred to at sub-paragraph (ii) above or by virtue of the fact that they were appointed to administer the contract fairly and having led Birse to believe that they would consider Birse's claims they were bound to do so fairly and properly and to arrive at a fair and proper assessment and/or estimate with a view to reaching agreement on Birse's entitlement.

9.5 Wrongfully and in breach of contract, McCormick by itself or through Fluor failed to fairly and properly assess and/or estimate and/or agree Birse's entitlement and to fail and pay the sum of £546,764, or any sum, and the same is due and owing to Birse from McCormick pursuant to the Contract, or as damages for breach of it.

(i) When making the assessment contained in the letter of the 13th August 1997, Fluor were operating the Contract under Article 8.3, Part II and/or Article 14 and/or Article 34 and/or Article 39, Part III and/or as administrators of the Contract. The assessment should have been £546,764 alternatively any sum greater than £99,323. Birse contend that McCormick invited the submission of and/or agreed to the submission of the claim that led to the August 1997 assessment and are not therefore entitled to contend that there was no obligation to make an assessment.

(ii) Alternatively, the same assessment should have been made under Article 8.3, Part II and/or Article 14 and/or Article 34 and/or Article 39 Part III and/or as administrators of the Contract on or after the issue of the Notice of Acceptance of Works on the 2nd September 1997."

94. It is not unfair to say that this new pleading represented a considered effort on the part of Birse to try and extend the relevant date for limitation purposes to a date within the six years immediately before the issue of the Claim Form on the 23rd May 2003. For the purposes of Preliminary Issues 2 and 3, there were just two matters with which I was concerned: whether there was a duty and, if so, and assuming breach of that duty, whether the claim was statute-barred.

95. In support of Birse's case that Fluor were obliged fairly and properly to assess and/or estimate and/or agree Birse's entitlement under the contract, Mr Furst Q.C's principal argument relied on the general proposition of law that *"where a contract on its terms provides that a particular act of one of its parties (or their agent) will result in or*

affect a liability in the other" that party (or its agent) must act fairly: see Chitty on Contracts, 29th Edition, Volume 1, paragraph 1.025. He contended that, under this Contract, Fluor were appointed as agent for McCormick, and their decisions would plainly affect Birse's rights. He said that, for this purpose, there was no distinction between rights and liabilities. He also referred to the various Articles of the Contract, identified above, which envisaged agreement between the parties and submitted that Fluor were obliged to consider all matters put forward by Birse (a) in the light of what it knew and was told, and (b) fairly and properly. He further submitted that the obligation would arise by implication either because it was the obvious inference from the other terms of the Contract, or it was necessary to make the Contract work. In support of the argument that it would arise by way of obvious inference, he relied on paragraph 13.007 of Chitty: *"A term which has not been expressed may also be implied that if it was so obviously a stipulation in the agreement that the parties must have intended it to form part of their contract. 'Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander was to suggest some expressed provision for it in the agreement, they would testily suppress him with a common 'oh, of course.': **Shirlaw v. Southern Foundries (1926) Limited** [1939] 2KB 206, 227. A term will not, however, thus be implied unless the court is satisfied that both parties would, as reasonable men, have agreed to it had it been suggested to them."*

Mr Furst QC made plain that he did not contend that Fluor were bound to agree with what Birse put forward, or that McCormick were in breach simply because Fluor failed to agree or accept whatever it was that Birse claimed at the time. His contention was that they were obliged to seek to reach agreement having fairly and properly assessed and/or estimated Birse's entitlement.

96. On behalf of McCormick, Mr Nissen submitted that, since Fluor were, for the purposes of the Contract, standing directly in the shoes of McCormick, the argument had to be considered on the basis that the obligation to assess and/or estimate fairly was being imposed on McCormick itself. He said that there was no duty on a party to a Contract of this sort to treat the other side fairly. He said there was nothing in the Contract that required Fluor to act fairly and there was no room for the implication of any such terms in fact or in law. In particular, he relied on the last part of paragraph 13.007 of Chitty which makes clear, by reference to a raft of well-known cases including ***Lynch v. Thorne*** [1956] 1 WLR 303, that the Court will be reluctant to make any implication where the parties have entered into a carefully-drafted written contract containing detailed terms agreed between them. Mr Nissen contended that Birse had their remedy under the Contract and there was no need for the implied terms.

97. Because of the clear terms of the Contract Signature Document, which put Fluor into the position of McCormick "in the implementation of this Contract" I agree with Mr Nissen that the essential question is: were McCormick – through the agency of Fluor - obliged to assess and/or estimate fairly any claims made by Birse? I also accept Mr Nissen's submission that it will be relatively rare for a Court to impose such an obligation on one party to a contract in respect of claims made by the other, and that such terms would not ordinarily be implied into a complex contract such as this.

98. However, in my judgment, this Contract is unusual because of the repeated references to and emphasis upon the need for agreement between the parties as to the identification, carrying out and quantification of Changes, and in respect of various aspects of Birse's claims generally. Mr Nissen contended that these various references to "agreement" of one sort or another were merely the first stage in the dispute resolution process and, being procedural, did not carry with them the implication that Fluor/McCormick would act fairly in fulfilling this function. I do not accept that submission. It seems to me that, because this Contract expressly emphasised the need for agreement in respect of so many different day-to-day aspects of its administration, it seems to me that the Contract would have been largely unworkable if Fluor/McCormick had contrived, from day one, to act unreasonably in respect of any Changes that Birse might identify or any claims that Birse might make.

99. Accordingly, going back to the Birse pleading at paragraph 9.4A, I agree with the contention at paragraph 9.4A(iii) of the APoC that, by necessary implication, in seeking to reach the agreements identified in the Contract, Fluor/McCormick were obliged to act fairly and properly in considering the claims by Birse in support of an adjustment to the Contract Price and/or amendment to the Lump Sum. It seems to me that this implication would arise pursuant to the fairness test referred to in paragraph 1.025 of Chitty: it is, in addition, an obvious inference from the terms of the Contract.

100. I should make plain that I do not consider that the other ways in which the duty point was argued for on behalf of Birse have been made out. I have already said that I do not consider the fact of Fluor's agency itself to be relevant one way or another. More importantly, I do not consider that there is anything at all in the factual matters which I have set out from paragraphs 78-92 above which justifies or supports the pleading at paragraph 9.4A(iv) of the APoC to the effect that Fluor made any representation in relation to the claims being made by Birse. As the evidence made crystal clear, Birse considered at a very early stage that they had an entitlement under the Contract and therefore made their claims accordingly. Birse were entitled to assume that those claims would be fairly considered because of the implied obligation that I have identified above, but that is all.

101. It is also important that I make plain the limits of the implied duty which I have found. I do not believe that there was, in some way, a separate or stand-alone duty on the part of Fluor/McCormick to fairly and properly assess and/or estimate and/or agree Birse's entitlement in response to particular claims. I believe that such an obligation simply arose as part of Fluor/McCormick's obligations under the terms of the Contract itself, and not otherwise. It

was an implied term of the Contract: no more and no less than that. Subject to that potentially important qualification, the answer to Preliminary Issue 2 is Yes.

[20] PRELIMINARY ISSUE 3: IF SO, IS A CLAIM FOR BREACH OF THAT DUTY STATUTE-BARRED?

102. On behalf of Birse, Mr Furst QC's argument on this point is simply stated. He said that, by reason of the duty fairly and properly to assess/estimate/agree Birse's claims, Fluor had to assess the claim of the 29th April 1997 which they did on the 13th August 1997. He says that on the assumption that that August assessment was performed in breach of this duty, that breach occurred less that six years before the commencement of these proceedings. For this purpose, he submitted that the November 1996 claim was irrelevant. Accordingly, he said, the separate claim for breach of the duty fairly and properly to assess and/or estimate and/or agree the Birse claim accrued in August 1997 and is not statute-barred.

103. On behalf of McCormick, Mr Nissen submitted that Birse's formal claim under this Contract was the one of the 14th November 1996 and that, on the evidence, that was essentially the same claim as the document of the 29th April 1997: it was simply resubmitted. McCormick therefore contended that, if there was a separate duty, the breach occurred shortly after the submission of the claim in November 1996 and is therefore statute-barred.

104. There is an obvious difficulty inherent in Birse's case on this point. Taking Mr Furst QC's arguments to their logical conclusion, they could easily have the effect of extending the limitation period far beyond anything contemplated in the Contract. On the basis of their contentions, Birse could put in a claim one day before the expiry of the six year limitation period for claims under the Contract, and then contend that they had a further six years in which to bring an action for damages for breach of the duty fairly and properly to assess and/or estimate and/or agree that claim. Mr Furst Q.C. properly recognised this difficulty because he spent some time in his submissions arguing that this possibility would not actually arise in practice. He said that Fluor's obligation would not continue once the completion procedure under Article 39 was up and running. Essentially, he said that once there was a Notice of Acceptance, a claim would have to be made by Birse and thereafter Fluor would be *functus officio*.

105. I do not consider that this is a proper answer to the problem. First, I consider that Fluor's obligation to act as McCormick's agent *"in the implementation of the Contract"* might last considerably longer than the commencement of the completion procedure under Article 39. Secondly, and much more importantly, I have already explained that, in my judgment, the Notice of Acceptance might be legitimately delayed for months, if not years, because of, say, deficiencies in the design and construction; on Birse's case, this would have the effect of artificially extending the limitation period for claims against Fluor for breach of the duty to assess/estimate/agree fairly or properly. I have already found that such an artificial attempt to extend the limitation period is not appropriate in respect of claims under the Contract; it would therefore be illogical and unjustified to allow such an attempted extension in respect of Birse's alternative way of putting the case. It would offend against the principle identified in Coburn and (particularly) ***Reeves,*** above, in that it would mean that the limitation period would not run from the earliest time at which an action could be brought.

106. There is, however, an even more fundamental point. As I have already said, I am firmly of the view that the obligation on the part of Fluor/McCormick was not a separate stand-alone duty but an implied obligation as to how they were to perform particular functions under the Contract. If Birse made a claim under the Contract which was rejected by Fluor/McCormick then, when that claim was (or would have been deemed to have been) rejected, Birse had a cause of action under the Contract: that is my conclusion on Preliminary Issue 1. Birse might also have had a separate cause of action on the basis that Fluor/McCormick were in breach of the implied obligation to fairly and properly assess and/or estimate and/or agree Birse's entitlement. It seems to me that, even if those could properly be said to be two separate causes of action, they would have accrued at the same time, namely the date on which the claim was – or can be deemed to have been - rejected. To the extent that, in his Submissions in Reply, Mr Furst Q.C suggested (for the first time) that breach of the duty fairly to assess/estimate/agree could not arise until a formal written assessment of the claim had actually been provided back to Birse by Fluor, I reject such a suggestion. A failure to address a claim at all will always encompass a failure to address that claim fairly: the latter is merely an aspect of the former. Thus, the breach occurred here when there was a failure by Fluor to address the November 1996 claim within a reasonable time. In addition, because the fairness obligation arose as an implied term of the Contract, and in no other way, I do not believe that it gives rise (or could give rise) to a later or different accrual date to the claim under the Contract. Put another way, I consider that the existence of this separate way of putting the same claim is actually immaterial for limitation purposes.

107. For the avoidance of doubt, I expressly find that Birse's formal claim was made on the 14th November 1996 and that the fact that, a few months later, this claim was resubmitted is nothing to the point and does not somehow extend the relevant limitation period. I accept Mr Kingsnorth's evidence that the April claim was, to all intents and purposes, *"exactly the same"* as the claim in November 1996. The 14th November claim contained, by Mr Heath's admission, *"everything we knew at that time"* and the making of such a claim, and its timing, were, by Mr Elkington's admission, entirely down to Birse. As Mr Heath said of the November claim in cross-examination: *"we would have expected to be paid at least some of the claim as a consequence of making it. Otherwise we would not have done it."* Accordingly, for limitation purposes, what matters under Preliminary Issue 3 is when a cause of action accrued to Birse in consequence of Fluor's presumed failure properly or fairly to assess/estimate/value Birse's contractual claim which, I find, was the November 1996 claim. That was late November/December 1996. The April 1997 claim was, and was accepted by all the Birse witnesses to be, simply a resubmission of the same basic claim

based on the same 29 events. In Mr Kingsnorth's words, it was just a "progression" of the November claim. It did not, and could not, extend the relevant limitation period.

108. Whilst it is probably unnecessary to identify precisely when these causes of action accrued, I have reached a clear conclusion on that point. As I have previously explained, it was appropriate to take the accrual of Birse's cause of action under the Contract as being the date that their November 1996 claim was (or was deemed to be) rejected. That was probably fourteen days after 25th November, since that was the date Fluor promised to reply to the claim (paragraph 89 above) and was the sort of date by which Birse expected some sort of response. I do not believe that their failure in fact to respond by this date can extend the date of the accrual of Birse's cause(s) of action. Both Mr Sherman and Mr Elkington confirmed that they had expected a response to the claim by that sort of date, and certainly earlier than February 1997, which was the date of the first Fluor written response. It seems to me that the date of 9th December 1996 would probably have been when the cause of action accrued under the Contract. Accordingly since that was the date by which Fluor should have responded (but failed to respond) to the Birse claim (whether fairly or otherwise), that was also the date on which any cause of action accrued on the basis that Fluor/McCormick failed fairly and properly to assess/estimate/agree that claim.

109. I should deal here with one final point, which featured in both the Pleadings and in the cross-examination of the Fluor witnesses. This was Birse's suggestion that a proper evaluation of their claims had to wait until the end of the Contract, because it was only then that the precise consequences of any delaying or disrupting event would have been known. As part and parcel of this case, Birse suggested that Fluor had expressly told them not to make a claim until after the Contract had been completed.

110. On the evidence, I reject the suggestion that Fluor told Birse to wait until the end of the Contract before making a formal claim. As I have already pointed out, the Birse witnesses freely accepted that they had made their claim at a time and in a manner of their own choosing. I also reject the proposition that a proper evaluation of Birse's claims could not have been undertaken during the currency of the Contract; it is plain that, in this case, the alleged consequences of a claimed event could be, and in fact were, identified by Birse shortly after it had occurred: see paragraphs 78-92 above. That is what the Contract envisaged. In any event, even if Birse had to reserve their position in respect of the precise financial or time effects of a particular event, that would not (and did not) affect their ability and obligation under Article 17 to make a claim promptly in respect of the event itself. That was what Mr Kingsnorth repeatedly said in cross-examination, and Mr Brian Davies of Fluor said the same thing. I have no hesitation in accepting their evidence on this point. Thus, to the extent that it still forms part of Birse's case, I reject the suggestion that they had to wait (or did wait) until the end of the Contract before being able to make their claims.

111. In summary on this Issue, therefore, I find that the 14th November 1996 claim was, in effect, Birse's formal claim for additional monies for Site Establishment and was the only claim which survived the settlement of the 15th November 1997. I find that the claim document of April 1997 was simply a revision of that original claim. I find that there was no separate or different cause of action accruing to Birse simply because they chose to recast and resubmit their claim in April 1997 or because there was no formal response by Fluor to that recast claim until August 1997. In my judgment, it is simply contrary to common sense to suggest that there was a new duty and a new breach every time Birse put in a recast claim. The obligation fairly and properly to assess and/or estimate and/or agree was an inherent part of the Contract, and any breach occurred when Fluor failed to respond to the claim (whether fairly or at all). To the extent that this breach gave rise to a separate cause of action, I consider that that cause of action arose at the same time as the cause of action under the Contract itself. In this case, I consider that the date of accrual of each cause of action was in late November/December 1996, and was probably on or about the 9th December 1996.

112. Accordingly for all these reasons, I consider that the answer to Preliminary Issue 3 is Yes.

Mr Stephen Furst Q.C. (instructed by Osborne Clarke) for the Claimant
Mr Alexander Nissen (instructed by Baker & McKenzie) for the Defendant