Neutral Citation No. [2006] EWHC 1771 (TCC)  

IN THE HIGH COURT OF JUSTICE  
QUEEN’S BENCH DIVISION  
technology and Construction Court  

St Dunstan’s House  
133-137 Fetter Lane  
London, EC4A 1HD

Date: 13 July 2006

Before:

HIS HONOUR JUDGE PETER COULSON QC

Between:

(1) ROBERT CUNNINGHAMClaimants
(2) CATHERINE GOOD
(3) GELANDE CORPORATION LTD
- and -
COLLETT AND FARMER

Defendants

Ms Claire Packman (instructed by Fenwick Elliott) for the Claimants
Mr Justin Mort (instructed by Beachcrofts) for the Defendant

Hearing dates: 22, 23, 24 and 25 May,
12, 13 and 15 June 2006

Judgment
A INTRODUCTION

A1 A Short History Of The Project

1. In 2002, the First Claimant, Mr Robert Cunningham, and the Second Claimant, Ms Catherine Good, were involved in the purchase of Benego Hall, in Hertfordshire (“the property”). The property is an exquisite, late Georgian country house, and a Grade II listed building. It appears that Ms Good paid the deposit for the purchase and, although both Mr Cunningham and Ms Good are listed at the Land Registry as the legal owners of the property, the equitable title apparently resides with Ms Good alone, as a result of a separate Deed of Trust. The Third Claimant, a somewhat mysterious company whose relationship with both the other two Claimants and the Defendants is an issue in the case, did not come into the story until much later, when it was identified as the likely employer of any building contractor carrying out the extensive refurbishment works considered necessary at the property.

2. On 24 June 2002, Mr Cunningham and Ms Good engaged the Defendants to act as architects in respect of the proposed refurbishment of the property (“the project”). The Defendants prepared detailed drawings and a specification and, on 11 October 2002, they sent out invitations to tender to two building contractors, Sir Robert McAlpine and Eugena. At this stage, Mr Cunningham and Ms Good, and the Defendants, were all working to a budget figure for the project of about £500,000.

3. In November tenders were received from McAlpine and Eugena in sums higher than £500,000. The lowest adjusted tender figure produced by this process was Eugena’s revised tender figure of £605,772.22. This figure was the result of discussions between the Defendants and Eugena in late November/early December 2002, although, at the same time, it was decided to seek a third tender from a contractor called Albany. During this period, Mr Cunningham was recovering from a severe bout of cerebral malaria.

4. By the end of January, on the Defendants’ recommendation, the Claimants decided to go ahead with the project with Eugena as the contractor. This was subject to various matters, including the agreement of a reduced contract workscope (and therefore reduced contract sum) and the terms of an escrow agreement required by Eugena in order to provide them with security for work done prior to payment. At a meeting on 31 January, attended by Mr Cunningham, the Defendants and Eugena, the parties agreed that Eugena would commence works pursuant to a letter of intent and that a full contract would be agreed as soon as possible thereafter.

5. From 31 January 2003 onwards, there were delays to almost every aspect of the project. Even the letter of intent was not provided by Gelande until 14 February. Eugena went to the property later in February pursuant to this letter of intent and carried out a certain amount of preparatory work. However, no contract could be agreed between Eugena and Gelande, largely as a result of the difficulties with the wording of the escrow agreement. Only on 28 April 2003 was the wording of this escrow agreement finalised between Eugena and Gelande. However, at the meeting
on that date, it became apparent that Mr Cunningham would not pay any part of the money claim which Eugena had made as a result of the delays that had occurred between the end of January and the end of April. An impasse was reached, and that was the end of Eugena’s involvement with the project. There has subsequently been litigation between Eugena and the three Claimants, which action has not yet been finally resolved.

6. At the beginning of May 2003, the Defendants suspended work as a result of the non-payment of their fees. Almost immediately, the Claimants engaged a firm of building surveyors, AWH, to provide services similar to those originally provided by the Defendants. AWH produced a new set of contract documents (clearly based on the work carried out by the Defendants) and sent them out to a number of construction companies. By October 2003, AWH were recommending that Gelande enter a new building contract with a contractor called Noble and Taylor, in the sum of £447,457.95.

7. For reasons which are not entirely clear, in early 2004 Noble and Taylor abruptly withdrew from the proposed contract in respect of the project. This led to further delays. In August 2004, again on the recommendation of AWH, the Claimants issued a building contract for the project to contractors called Acorn. However, in October 2004, before Acorn could commence work, they went into administration.

8. In the first part of 2005, Acorn emerged from administration and started the work at the property. However, almost immediately thereafter, Mr Cunningham lost his job with Earthport Plc. It quickly became apparent that, to the extent that the proposed works were being funded by Mr Cunningham, he could no longer afford to pay for them. Acorn therefore abandoned the works at the property. And, sadly, that remains the position today: the property is uninhabited, with only a small part of the necessary refurbishment works having been carried out, and with no realistic prospect of any further works being carried out in the immediate future.

A2 A Short History Of The Litigation

9. Following their unsuccessful attempts to be paid their outstanding fees, the Defendants commenced adjudication proceedings against Mr Cunningham and Ms Good. On 24 October 2003, the adjudicator awarded the Defendants £21,464.60, but Mr Cunningham and Ms Good continued to refuse to pay any part of this sum, and so, on 22 January 2004, the Defendants commenced enforcement proceedings against them. In response, the Claimants commenced their own claim against the Defendants.

10. By an order of His Honour Judge Richard Seymour QC, dated 10 March 2004, the Claimants were ordered to pay the sum of £21,464.60 into Court as a condition of being granted permission to defend the claim. The Claimants’ claims for breach of contract/negligence now made against the Defendants arose out of that original order and the consolidation of the two actions.

11. Originally, the Claimants’ allegations of breach were extensive, although they were never satisfactorily linked to any plausible case on causation. The Claimants complained about numerous aspects of the conduct of, and advice given by, the Defendants, and in particular the advice on 31 January 2003 that Gelande could enter into a letter of intent with Eugena. It appeared to be the Claimants’ case that all the
misfortunes that had been suffered on the project since early 2003 could be blamed on the Defendants, and their allegedly inadequate advice. According to the original Scott Schedule in this case, the damages claimed against the Defendants totalled something like £450,000, although the largest element of this claim was a claim for damages covering the period from July 2003 to about October 2005. It was never clearly explained how, even if the Claimants’ claims as to breach of contract/negligence were made out, the Defendants could be liable in law or in fact for the delays caused by events which occurred long after they had ceased to have any involvement with the project.

12. The procedural history of the action has been as unsatisfactory as the Claimants’ original pleadings. It is unnecessary for me to set out that history in any detail in this Judgment: it can be found in my Judgment on costs reported at [2006] B.L.R. 97. In short, the trial was adjourned on three separate occasions, each time at the instigation of the Claimants, the last application triggering an extraordinary series of events that are set out in detail in the costs Judgment.

A3 The Application To Amend

13. At the trial, the Claimants were represented by new solicitors (the fourth firm to represent the Claimants in this action in a year) and new Counsel, Ms Packman. Ms Packman properly recognised the difficulties with the Claimants’ pleaded case and sought to make radical amendments to the Particulars of Claim. In my judgment, she was entirely right to do so. Unfortunately, the application to amend was not made until 22 May 2006, the first day of the trial.

14. In one sense, the most important element of the application to amend was the recognition by Ms Packman that the claim for delay, as set out in the original Scott Schedule, was plainly unsustainable. That claim was therefore abandoned. In its place were a new claim for general damages, which I allowed by way of amendment, and a claim for diminution in value, which I rejected, largely because I concluded that such a claim was doomed to failure both in principle and on the pleaded facts. The detailed reasons for my refusal to allow this entirely new claim can be found in my Judgment on the amendment application at [2006] EWHC 122 (TCC). As a result of the amendments which I allowed, the overall value of the Claimants’ claim was reduced very significantly. It must be said that the money claims now made by the Claimants against the Defendants arising out of the allegations of breach of contract and/or negligence are modest by the standards of the London TCC.

B THE ISSUES

B1 The Liability Issues

15. The Claimants make a series of allegations of breach of contract and/or negligence on the part of the Defendants. These allegations concern the Defendants’ conduct and advice up to 31 January 2003; the advice that the Defendants gave as to the letter of intent at or around the meeting on 31 January 2003; and the Defendants’ conduct and advice thereafter, up until the Defendants’ suspension of work in early May 2003.

16. As I indicated to the parties prior to their closing submissions, I have found it convenient to consider the allegations of breach of contract and/or negligence on this
chronological basis. Accordingly, in **Section D** below, I deal with the allegations against the Defendants arising out of the period up to the meeting on 31 January 2003. In **Section E** below, I deal with what the Claimants regard as the critical part of the case, namely the allegations surrounding the letter of intent of 14 February agreed between Gelande and Eugena. And at **Section F** below, I deal with the allegations made against the Defendants arising out of the events after the letter of intent was agreed upon, up to early May 2003 when Eugena left the project and the Defendants suspended work.

**B2 Causation**

17. I have addressed the issues as to causation in the same Sections of my Judgment that deal with the relevant disputes as to liability. In other words, the issues concerning causation arising out of the allegations concerning the Defendants’ conduct and advice prior to 31 January 2003 are dealt with in **Section D** below; the issues concerning causation arising out of the letter of intent are dealt with in **Section E** below; and the causation issues arising out of the events after the letter of intent are dealt with in **Section F** below. I have determined the points raised by the Claimants’ pleaded case on causation, irrespective of whether or not I have found the allegations of breach and/or negligent to have been made out.

**B3 Loss And Damage And The Defendants’ Counterclaim**

18. In **Section G** below, I have considered the Claimants’ case as to loss and damage by reference to the four pleaded elements of loss set out in paragraph 35 of the Re-Amended Particulars of Claim. At **Section H** below, I set out my conclusions as to the Defendants’ fee claim, which was the original basis for this litigation.

**B4 Conclusions**

19. At **Section I** below, there is a short summary of my conclusions.

**C GENERAL OBSERVATIONS ON THE EVIDENCE**

**C1 Introduction**

20. Before embarking on the analysis outlined above, it is appropriate to set out some general observations on the evidence. My detailed findings in **Sections D – F** below arise from these general observations.

**C2 The Documents**

21. There was a large volume of documentation before the Court. Of particular importance were the two chronological files of documents, containing all relevant correspondence, E-mails, minutes of the meetings and the like. I have found that contemporaneous material to be of considerable assistance in determining the many issues of fact that have arisen in this case. In these sorts of disputes, I consider that, as a general rule, the contemporary documents represent the most reliable source of information as to what happened when, and who said what to whom and at what point. This case is no exception. Allegations concerning important events or conversations to which no reference is made in the contemporaneous documents, I
consider with caution; assertions of such events or conversations which are actually contradicted by the contents of the contemporaneous documents I regard with grave suspicion. That general approach is of particular relevance in the present case because of the points made in paragraphs 22 - 25 below.

C3  The Claimants’ Evidence

(a)  Mr Cunningham

22. In her helpful closing submissions, Ms Packman had this to say about Mr Cunningham:

   “Mr Cunningham’s credibility should be judged on the matters before the court in this hearing and not against the background of the procedural history which was not canvassed in the evidence, nor in relation to side-swipes made about other litigation involving Mr Cunningham, the merits of which are not before the Court.”

I respectfully agree with that submission. I make it clear that I have judged the credibility of Mr Cunningham’s evidence solely by reference to the evidence that he gave during the day and a half that he was answering questions under oath.

23. Unfortunately, on that properly limited basis, I have concluded that Mr Cunningham was not a credible witness. I accept that Mr Cunningham was entitled to protect his financial interests in whatever way he wanted, and I have no doubt that he was, and remains, a shrewd and capable businessman. However, it is clear to me that Mr Cunningham made decisions at the time which he now regrets, and he is now seeking to blame the Defendants for matters which were wholly his responsibility. In taking this course, I consider that there were a number of occasions on which Mr Cunningham sought to enhance his commercial position by not telling the court the truth.

24. The most obvious examples of this tendency concerned the advice which Mr Cunningham said he received from the Defendants on certain specific matters, and the information which he said he passed on to them. Often, the advice about which Mr Cunningham was purporting to complain, or the information he said he passed on, was advice/information which he said was communicated orally, in telephone conversations, the dates of which he could not recall, and which were not confirmed in writing. Very often, the alleged oral advice or information was contradicted by what was in writing. Much of the written material setting out the Defendants’ advice to him was not even referred to in Mr Cunningham’s brief witness statement. The inevitable impression created by his oral testimony was of a witness who was prepared to say whatever he could to bolster his commercial position against the Defendants.

25. Accordingly, I have generally declined to make any findings in respect of matters which were the subject only of Mr Cunningham’s oral evidence. In contrast, where Mr Cunningham’s evidence was borne out by the written documents, or the evidence of others – and it is right to say that there were a number of occasions where this was
the case - I have had no difficulty whatsoever in making findings that are consistent with his oral evidence.

(b) Ms Good

26. Ms Good was not involved in many of the key events during this unhappy saga. I consider that when she gave evidence, she was endeavouring to assist the court with her recollection of those events with which she did have an involvement. I reject the Defendants’ suggestion that Ms Good was somehow an unreliable or untrustworthy witness. I consider that her evidence was entirely honest and straightforward.

(c) The Expert Evidence Of Mr Palos

27. The only other witness called on behalf of the Claimants was their expert, Mr Palos. His evidence was of far less assistance to me than it might have been. The principal reason for this was that his lengthy report was made up of an extensive narrative in which he purported to tell the story of what happened at considerable length, making various criticisms of the Defendants along the way. The difficulty with this approach was that Mr Palos produced his report before the Claimants’ witness statements had been prepared, and long before the Defendants’ witness statements had been exchanged. It was therefore a very partisan account, amounting to little more than a lengthy reiteration of his instructions. Although Mr Palos said that he had been provided with copies with both sides’ witness statements, this had apparently only happened shortly before the trial, and he said that he had not had the opportunity to review his report in the light of their contents. In addition, he had undertaken no review of his report following the oral evidence of fact in the trial during the week of 22 May 2006.

28. The result of all this was that Mr Palos’ expert’s report was based on an understanding of the facts which, to put it neutrally, had been overtaken by events in numerous ways. It was an incomplete and sometimes incorrect version of what had actually happened. In those circumstances, it was of very little assistance to me. All the references below to Mr Palos’ evidence have to be considered in the light of this major deficiency.

C4 The Defendants’ Evidence

(a) Mr Farmer

29. I consider that Mr Farmer was an honest witness doing his best to recollect the events for the Court. I do not consider that there were any significant discrepancies between his evidence to me, and his evidence two years ago at the trial of the liability issues in the Eugena/Gelande litigation. However, as will become apparent below, I do consider that, after the letter of intent had been issued, Mr Farmer was perhaps too quick to assume that the full contract between Eugena and Gelande would be completed, and he did not always think through what might happen if, contrary to his expectations, Gelande and Eugena were not able to agree that contract.
Mr Collett

30. Mr Collett was an entirely honest witness. However, he had very little involvement in the important events with which this case is concerned.

The Eugena Witnesses

31. I consider that the Eugena witnesses (namely Messrs O’Sullivan and Overd) were again honest and clear in their evidence. Although it is far from being a criticism of them, I consider that their evidence demonstrated that, at all times, they did what they considered to be in Eugena’s best commercial interests. This was certainly a factor in the ultimate breakdown of the relations between Eugena and the Claimants in April 2003.

Mr Blockley

32. Mr Blockley was the expert architect called on behalf of the Defendant. I regarded his evidence as helpful. I note in particular that, in relation to a number of general questions about the role of the architect in this situation, Mr Blockley properly made a number of clear concessions to Ms Packman. It was apparent, therefore, that Mr Blackley considered that there were ways in which, with hindsight, the Defendants’ performance might have been improved. I consider that, in adopting this entirely frank approach, Mr Blockley was doing what an expert should do when assisting the Court. It is not unfair to say that this stance could be contrasted favourably with the rather more adversarial approach adopted by Mr Palos.

D EVENTS PRIOR TO THE LETTER OF INTENT


The Relationship Between The Claimants

33. As noted above, whilst the legal title to the property rests in the joint names of Mr Cunningham and Ms Good, it was Ms Good who paid the deposit when the property was purchased in April 2002, and Ms Good who is the sole beneficiary of the trust in which the property is apparently vested. It certainly appears that Mr Cunningham has no equitable interest of any kind in the property, despite his previous claims to the contrary.

34. The position of Gelande is very unclear. It appears that Mr Cunningham and Ms Good intended that an off-shore company would be involved in the refurbishment of the property, and it was Ms Packman’s submission that it was Gelande who acted as the agent of Mr Cunningham and Ms Good in respect of the project. However, on analysis, and to the extent that it has any bearing on the issues before me, I have concluded that this submission is incorrect.

35. An agreement of 28 November 2001 purported to demonstrate that, at the time of the purchase of the property, a company called Goldway Enterprises Ltd were going to act as the agent of the ‘Bengeo Hall Estate’ (defined as Robert Cunningham and Catherine Good) in respect of the project. It is very unclear what Goldway were actually going to do: it appears that they were simply a company vehicle whose
purpose was to limit the tax liabilities that would otherwise be incurred by Mr Cunningham and Ms Good in carrying out the project. The agreement of 28 November 2001 purporting to set out Goldway’s agency was not clear and contained what Mr Cunningham accepted in cross-examination were a number of fundamental errors and anomalies. There was also a document, dated 23 March 2002, that indicated that Goldway intended to assign their agency to Gelande. This time, Mr Cunningham signed on behalf of Goldway. But there was no evidence that the purported assignment had ever been accepted by, or novated to, Gelande. There was therefore nothing to say that the intended assignment of the purported agency had ever taken effect.

36. There were two other points which increased the mystery surrounding Gelande. First, it was wholly unclear who they were or what they were actually going to do in connection with the project. There is no evidence that any individuals employed by or acting for Gelande did anything in respect of the property or the project. For example, there is no evidence that anybody employed by or acting for Gelande ever paid any bills relating to the property. Secondly, it became clear from Mr Cunningham’s oral evidence that, somewhat surprisingly, he was not a director, or an employee, of Gelande and had no legal or equitable interest in Gelande at all. He claimed that he thought that he owned a controlling interest in Gelande’s holding company (whoever they were), but then went on to say that it had turned out, on investigation, that there had been some sort of error and he was not, in fact, the owner of the controlling interest in the holding company. He therefore accepted that he had no interest in Gelande at all.

37. For these reasons, I cannot conclude that Gelande were the agents of Mr Cunningham or Ms Good. That was a mere assertion, which has simply not been made out on the evidence. It may be that it was the intention that Gelande should act as their agent, but there was nothing to say that this role had ever been properly assigned to them or accepted by them. In fact, the alleged agency was contradicted by the 23 March 2002 document, because that made it clear that Mr Cunningham and Ms Good would have no liability to Gelande for fees or for any cost that it incurred, which is the complete opposite of a typical principal/agent relationship. Furthermore, as well as having no legal relationship with Mr Cunningham and Ms Good, and for reasons which are explained below, Gelande never had any sort of legal relationship with the Defendants either. Thus the most that can be said of Gelande is that they were actually Eugena’s employer under the letter of intent contract, and that they were intended to be the employer of Eugena under the full building contract, if it could be agreed. Even their fulfilment of this role gives rise to separate problems in relation to the loss now claimed against the Defendants, which are analysed in detail below.

38. There is one further point that needs to be made about the inter-relationship between the respective Claimants. Originally, the vast bulk of the claims for professional negligence/breach of contract against the Defendants were made by Mr Cunningham and Ms Good. The separate claims made by Gelande were very small. However, as part of the amendments which I allowed on the first day of the trial, Gelande belatedly associated itself with all the claims against the Defendants, by alleging that it was owed by the Defendants a duty of care at common law.

39. During the two week gap between the first and second weeks of the trial, the Defendants made an application for security for costs against Gelande. It appears that
this development, perhaps in tandem with what might fairly be called the unconvincing evidence in the first week of the trial from Mr Cunningham as to the factual basis of any such duty of care, caused Gelande to have second thoughts. On Friday, 9 June 2006, Gelande abandoned all their claims for damages against the Defendants. Thus, on the Claimants’ case, the only parties claiming to have suffered loss recoverable from the Defendants were Mr Cunningham and Ms Good.

(b) The Engagement Of The Defendants

40. Mr Cunningham and Ms Good appointed the Defendants to act as the architects in respect of the proposed refurbishment of the property on 24 June 2002. The contract was evidenced by the Defendants’ letter of that date. The fees were calculated by reference to a construction budget figure of £300,000. The evidence was that everybody, including Mr Cunningham, knew and accepted that that figure was purely notional, included in the letter for the sole purpose of fees calculation. It was also clear that everybody knew that the total cost of the works would be considerably higher. I accept the evidence from Mr Cunningham that he had in mind at this stage a budget of about £500,000. This is referred to on the second page of the Defendants’ letter of 24 June.

41. Attached to the letter of 24 June 2002 was the RIBA Schedule of Services for Small Works. These were the services that it is agreed were to be provided by the Defendants for Mr Cunningham and Ms Good.

(c) The Tenders

42. Between June and early October 2002, the Defendants worked up the design of the proposed refurbishment works. They produced a specification (including a Preliminaries section), a series of drawings, and schedules of work. These were sent out to two tenderers (Sir Robert McAlpine and Eugena) on 11 October 2002. Tenders would also have been sought from Albany Group Limited, contractors/developers who had bought a site immediately adjoining the property, but at the last minute Mr Cunningham told Mr Farmer that, because he was in dispute with them, no tender should be requested from them. When told that there would be a delay if a further prospective tenderer had to be found at such a late stage, Mr Cunningham instructed Mr Farmer that tenders should be sought from McAlpine and Eugena only.

43. McAlpine’s tender was in the sum of £766,766. Eugena’s original tender was in the sum of £502,747 but this contained various omissions and, following discussions, the Eugena figure was first adjusted to a figure of £693,951. On 26 November, the Defendants wrote to Mr Cunningham and Ms Good to the effect that further considerations should be given to Eugena’s tender and a costs/value exercise should be carried out “to negotiate the revised sums”.

44. By this time, Mr Cunningham had contracted cerebral malaria. He had plainly been seriously ill in the middle of November and, by the end of the month, he was recuperating at the home that he shared with Ms Good. They were living at Bengeo Cottage, very close to the property.

45. The relevance of Mr Cunningham’s illness seemed to loom large in the Claimants’ conduct of their case at trial, although it had not been a matter that had been
considered important before. No mention of it was made in Mr Cunningham’s own witness statement, or in Mr Palos’ report. In particular, it was suggested that, at the meeting on 27 November 2002, when Mr Farmer met with Mr Cunningham and Ms Good to discuss various aspects of the Eugena tender, Mr Cunningham was extremely ill and unable to concentrate on and take in what was being said. The suggestion appeared to be that Mr Farmer was somehow acting improperly in going ahead with the meeting at all. I reject that criticism. It is plain that Mr Farmer had no reason to believe that Mr Cunningham was not capable of going through matters of detail on 27 November; indeed, Mr Cunningham insisted on doing just that. For the avoidance of doubt, I find that Mr Cunningham was able to, and did, concentrate on matters of detail at the meeting. I note that, within a week or so of this meeting, Mr Cunningham was back at work.

46. In any event, very little of any significance to the present dispute happened at that meeting. It was decided that a third tender would be sought from Albany, because Mr Cunningham informed Mr Farmer that their earlier dispute had been resolved. Therefore, on 6 December, Mr Farmer wrote to Albany, sending them the specification, drawings and schedules and requesting a tender. Their tender came back in January and was higher than the Eugena revised tender. It was not therefore pursued further: see paragraph 50 below.

(d) Progress With Eugena

47. During December 2002, Mr Farmer had a number of important communications with Eugena. One of the points they had raised with him was the need for security to be provided by the employer during the construction contract in respect of the next payment that fell due at any given time. To that end, on 3 December, they sent Mr Farmer a copy of an escrow agreement that they had entered into with another client on another project. They also discussed revising their prices. By 18 December 2002, they had reduced their tender sum to £605,772.22 on the basis of the workscope in the tender documents, and a 23 week contract period. Both the figure of £605,772.22 and the 23 week period are apparent from a tender report sent by Mr Farmer to Mr Cunningham and Ms Good on 18 December 2002.

48. The previous day, Mr Farmer had sent a letter of general advice to Mr Cunningham and Ms Good which dealt with a whole range of matters. In relation to other consultants, Mr Farmer said:

“We will need the services of a structural engineer when the works are being opened up to enable the contractors to submit calculations to the building control officer for approval. We have a quote from David Burle, who has experience of this type of work, and he suggests an hourly rate of £185, as the scope of the work is small but unpredictable...”

49. In the same letter, having dealt with Eugena’s revised cost of £605,772.22 and the 23 week period, and the fact that Albany would not be providing a tender until the new year, Mr Farmer went on to address the question of surety. He said:

“The remaining issue for negotiation with whoever is appointed [as main contractor] will be surety and this will have to be
discussed and agreed in person with yourselves and the contractor, we will of course be present and advise you of any pitfalls during this discussion.”

The letter concluded by confirming that “subject to appointment of a contractor, we are ready to commence works on site, and relevant parties are lined up to commence their works when instructed in January.”

(e) The Events In January 2003

50. On 23 January, Albany finally returned their tender. It was in the sum of £685,999. It was therefore considerably higher than the revised Eugena tender price of £605,772.22, and there were no subsequent discussions with Albany. By the end of January 2003, it was apparent that, subject to various outstanding matters which needed to be agreed, Eugena would be appointed as the main contractor for the project. A meeting was arranged on 31 January 2003 to finalise the necessary arrangements.

D2 The Allegations of Breach of Contract/Negligence

(a) Criticism 1: That The Minor Works Form Was Inappropriate

51. There is no dispute that the Defendants recommended to Mr Cunningham the use of the JCT Minor Works Form ("MW 98"). In his letter to Mr Cunningham and Ms Good of 9 October 2002, he recommended the form and described it as “a clear, simple contract”. It was referred to in the Preliminaries document sent out with the tender documents. It was also the subject of later written advice from Mr Farmer, in a letter of 4 February 2003, where he recommended it as being “short and simple to understand”. This letter also pointed out that the form contained no loss and expense provisions. In his oral evidence, Mr Farmer said that he had discussed various contract forms with Mr Cunningham and had recommended MW 98 because of its clarity and because it did not expressly provide for the payment by the employer of loss and expense to the contractor in circumstances of delay. It was suggested by the Claimants that this element of Mr Farmer’s oral evidence was inconsistent with his evidence on this topic in the Eugena action, which was much briefer and to the effect that he had recommended MW 98, and Mr Cunningham had not dissented from that proposal.

52. To the extent that it matters, I find that Mr Farmer did discuss the perceived advantages of MW 98 with Mr Cunningham in some detail. Indeed, Mr Cunningham expressly conceded that in cross-examination, before going on to say that he could not remember what those advantages were said to be. I also find that Mr Farmer did advise Mr Cunningham that the vagueness of MW 98 as to the employer’s liability for the payment of loss and expense was an attraction and that Mr Cunningham expressly accepted it as such.

53. The Claimants now maintain that Mr Farmer was negligent to recommend the use of MW 98. This was not really something that was explored in any detail in the evidence. It appeared that the only basis for this suggestion was the fact that when, the following year, AWH came to advise as to the appropriate contract form, they suggested the JCT Intermediate Form as being more appropriate for this project.
To the extent that this allegation was maintained as an allegation of professional negligence against Mr Farmer, I reject it. It seems to me that there was nothing intrinsically wrong with the choice of MW 98 for the project. Furthermore, it is well known to those who practice in and around the construction industry that, from an employer’s perspective, MW 98 does have the advantage over other JCT forms in that it does not contain an express provision entitling the contractor to loss and expense in the event of delay. More generally, and for what it is worth, I should say that I have always regarded the comparative brevity of the Minor Works form, and the clarity of its terms, as giving it a major advantage over a number of the other, rather more prolix, standard forms of building contract issued by the JCT.

I accept that the Guidance notes provided by the JCT suggest that the form is suitable for works with a value up to £100,000 (at 2000 prices). It was not clear whether the Claimants alleged that it was therefore automatically unsuitable for this project, where the tender figures were so much higher. This was not a point made with any emphasis by Mr Palos in his report. In any event, it was Mr Blockley’s evidence, which I accept, that “in practice it [MW 98] is frequently used for contracts of a much greater value”. I also agree with Mr Blockley’s conclusion that, because many of the most costly elements of these works were being carried out by specialist contractors appointed by Gelande, “the works to be undertaken by Eugena were essentially of a simple nature”. Thus I conclude that there is nothing in the point that the MW 98 form was somehow inappropriate here, simply because of the likely cost of the project.

The recommendation of which standard form of building contract should be used for a particular project will usually come down to the consultant’s personal preference and his previous experience. Such a subjective basis for choice seems to me to be entirely reasonable: if, as a contract administrator, a professional person likes and understands the way a particular standard form works, then, unless there is a very good reason why he should not use it in a particular instance, it seems to me to be to everybody’s advantage if he recommends that form for use on his projects. Mr Farmer was happy with MW 98, and for good reason. There was no feature of this project that should have caused him to think twice about recommending it here. The fact that the contract sum was more than £100,000 was irrelevant. I therefore reject this first criticism of the Defendants’ advice prior to the letter of intent.

(b) Criticism 2: That There Were Insufficient Tenderers

The second criticism of the Defendants’ conduct and advice in the months leading up to the letter of intent was the bold allegation that there were insufficient tenderers to allow a properly competitive price to be identified for the project. Again, it could not be said that this allegation was explored in any detail in the evidence. Again, it appears to have its roots in what AWH did the following year: the suggestion is that, because AWH sent out tender enquiry letters to seven contractors, the Defendants were negligent to send out tender enquiries to just three contractors in December 2002/January 2003.

Mr Farmer explained that, in the autumn of 2002, he had contacted five contractors in total: the three who provided tenders, along with Wates and William Verry. Wates and William Verry both declined the opportunity to tender. As I have noted, Mr Farmer explained in his evidence that Mr Cunningham had originally instructed him not to ask Albany to tender. Mr Farmer told Mr Cunningham that there would be a
delay if he sought to find another tenderer and Mr Cunningham instructed him to proceed with just two tenderers. Eventually, of course, Mr Cunningham changed his mind and Albany did provide a tender, although it was higher than the Eugena figure.

59. In all those circumstances, I reject the suggestion that, in some way, the Defendants were negligent because they only sent out enquiries to three tenderers in total. It seems to me that, on the basis of the evidence set out above, the Defendants acted quite properly in seeking five, and ending up with three, prospective tenderers. The second criticism of the Defendants’ conduct/advice prior to the letter of intent is therefore rejected.

(c) Criticism 3: Insufficient Development Of The Design

60. The third criticism in respect of this period is that the design developed by the Defendants in the months up to 11 October 2002 (and thereafter) was in some way insufficient or inadequate. It appears that this allegation proceeds from the fact that, within the Eugena tender, there was about £260,000 worth of provisional sums. I am therefore asked to infer that, with such a high proportion of the contract sum as provisional sums, the design was insufficiently developed.

61. There can be no doubt that the design of the project was not completely ‘designed out’ by the Defendants. Of course, it is rare for any scheme to go out to tender with every last element of the works designed, particularly on a refurbishment project like this, when the precise condition of the existing property will simply not be known prior to opening up. In this case, more design work remained to be completed than is sometime the case, but the reason for that was explained by Mr Farmer. He said that Mr Cunningham had made it plain that the appointment of other consultants or specialist suppliers/artisans, who would be carrying out elements of the design, would have to await the appointment of the main contractor. This in turn meant that certain elements of the design remained to be completed. Again, this is not unusual, but I do accept that in this case, it was perhaps more marked than sometimes, and was a direct result of Mr Cunningham’s desire to limit his expenditure wherever possible, as least until the main contractor was appointed.

62. Accordingly it seems to me that this criticism comes down to the £260,000 worth of provisional sums in the Eugena tender. That being the case, I consider that Mr Mort demonstrated a complete answer to the point in his cross-examination of Mr Palos. Mr Palos, the Claimant’s expert, was a building surveyor who works for AWH. Mr Mort demonstrated to Mr Palos that, when AWH re-tendered for the work in 2003, there were undefined prime cost items and provisional sums which were worth about £267,000 against a total tender of about £450,000. In other words, the same sort of percentage of undefined sums within the Eugena tender could be found in the tenders obtained by AWH: indeed, the percentage in the Eugena tender was actually slightly less. Again, I am not surprised by this similarity: it is an inevitable consequence of outlining refurbishment work to a listed building before that building has been opened up. But, for all these reasons, it would be impossible for me to conclude that the mere fact that there was a large element of provisional sums within the Eugena tender somehow demonstrated a negligently incomplete design. For the reasons I have given, it blatantly does not.
(d) Criticism 4: Failure To Progress Discussions As To Security/Escrow

63. Although this is a criticism that covers at least one event prior to 31 January 2002, it is more convenient to deal with this criticism in the context of the letter of intent and thereafter. Therefore, I deal with it at the appropriate place in Sections E and F below.

D3 Causation

(a) Introduction

64. At paragraphs 51 – 62 above, I have rejected the three criticisms made of the Defendants’ conduct prior to 31 January 2003. Accordingly, any issue as to causation in connection with those allegations simply does not arise. However, for completeness, and as a result of the firm view that I have formed on the point, it is appropriate for me to set out my conclusions as to the causation issues in any event. In my judgment, even if criticisms 1, 2 and 3, noted above, had been made out by the Claimants, they could not have been causative of any recoverable loss or damage.

(b) Criticism 1: MW 98

65. Assume that, contrary to my view, the Defendants were negligent because they suggested the use of the JCT Minor Works Form instead of the JCT Intermediate Form. In my judgment, no loss or damage could have been caused by such a breach. Loss could only have been suffered if a contract had been agreed which incorporated MW 98, and it was shown that this had somehow been to the employer’s financial detriment. Of course, the whole point about this case is that the principal building contract between Gelande and Eugena never materialised. Accordingly, even if the Defendants could be criticised for recommending MW 98, because no contract was ever agreed by anyone on that basis, no loss and damage to the Claimants could result. Further and in any event, any such loss would have been suffered by Gelande, as the employers of the building contractors, and not Mr Cunningham and Ms Good.

66. There was a suggestion that, in some way, the later decision by AWH to switch to the JCT Intermediate Form caused extra/duplicated costs and fees, and that these additional fees were recoverable from the Defendants. There was no evidence of this, and it is very difficult to see how there could have been any additional cost in the circumstances of this case. I deal with this point in greater detail in Section G2 below.

(c) Criticism 2: Insufficient Tenderers

67. Similarly, if, contrary to my view, the Defendants could be criticised because only three contractors were invited to tender in the autumn/winter of 2002, I find that no loss and damage can have resulted. The only way in which loss could have arisen in such circumstances is if Gelande had entered into a binding contract with one of the contractors, and it could be shown that their tender figure, which became the contract sum, was unreasonably high. In fact, no contract was ever entered into between Gelande and any of the contractors who were asked to tender by the Defendants in the autumn of 2002, so there can be no loss. In any event, it appears that, after the Defendants had ceased their involvement with the project, Gelande came close to entering into a contract with two further contractors, first Noble and Taylor and,
latterly, Acorn. In each case, on the evidence I heard, the anticipated contract sum would have been lower than the Eugena figure, thus avoiding any loss that might have otherwise been caused by Eugena’s tender being too high. For these reasons, I cannot see that any loss or damage has been caused as a result of the alleged failure to go out to more tenderers in the autumn of 2002.

(d) Criticism 3: Insufficient Design

68. I have concluded that this criticism of the Defendants’ design has not been made out. However, let us assume that I am wrong about that and that the design that formed the basis of the tender documents in the autumn of 2002 was insufficiently developed. Even on that assumption, I again fail to see what recoverable loss and damage has been caused as a result. No contract was ever entered into on the basis of the Defendants’ design as it existed in the latter part of 2002. Although it is not clear to me that AWH did very much more work on the existing design before they sent the project out for tender to Noble and Taylor and others a year later, the fact that the Defendants’ design did not form the basis of any binding contract seems to me to make it impossible for the Claimants to demonstrate that any loss flowed as a result of this alleged breach. Further and in any event, any such loss would again have been suffered by Gelande alone.

69. I note that the Claimants maintained that some, if not all, of the additional fees paid by the Claimants to AWH resulted from the Defendants’ alleged failure to develop the design sufficiently. I reject that submission for two reasons. First, there was no evidence that AWH duplicated any part of the design work carried out by the Defendant. There was nothing to show that the fees paid to AWH related to design work for which Mr Cunningham and Ms Good had already paid the Defendants. It appears that the fees paid to AWH included the interior design work (which was always outside the terms of the Defendants’ retainer) and the mechanical and electrical design (which, again, was always to be for others to perform). This point is dealt with in Section G2 below.

70. Secondly, to the extent that the Claimants abandoned parts of the Defendants’ design, and instead utilised different designs produced by AWH, it seems to me that that was entirely their own decision. The Defendants suspended work as a result of the non-payment of their fees and, almost immediately, the Claimants engaged AWH in their place. In the absence of any evidence that any particular aspect of the Defendants’ design was inadequate or under-developed, it is impossible for me to conclude that the decision by the Claimants to incur the fees of another professional was anything other than their own choice, unconnected to any alleged defaults on the part of the Defendants.

71. For these reasons, I reject the Claimants’ case that the fees paid to AWH can somehow be linked back to the insufficient design produced by the Defendants.

(e) Would There Have Been A Contract Anyway?

72. On behalf of the Defendants, Mr Mort ran an alternative causation argument. This is set out in his closing submissions, at paragraph 98. Essentially, he argued that I should infer from other evidence that, as a result of internal funding difficulties in early 2003, the Claimants would not have gone ahead with the proposed contract with
Eugena in any event. Accordingly, he says, these criticisms of the Defendants cannot have caused any loss because, for their own reasons, the Claimants were not able to enter into a contract with Eugena in early 2003.

73. I accept that, for reasons which we will come to analyse in greater detail below, Mr Cunningham’s conduct between February and April of 2003 was not obviously the behaviour of a man who was anxious to commit himself to a major building contract. The delays he caused, and his subsequent intransigence in refusing to pay for any of the cost consequences of those very same delays, undoubtedly explain why no contract could be agreed between Eugena and Gelande: see Section F2 below.

74. However, I consider that it would be wrong for me to infer that there would never have been a contract between Gelande and Eugena because of the Claimants’ internal funding difficulties. There was no direct evidence of those difficulties. Indeed, when this potential issue was raised by the Defendants prior to trial, the Claimants produced extensive evidence to support their case that the allegation was false. That seemed to cause the Defendants to shy away from advancing this argument directly: it was not pleaded, and it was not put to Mr Cunningham in cross-examination. It would be unfair to allow the point in by the back door, as a result of an alleged inference, in circumstances where the Claimants did produce extensive evidence which they would have relied on to refute the allegation that they were in financial difficulties in early 2003, if that allegation had been pursued.

75. Accordingly, I make no finding that the Claimants were in financial difficulties or that any such problems meant that there would never have been a contract between Gelande and Eugena in early 2003. However, that does not affect my conclusions, set out above, that, even if – contrary to my conclusion - the three criticisms analysed in Section D2 above had been made out, no recoverable loss and damage arose in consequence.

E THE LETTER OF INTENT

E1 The Relevant Events

76. On 31 January 2003, there was a meeting at the offices of Earthport, Mr Cunningham’s then employers. Present were Mr Cunningham, Mr Farmer of the Defendants, and Mr O’Sullivan and Mr Richardson of Eugena. A number of important matters were discussed. They are the subject of the minutes prepared by the Defendant.

77. Important extracts from the minutes are as follows:

   “Contract

   2.01 Priorities

   The contract shall be an amended form of MW 98 with additional sections to cover artisans and sub-contractor design for the plumbing and electrical works. The adjudication clause was agreed as being included in the contract.
A letter of intent is to be produced by Gelande by the 3rd February 2003 in the sum of £50,000 to enable design works to commence for M and E works and erection of scaffold. [That was actioned for Gelande]

[Mr Cunningham] stated that the critical elements were the quality of the finished product and maintaining the works within budget [Mr Cunningham] asked for proposals to reduce the budget to £525,000 from the current tender price of £605,000. [Mr Cunningham] asked for some of the principle (sic) ground floor rooms to be ready by the third week in June 2003.

2.02 Handover of Production Information

Initial production information will be provided by [the Defendants] at the first site meeting. Further information will be provided following opening up and input from the structural engineer.

2.03 Commencement and completion dates

It was agreed that the works would commence on 21 February 2003 and would take 26 weeks completing on 25 August 2003. A pre-contract meeting was arranged for 5 February 2003, 10 am on site.

5.0 Consultants’ Matters

5.01 Structural

A structural engineer is to be appointed by Gelande as soon as contractual matters are resolved.

6.0 Quantity Surveyors’ Matters

6.01 Adjustment to tender figures

Tender figures had been adjusted once already, by A. Richardson and M. Farmer at a meeting on 3rd December 2002. Further savings (approximately £75,000) are required and suggestions for these savings are sought.”

78. On 3 February 2003, the Defendants wrote to Eugena, setting out Gelande’s instruction to the Defendants to appoint Eugena as main contractors for the works. The letter expressly authorised expenditure on preliminaries and specialist design works up to a value of £50,000, but excluded construction works which, the letter said, were to be the subject of a separate instruction. The following day, the Defendants wrote to Mr Cunningham and Ms Good identifying (amongst other things) some of the perceived advantages of MW 98. It was this letter that expressly
made the point that the contract contained “no provision for recovery of loss and expense [by the contractor] caused by disturbance to the regular progress of the works”: see paragraph 51 above.

79. On 6 February, Eugena replied to the Defendants saying that, before they expended any money, they required the letter of intent to be issued directly by the employer who was to be named in the contract documents. For reasons which are still not clear, it was not until 14 February 2003 that Gelande, in the person of Mr Cunningham, wrote to Eugena in the form of a letter of intent.

80. I should set out the letter of intent in full:

“Re: Refurbishment works to Bengeo Hall, Herts. – Letter of Intent

Dear Sirs

We are pleased to inform you that Gelande Corporation Limited (“GCL”) (“the Employer”) acting for Rob Cunningham and Catherine Good has instructed Collett and Farmer to appoint Eugena as main contractor for these works. This letter confirms the Employers’ appointment of Eugena and acceptance of the terms of your revised agreed tender return of the 7th November 2002, in the sum of £605,772 (tbc) with a 23-week programme commencing on site.

Several items are still being revised/reviewed and these amendments will be incorporated (when they are finalised) as variations in the tender return. We have instructed Collett and Farmer to send the contract documents to you for signing.

At the meeting with Eugena and Collett and Farmer on Friday 31st January 2003, it was agreed that this letter would authorise expenditure on preliminaries and specialist design works up to a value of £50,000, but that this letter of intent does not cover construction works which will be the subject of a separate instruction.

It was also agreed that the Client would provide an initial payment of £40,000 on account of the works and that an escrow account would be established to hold one valuation on account during each monthly period of the works. It is our understanding that Eugena will provide suggested wording for this agreement.

We would like to arrange payment by credit transfer. Can you therefore please provide detail of your bank account, sort code etc.
It was agreed that an early start to the works is required and Eugena is to arrange for site operations to commence on 21\textsuperscript{st} February 2003.

Eugena confirmed that it was arranging the insurances required by the contract (MW 98). It was also agreed that Eugena would provide a quote for the insurance of the building during the works, which has now been delivered and is receiving our urgent attention.

Please confirm that these matters are in hand and kindly provide the name and contact numbers of the proposed site manager.

Yours Faithfully

Rob Cunningham

Gelande Corporation Limited.”

81. It is the Claimants’ case that the Defendants should have advised the Claimants that such a letter of intent was not appropriate at all and/or premature in all the circumstances. It appeared from paragraph 120 (and others) of Mr Palos’ report that he considered that, as a matter of principle, a letter of intent of this type was an inappropriate way of proceeding: he called it “a recipe for disaster”. Accordingly, it seems to me that there are two issues for me to determine. One is a matter of principle: Can letters of intent of this type be an appropriate mechanism by which construction works can be commenced on site? If the answer to that question is in the affirmative, then the second issue is a matter of fact: On the facts of this particular case, was this letter of intent premature or inappropriate? I deal with these issues in Sections E2 and E3 below. I then go on to consider other aspects of the advice given by the Defendants in respect of the letter of intent (Section E4 below) and, at Sections E5 and E6 below, I deal with the issues that arise in respect of the Claimants’ case on causation.

E2 Letters Of Intent: Relevant Principles

82. As I pointed out during the evidence, there is a danger of confusion when talking generally about letters of intent. It seems to me that there are two distinct types of letters of intent: those that create no rights and liabilities, and those that do.

83. A letter of intent, properly so called, is a document which expresses an intention on the part of party A to enter into a contract in the future with party B, but creates no liability in regard to that future contract. It is expressly designed to have no binding effect whatsoever. A good example of this type of letter of intent is the document published by the RIBA as Figure J.01 of the Architect’s Job Book, sixth edition, 1995. They call it a “specimen letter to contractor notifying early start to the main contract works”. That specimen letter refers to the intention of the employer to appoint the contractor and requests the contractor to mobilise. However, the specimen letter is deliberately drafted to avoid any liability on the part of the employer for the costs of that mobilisation work. It is, in those circumstances, a true letter of intent. Given that
such a letter of intent is expressly designed not to create any liability or entitlement on either side, such a letter can hardly be objectionable. Of course, the reality is that, in the construction industry today, most letters of intent are not in this form, but are instead expressly designed to give rise to some, albeit limited, reciprocal rights and liabilities.

84. The common type of letter of intent is that which gives rise to limited rights and liabilities. This is the type of limited contract which is the subject of the rest of Section E2 of this Judgment. It was the type of letter of intent that was analysed in British Steel v Cleveland Bridge [1984] 1 All ER 504 and is the subject of the commentary at paragraphs 2-08 and 2-09 of Keating on Building Contracts, 7th Edition. It is usual for such documents to limit the employer’s liability for the works to be carried out pursuant to the letter of intent. Commonly this is done, either by limiting the amount of money that the contractor can spend pursuant to the letter, or by reference to the particular elements of work that the contractor is permitted to carry out. In the present case, the letter of intent of 14 February 2003 was limited in both respects. The letter limited the value of the work to be carried out by Eugena to £50,000, and limited the permitted works to preliminaries and specialist design works.

85. The background to the widespread use of this type of letter of intent in the construction industry is perhaps best summarised by His Honour Judge Richard Seymour QC in Tesco Stores Limited v Costain Construction and Others [2003] EWHC 1487 (TCC). At paragraph 162, he said:

“It has become increasingly common in recent years in the construction industry for a form of “letter of intent” to be employed which, while it does indeed contain a request to a contractor to commence the execution of works, also seeks to circumscribe the remuneration to which he will be entitled in respect of work done pursuant to the request in the event that no contract is concluded. Typically the “letter of intent” will seek to provide that the remuneration of the contractor will not include any element of profit in addition to out of pocket expenses incurred in doing the relevant work or that the remuneration payable will be ascertained by someone like a quantity surveyor employed by the person making the request for work to be done. It is also likely to request that the addressee indicates his agreement to the terms set out in the “letter of intent”. The natural interpretation of a “letter of intent” of the sort now under consideration is that it is an offer to engage the addressee to commence the execution of work which it is anticipated will, in due course, be the subject of a more formal or detailed contract, but upon terms that, unless and until the more formal or detailed contract is made, the requesting party reserves the right to withdraw the request and its only obligation in respect of the making of payment for work done before the more formal or detailed contract is made is that spelled out in the “letter of intent”. If an offer in those terms is accepted either expressly, as, for example, it could be by counter-signing and returning a copy of the “letter of intent”
to indicate agreement to its terms, or by conduct in acting upon the request contained in the letter, it would seem that a binding contract was thereby made, albeit one of simple content.”

86. As I have already indicated, it appeared that Mr Palos did not consider that, as a matter of principle, letters of intent constituted an acceptable way to commence any building project. His main criticism was that it was almost inevitable that, if an employer issued a letter of intent of the type described by Judge Seymour QC, and of the kind sent in this case, the parties would immediately have two wholly different sets of expectations. He said that the employer would be operating on the basis that the workscope pursuant to the letter of intent was simple and straightforward and that he had no commitment in respect of the wider contract; the contractor, on the other hand, would view the letter of intent as being, essentially, a commitment on the part of the employer to the full contract workscope. Mr Palos indicated in his evidence that it would be very rare for a letter of intent ever to be appropriate and no circumstances were identified, either in his report, or in his oral evidence, in which he accepted the applicability or appropriateness of such a letter of intent.

87. It is certainly right that Mr Palos’ general caution in respect of letters of intent was borne out by other witnesses. Mr Blockley appeared to regard such letters as a necessary evil in certain circumstances, and he stressed that their use should be strictly limited. Mr Farmer, of the Defendants, said that he did not personally like letters of intent, and that he was anxious to ensure that, if, as here, a letter of intent was sent, it expressly excluded any element of the construction works themselves. These views found an echo in the Architect’s Job Book referred to above, which states expressly that “it is not good practice to commence the construction phase before the contract documents have been signed.”

88. I accept the general tenor of Mr Palos’ evidence, that letters of intent are used unthinkingly in the UK construction industry, and that they can create many more problems than they solve. In my view, the principal problem with letters of intent is a practical one: once they have been sent, and the contractor has started work pursuant to that letter of intent, all those involved, including the professional team, can easily take their eye off the ball and forget about the importance of ensuring that the full contract documents are signed as quickly as possible. Everybody is then so busy dealing with the day-to-day problems being thrown up by the commencement of the works themselves that the task of signing off an often complicated set of contract documents is relegated to an item of secondary importance. Then, very often, something goes wrong on site and, in the absence of a full contract to regulate the parties’ rights and obligations in such circumstances, the result is confusion and acrimony.

89. Accordingly, I agree with Mr Palos to this extent: that letters of intent are used too often in the construction industry as a way of avoiding, or at least putting off, potentially difficult questions as to the final make-up of the contract and the contract documents. There is no doubt that, sometimes, they are issued in the hope that, once the work is underway, potentially difficult contract issues will somehow resolve themselves. They are plainly not appropriate in such circumstances. But, having said all that, I do not agree that letters of intent are, as a matter of principle, always, or almost always, inappropriate. There will be times when a letter of intent is the best way of ensuring that the works can start promptly, with a clear time-table both for the
finalisation of the contract formalities, and for the carrying out of the works themselves.

90. Thus, so it seems to me, a letter of intent can be appropriate in circumstances where:

i) the contract workscope and the price are either agreed or there is a clear mechanism in place for such workscope and price to be agreed;

ii) the contract terms are (or are very likely to be) agreed;

iii) the start and finish dates and the contract programme are broadly agreed;

iv) there are good reasons to start work in advance of the finalisation of all the contract documents.

In those circumstances I consider that, if the employer wants the work to start on site promptly and the contractor is also keen to commence work, then a careful letter of intent can be appropriate.

91. It is important to stress, however, that, if the parties enter into a letter of intent of this type, there is a clear risk that agreement will not be possible on all the matters necessary to give rise to the full building contract and that, if there is no such agreement, no principal contract will ever be entered into. It seems to me that that is an inevitable risk of any letter of intent which creates respective rights and obligations, no matter how carefully it is drafted. The point of the careful drafting, however, is to minimise the risk, to both sides, if no contract eventuates. After all if, pursuant to a letter of intent, the contractor carries out a fixed amount of work, or an amount of work limited by a particular sum, but no final contract can be agreed, then the contractor is paid for the work that he has carried out in accordance with the letter, and the employer looks elsewhere for another contractor to carry out the bulk of the work. In such circumstances, there should be no significant loss to either side.

92. Accordingly, in my judgment, although I consider that letters of intent are used too often in the UK construction industry, sometimes without careful or proper thought having been given to their consequences, I do not accept the argument that letters of intent of this sort are wrong in principle. For the reasons that I have given, I consider that there can be limited occasions when such a letter of intent is appropriate. Thus, in this case, the issue then becomes: Was this letter of intent appropriate in all the circumstances? I deal with that issue in Section E3 below, where I consider the allegations made by the Claimants that this letter of intent was premature.

E3 Was The Letter Of Intent Premature?

(a) Introduction

93. Before considering the various reasons why it is said that the letter of intent is premature, I should make one point clear at the outset. In the minutes of the meeting of 31 January, there is an express reference to Mr Cunningham’s request that some of the principal ground floor rooms were to be ready by the third week in June 2003. The oral evidence expanded on this. It appeared that Ms Good’s daughter, Anna, was having her first communion in the middle of June 2003 and that there would be a
large family celebration to mark the event. Whilst Mr Cunningham realised that the totality of the refurbishment works at the property would not be completed by that date, he was anxious to ensure that some of the main rooms on the ground floor, including the kitchen and the drawing room, were complete so that they could be shown off to the guests.

94. Mr Farmer explained in his evidence that, at the meeting on 31 January, Mr Cunningham was very clear that he and Ms Good wanted those rooms to be available by that date. It was apparent to everybody that, in order for that to happen, Eugena needed to start work as soon as possible. It was that request that triggered the decision to commence the project pursuant to a letter of intent. I find, therefore, that both the Defendants and Eugena had sufficient justification for thinking that a letter of intent may be appropriate in these circumstances, in order to achieve this particular result. The issue is whether, despite Mr Cunningham’s request, he should have been told that any such letter of intent would be premature and invite unnecessary risks. Clearly, if the proper advice from the Defendants was that, notwithstanding the request, a letter of intent would be premature in all the circumstances, they should have said so. I therefore consider each of the ways in which it is said by the Claimants that the letter of intent was premature.

(b) No Agreed Price

95. The Claimants contend that the letter of intent was premature because there was no agreed contract price. The argument is that, although the Eugena tender was in the sum of £605,772, this was £75,000 odd over the Claimants’ budget figure and that, given the absence of agreement on the contract price on 31 January, the letter of intent should not have been issued.

96. I accept the proposition that if there is no agreement of the contract price, and no agreed means by which such a price might be arrived at, a letter of intent contract is not appropriate. If detailed negotiations remain in order to get the desired worksop carried out for less than the tendered sum, then ordinarily a letter of intent would be premature. However, for the reasons explored below, that was not the situation here.

97. First, there can be no doubt that the Claimants accepted Eugena’s figure of £605,772 as reasonable for the works identified in the tender documents. Indeed, Gelande’s own letter of intent of 14 February 2003, drafted by Mr Cunningham, refers to that very figure. The point was that, given Mr Cunningham’s express budget figure of £525,000, omissions to the worksop were going to be required to get the final contract sum down to the budget figure. It is for that reason that item 6.01 of the minutes expressly refers to the savings of £75,000 that are required.

98. Accordingly, on one view, there already was an agreed contract price at 31 January, and a contract could have been agreed in that amount of £605,772. The works to be omitted could have been identified by way of a separate instruction thereafter, with the value of the instructed omissions, calculated by reference to Eugena’s tender breakdown, bringing the total down to Mr Cunningham’s budget figure. However, all parties realised that it would be better for the omissions, and their value, to be agreed, so that the eventual contract price was an agreed amount, calculated once the omissions had been accounted for. The important thing is that, on the evidence,
neither the Claimants nor the Defendants considered that there was any problem at all in identifying these omissions.

99. Mr Cunningham told me that the omissions which he had in mind had been discussed at a meeting with the Defendants in early December and that these omissions, which related to things like the security gates, could be easily identified. That evidence chimed with the evidence of Mr Farmer. He referred to his letter of 18 December 2002 which identified various potential savings that amounted to a total figure of £100,000 – £120,000.

100. Accordingly, both men considered that the task of identifying both the works to be omitted from the contract workscope, and the tendered value of those items, was going to be a relatively straightforward exercise. They both considered that, between themselves, they had largely identified the items to be omitted. All that was needed was an agreement with Eugena as to the precise value to be ascribed to those items, and any other suggestions that Eugena might have for potential savings. I find that it was for that reason that this prospective exercise is dealt with in such a matter-of-fact way at items 2.01 and 6.01 of the minutes.

101. Thus it seems to me that, as at 31 January 2003, a contract price had been agreed by the parties. However, from the workscope on which that agreed price was based, Mr Cunningham wanted to make omissions in order to get the price down to his budget level. There was, therefore, no need for further negotiation as to the price of the works in the tender documents. That had already happened in December, and had resulted in the reduction of Eugena’s tender figure down to £605,000. All that was outstanding was the much more mechanical exercise of taking out certain items from the tender workscope, and identifying the value that each of those omitted items comprised within the Eugena tender. Both Mr Cunningham and Mr Farmer rightly thought that, as at 31 January 2003, this would be a straightforward exercise. For all these reasons, I do not accept that, on these facts, the letter of intent was premature simply because this (uncomplicated) exercise remained outstanding.

(c) Contract Terms Not Agreed

102. The next point taken by the Claimants in support of their contention that the letter of intent was premature was an argument that the contract terms had not been agreed. Thus, it was said, the letter of intent should not have been sent.

103. I consider that this criticism is unjustified. Everyone understood that the contract terms were always going to be MW 98. Mr Farmer had recommended it to Mr Cunningham and Ms Good as far back as 9 October 2002. Moreover, the proposed use of that form was made clear in the tender documents sent out to Eugena in October 2002. Eugena therefore tendered on the basis of the Minor Works form. I find that there was therefore complete agreement as to the form of the proposed contract on 31 January 2003.

104. It is right that the Defendants proposed making a number of amendments to the MW 98 terms. On the evidence, those bespoke amendments were not prepared and sent out by the Defendants until 24 February 2003 (see paragraph 147 below). However, perhaps fortunately for the Defendants, nothing turned on this delay, because the proposed amendments were considered by Eugena and accepted by them without
further debate. Accordingly, it is impossible to say that the letter of intent was premature because the bespoke amendments to the contract form were not ready at the time that the letter of intent was sent, in circumstances where, when those amendments were sent later, they generated no controversy whatsoever.

105. I do consider that, where the contract administrator proposes amendments to a JCT standard form, it is best for those amendments to be provided at the time that the tender documents are sent out. They should, at the very latest, be provided at the date of any letter of intent. That did not happen here, and the delay was the Defendants’ responsibility. However, given that the amendments were not of any great import, and generated no controversy when they were provided, I decline to find that the letter of intent was premature in consequence.

(d) Non-Agreement Of Security/Escrow

106. The Claimants criticise the letter of intent as premature because, at the time that it was discussed on 31 January, and sent out on 14 February, the Claimants and Eugena had not agreed the form in which Gelande would provide security as against the next month’s interim payment due under the building contract. The history of this point is important.

107. At the meeting on 3 December 2002, Eugena made it plain to the Defendants that they would require some sort of security from Gelande in respect of the ongoing work on site. Their concern was a normal one for contractors, namely that, because they were paid a month in arrears, they might do the best part of a month’s work, only to find that employer was unable to pay the next interim certificate. Later that same day, after the meeting, Mr Richardson of Eugena sent the Defendants a copy of an escrow agreement that they had entered into with another employer on another site, which provided for the setting up of an escrow account, and which had thereby provided the security that Eugena sought.

108. The Defendants did not send a copy of this escrow account document on to the Claimants. The reason given by Mr Farmer was that, at this time, a third tender was being sought from Albany and the Defendants did not believe it appropriate for them to be in detailed discussions with one tenderer about security when it was not yet clear that that tenderer would be getting the job. In my view, notwithstanding the involvement of Albany, there was probably nothing to stop the passing on of this document to Mr Cunningham. However, in my judgment, it would be inappropriate to criticise the Defendants for deciding not to do so. Mr Blockley said he would not have passed on the document until the negotiations with Eugena were further advanced.

109. Furthermore, I have no doubt that, if the draft escrow agreement had been sent to him in early December, Mr Cunningham would have done nothing with it. He certainly would not have sought professional advice (for which he would have paid) on its wording, unless and until it became quite clear that Eugena were going to be getting the contract. Throughout his evidence, and throughout the contemporaneous documents, Mr Cunningham made plain that he did not want to incur expense unless and until it was absolutely necessary. Therefore I find that, even if, contrary to my conclusion, the Defendants could be criticised for not sending the draft escrow agreement to him in December, Mr Cunningham would not have sought legal advice on that wording at that stage. Therefore there was no delay in consequence.
Accordingly, as at 31 January 2003, the parties were aware that an escrow agreement between Gelande and Eugena was going to be required and that the precise terms of this agreement had not yet been concluded. However, there was no reason for the Defendants, or indeed anyone else, to think that the wording of this agreement would create any difficulties whatsoever. It was simply one way in which the requisite security might be provided. The detail of it was not a matter for the Defendants, since both Gelande and Eugena were going to be taking separate legal advice on the wording of the account. They had made this clear in their letter of 17 December (paragraph 49 above). I do not accept the submission that the letter of intent was premature because this escrow wording had not been agreed on 31 January. I consider that the agreement of this arrangement was properly regarded by everybody at that stage as a relatively peripheral matter which could not have been anticipated as giving rise to any particular difficulty. It was not, of itself, any reason not to issue the letter of intent.

I should say, in passing, that I suspect that the Claimants’ case on this point was driven by the knowledge that, after the letter of intent was issued, the wording of the escrow agreement became the principal source of delay and contention between Gelande and Eugena. For the reasons which I explore in greater detail in Section F2 below, I consider that both the delays, and the difficulties in getting the wording agreed, were wholly the responsibility of Mr Cunningham. But in any event, I do not consider that those delays and difficulties could reasonably have been anticipated by the Defendants at the time of the meeting on 31 January 2003. I therefore reject the contention that the letter of intent was premature because the escrow agreement had not been concluded at the time that the letter was sent out.

(e) No Structural Engineer

The Claimants’ next criticism is to the effect that the letter of intent was premature because, at the time that it was sent, there was no structural engineer appointed. By the close of the case, this had become one of their principal criticisms of the Defendants. It is therefore necessary to consider it in some detail.

As early as 24 June 2002, the Defendants had advised Mr Cunningham and Ms Good in writing that they would need the services of a structural engineer who would advise on the structural amendments to the existing building and submit calculations to building control for approval. The documents that were sent out to Eugena and McAlpine in October identified limited matters that would be subject to the input of a structural engineer, largely beams and lintels above the windows. Provisional sums totalling just £11,000 had been allowed against these items. Mr Farmer explained that, in refurbishing any older building, it is necessary for a structural engineer to be present when the building is opened up so that he can form a view as to the precise condition of the existing beams and lintels. That was the explanation for this notation on the Defendants’ drawings.

As set out in paragraph 48 above, the Defendants returned to the question of the engineer in their letter of 17 December 2002 to Mr Cunningham and Ms Good. That letter stated that they considered that the scope of the structural engineer’s input was “small but unpredictable”. There was nothing in the evidence which suggested that the Defendants were wrong to categorise the structural engineer’s likely input in these
terms. The letter also made it plain that an engineer, David Burle, was lined up to undertake the work necessary and be present when the building was opened up.

115. Accordingly, as at 31 January 2003, the Defendants reasonably believed that the structural engineer’s input would be “small but unpredictable” and that, in the light of their letters of 26 June 2002 and 17 December 2002, the Claimants would appoint a structural engineer in accordance with their advice to be present at the opening up.

116. In those circumstances, it does not seem to me that the Defendants can be criticised because there was no structural engineer appointed at the time of the letter of intent. Provided that a structural engineer was appointed and ready to come to site at the time that the works were opened up, which was planned to take place about two or three weeks after the meeting on 31 January, the structural engineer’s input could easily be managed within the overall contract programme. Problems would only arise if the structural engineer was not appointed by that time. That was, ultimately, a matter that was wholly with the Claimants’ control since only they could appoint him. By identifying a specific engineer who could carry out this work (and who, as things turned out, did come to the property for the opening up), the Defendants had done all they could do on 31 January. In those circumstances, it does not seem to me realistic to criticise the Defendants because no structural engineer was actually appointed at the time of the letter of intent.

117. There was a suggestion that the Defendants were at fault because they did not spell out to the Claimants the precise consequences if the structural engineer was not appointed in time. I deal with (and reject) that criticism in Section F3(d) below, because it seems to me that it is an allegation that could only arise in the period after Eugena had started work at the property. I can see no basis for saying that, prior to or at the meeting of 31 January, the Defendants, who had already spelt out the need for a structural engineer in writing, were somehow negligent for not also spelling out what would happen if a structural engineer was not appointed in accordance with that advice.

118. In addition, it is also necessary to remember that Mr Cunningham had made it plain, both before and at the meeting on 31 January, that he would not appoint an engineer until the main contract was signed. Thus, even if the Defendants had spelt out at that stage the (obvious) consequences of a delay in the appointment, Mr Cunningham would not have acted any differently. He would always have waited until the main contract was agreed (or the appointment became a matter of screaming urgency); I find that he would not have incurred a liability for the engineer’s fees before he had to, no matter what advice he was given.

(f) Programme Likely To Be Unachievable

119. The final point relied on by the Claimants in support of their contention that the letter of intent was premature was the allegation that the programme that was being discussed at the time of the letter of intent was unclear or unachievable. I do not accept that submission.

120. From the minutes of the meeting on 31 January 2003, it was apparently agreed that the works would commence on 21 February and would take 26 weeks, completing on 25 August 2003. On 4 February 2003, Eugena produced a programme which showed
the work commencing on 17 February and continuing for 26 weeks which ended on 25 August 2003.

121. The Defendants’ draft letter of intent of 4 February 2003 identified a 23 week period, a start date on 24 February, and a completion date of 4 August. In the actual letter of intent, the 23 week period reference is retained, but the start date was identified as 21 February, which was a Friday, rather than the following Monday. The 23 weeks was the period which had formed the basis of Eugena’s tender.

122. It seems to me that, although these various periods and dates do not quite tally, the parties’ intention was clear enough. Originally it was hoped that Eugena would start at the property the week commencing 17 February but, because of the delays in the issue of the actual letter of intent, for which only the Claimants can possibly be held to be responsible, Eugena were not able to go to site until the last day of that week, the 21 February, in order to make an effective start the following Monday, 24 February. Thereafter, the precise contract period, if 23 weeks, would expire at the end of the week commencing 4 August, and if 26 weeks, would expire at the end of the week commencing 25 August. The contract period was obviously a matter that remained to be finalised between the parties, but there is nothing in the evidence which demonstrated that the overall contract period could not be agreed. Indeed, on one view, Eugena, having agreed to the 26 week period at the meeting on 31 January, were now accepting a shorter contract period as a result of the letter of intent, which could only be to the Claimants’ advantage.

123. Accordingly, it does not seem to me that the fact that the precise contract period and completion date were a little unclear on the face of the documents meant that there was any reason not to issue the letter of intent. The basic agreement between the parties was clear enough; if Eugena agreed to carry out the project in 23, rather than 26 weeks, that was to the Claimants’ advantage.

124. It appeared that there was a separate argument advanced by the Claimants, to the effect that, because of the letter of intent itself, the works were inevitably going to be delayed. It seemed to me that that argument was based entirely on what actually happened after the letter of intent had been issued. In other words, I do not regard that as a criticism that the letter of intent was itself premature; it was more an allegation relating to the circumstances after the letter of intent had been issued, and the delays that were thereafter caused. Accordingly I deal with that allegation in Section F below.

(g) Summary On Prematurity

125. It follows from my conclusions, in paragraphs 93 - 124 above, that I reject the Claimants’ case that the letter of intent was in some way premature. All the matters that were outstanding were reasonably considered by the Defendants to be straightforward matters that could probably be resolved without too much difficulty. Some of them were just that. In the event, some of them proved much more difficult than had been anticipated, but those difficulties do not demonstrate that the letter of intent was premature; in my view they give rise to other questions as to how and why those difficulties arose and whether the Defendants dealt properly with them when they were brought to their attention. Those issues I deal with in Section F below.
E4 Inadequate Advice

126. In connection with the letter of intent, the Claimants also make the slightly different criticism that the Defendants failed to advise them of the risks inherent in entering into a letter of intent of this sort. It appears that the Defendants did not advise Mr Cunningham against entering into the letter of intent, or any specific risks that were involved if he did. Were they negligent in failing so to do?

127. The first point to make is that the Defendants should only have advised Mr Cunningham not to enter into the letter of intent if they believed that he should not do so. For the reasons set out in Sections E2 and E3 above, there were no reasons which should have led the Defendants to advise Mr Cunningham against entering into the letter of intent. Such a letter was not inappropriate as a matter of principle, and it was not premature. The Claimants’ alternative case is that the Defendants should have advised the Claimants about the risks if they did enter into the letter of intent. But what were those risks? It appears from paragraph 30 of Ms Packman’s closing submissions that the Claimants say that two particular risks had not been explained to them. Those were said to be:

“(a) The risk of delays due to lack of information, and
(b) The risk that if the contractual terms (including the price or the terms of the escrow) took longer than envisaged to agree, the client would become liable to a delay claim once the MW98 was signed because the Defendant intended to administer it so as to have retrospective effect.”

128. In my judgment, there was no risk of delay “due to lack of information” that the Defendants needed to warn the Claimants about on 31 January. There was sufficient information to enable Eugena to start work under the letter of intent and to enable them to complete the project within the contract period for which they had allowed in their tender. As we shall see in Section F3(d) below, Eugena’s complaint about lack of information related to the delay in the appointment of the structural engineer, and that was a matter for which the Claimants were wholly responsible. I reject the suggestion that the Defendants should have advised the Claimants that entering into the letter of intent somehow carried with it a risk that the Claimants would fail to appoint the structural engineer in time and therefore give rise to a situation where there was a lack of information in respect of the beams and lintels.

129. As to the point about the delay in agreeing the contract terms, I consider that it was plain to everybody – including Mr Cunningham - that, if there were delays in concluding the contract documents, there would inevitably be a knock-on effect on the completion date. This was because the letter of intent expressly excluded the construction works. Accordingly, if Eugena could not carry out the construction works until the contract documents were completed, then a delay in agreeing those documents inevitably meant that there was going to be a delay in completing the works. I consider that it is fanciful to suggest that Mr Cunningham, or anyone else at the meeting on 31 January 2003, did not have a lively appreciation of that. That is why everybody knew that it was so important to ensure that the various outstanding matters were agreed as soon as possible.
Although I accept that, if there was a delay in agreeing the contract documents, then there would be a delay to the completion of the project, I do not agree that this would have made the Claimants automatically liable to meet a money claim from Eugena. As Mr Farmer had correctly pointed out some months previously, MW 98 contained no entitlement on the part of the contractor to loss and expense. Thus, whilst there was a risk, which everybody was aware of, that a delay in agreeing the contract would delay the completion of the project, there was no obvious risk that such a delay would automatically carry with it a financial penalty for the Claimants. In any event, the party *prima facie* liable to pay for any delay costs was the party responsible for causing that delay in the first place.

Accordingly, for all these reasons, I reject the Claimants’ case that the Defendants should have advised them either not to enter into the letter of intent at all or, if they did, that there were specific risks involved in so doing. In the circumstances of this case, I consider that it was reasonable for the Defendants to conclude that, given the stated desire to complete some of the downstairs rooms by June (paragraphs 93 and 94 above), the letter of intent was a reasonable way of proceeding.

However, even if I am wrong about that, and even if the Defendants should have advised, either that the letter of intent should not be entered into at all or that, if it was, there were specific risks involved, I do not consider that such advice would have made any difference to Mr Cunningham. He accepted in cross-examination that, on the basis of the discussion on 31 January 2003, he would have proceeded with the letter of intent in any event. He said:

“My decision was, after a quite lengthy debate with Eugena about what the ramifications were in terms of timing, programme, in terms of cost, mitigation of liability, risk that we could proceed, but we did so on the understanding given by Mr Farmer that a contract could be signed in two weeks and that he did not anticipate anything holding up – holding the progress up, so if we went along with the letter of intent which effectively limited our risk to £50,000 we were given comfort by Mr Farmer that there were no matters that were going to hold that up, that there would be a smooth transition from the letter of intent into the project.”

I accept the Defendants’ submission that, on the basis of this and other answers during cross-examination, Mr Cunningham’s evidence was clear: that he had made his own analysis of the relevant risks and decided that he would proceed on the basis of the letter of intent. For the reasons which I have indicated, I consider that, to the extent that it was relevant to Mr Cunningham’s decision, Mr Farmer was right to have advised that there was nothing that he could see that would unduly delay the agreement of the contract.

Accordingly, I am of the view that Mr Cunningham would have entered into the letter of intent in any event, because he had made his own assessment of the position and had concluded that, to the extent that he ran a risk by entering into the letter of intent, he was reasonably protected by the limitations on the permitted workscope and the financial ceiling of £50,000. I consider that that was a reasonable conclusion for him to have reached, but it means that he cannot now complain that his decision was
somehow reliant upon any incorrect advice or omissions emanating from the Defendants.

E5 Causation

135. For the reasons set out above, I have concluded that the Defendants were not negligent in failing to advise the Claimants not to enter into the letter of intent and/or failing to advise the Claimants that the letter of intent carried with it specific risks. It therefore follows that, because I have not found any relevant breaches of contract and/or negligence, no issues on causation can arise. However, let us again assume that I am wrong and the fact that Gelande entered into the letter of intent was (or arose from) a culpable error on the part of the Defendants. Let us also assume, contrary to my conclusion above, that Mr Cunningham would not have entered into the letter of intent in any event. What loss and damage can have been caused in consequence?

136. If the letter of intent had led on to the envisaged contract for the whole of the works (the “smooth transition” referred to by Mr Cunningham in his oral evidence), then the Claimants would have suffered no loss at all. It would have simply meant that some of the early works had been carried out pursuant to a letter of intent, with the majority of the works having been completed pursuant to a full contract which subsumed the letter of intent. There could be no loss in those circumstances. Accordingly, it seems to me that, even if the Defendants were somehow in culpable default for allowing the Claimants to enter into the letter of intent, no loss and damage could possibly have arisen unless and until the letter of intent was – contrary to expectations - not subsumed by the main contract. Thus, it seems to me, the critical events were not those surrounding the entering into the letter of intent, but those surrounding the events thereafter, which led to the breakdown of the relationship between the Claimants and Eugena, and meant that no full contract eventuated. That is dealt with in Section F below.

137. If, contrary to my primary conclusions, the Defendants should have advised against entering into the letter of intent, I consider that, for the reasons I have given, the Defendants were still reasonably entitled to believe, on 31 January 2003, that a full contract would eventuate between Gelande and Eugena. In those circumstances, to the extent that any losses were caused as a result of the failure of Gelande and Eugena to agree such a contract, then those losses were not reasonably foreseeable as the consequences of the Defendants’ failure to advise against the letter of intent. They were too remote from the Defendants’ alleged failure.

138. In my judgment, in order to succeed on a case of causation arising solely from the letter of intent, without regard to what happened after the letter of intent was issued, the Claimants would need to demonstrate, not only that the Defendants were in culpable default for allowing the letter of intent to be entered into, but also that, in addition, the mere fact that the letter of intent was entered into – of itself - made it more likely than not that the full contract would not ultimately be agreed. There is no evidence on which I could base any such finding. I reject any such case. Accordingly, I do not consider that any culpable default on the part of the Defendants in respect of the letter of intent on its own (which I have in any event rejected) would, of itself, have led to recoverable loss and damage.
139. To put the point another way, it seems to me that the sorts of losses that might flow from an inappropriate letter of intent, such as abortive work and delay costs, could only be recoverable if, contrary to the reasonable expectations of the parties on 31 January, there was no full contract between Gelande and Eugena. Thus what matters is why there was no such contract with Eugena. In my judgment, the points in relation to the letter of intent alone are incapable of causing recoverable loss and damage.

140. I should also add that, even if that point was also wrong, so that, prima facie, abortive work done by Eugena and/or the cost of delay was recoverable against the Defendants simply because there was a letter of intent, the difficult question then arises: who has suffered such loss? The answer is plainly Gelande. It was Gelande who were the employers under the building contract. If, for example, they have had to pay Eugena for abortive work, then they have suffered a loss. But, as I have indicated, Gelande accepted that their claims against the Defendants should be abandoned. They therefore have no claim against the Defendants in respect of these items. There is no evidence on which I could find in principle that Mr Cunningham or Ms Good could, for instance, recover the costs of abortive work as a result of Gelande entering into the letter of intent, since they were deliberately not the employers of the building contractors under the letter of intent contract or the proposed full contract.

141. For all these reasons, therefore, it seems to me that, even if, contrary to my primary findings, the case against the Defendants had been made out in respect of the letter of intent, it seems to me that – without more - such default on the part of the Defendants caused no loss and damage that was reasonably foreseeable and/or not too remote. For completely separate reasons, it does not seem to me that such losses could be recovered by Mr Cunningham and Ms Good in any event because any such losses would have been suffered by Gelande, the employers under both the existing and proposed contracts.

142. It is doubtless apparent from the preceding paragraphs that, in my judgment, there has been an inappropriate conflation of what are in fact two entirely separate strands of the Claimants’ case. There are the allegations made in respect of the letter of intent itself, which I have dismissed for the reasons above. There are also entirely different allegations, regarding the events after the letter of intent, which I consider to be of greater significance, because it was those later events which prevented the agreement of the full building contract, and it was that failure which started the apparently inexorable run of problems on the project. There is an assumption in the Claimants’ case that, somehow, the project was effectively doomed from the moment that the parties agreed on 31 January 2003 to proceed by way of a letter of intent. For the reasons set out above, I categorically reject that assumption. It seems to me to be wholly unwarranted on the evidence. The letter of intent was, in all the circumstances, a reasonable course to adopt. Why, then, contrary to the expectations of everyone involved, did it not lead on to a full contract between Eugena and Gelande?
F THE EVENTS IN FEBRUARY, MARCH AND APRIL 2003

F1 The Relevant Events

143. As noted above, Gelande did not prepare the letter of intent until 14 February 2003. It is unclear when they sent it to Eugena but, four days later, on 18 February 2003, Eugena were writing to the Defendants complaining that they had still not received it. It appears that, as a result of this delay by Gelande, Eugena did not make a meaningful start to the works until 24 February 2003.

144. Also as noted above, on 11 February, the Defendants had sent to Mr Cunningham the proposed wording for the escrow account prepared by Eugena and asked Mr Cunningham to get his solicitors to review that draft. On 14 February, Mr Cunningham wrote to Eugena to inform them that the escrow account wording had been sent to his solicitor for comment. In the documents, there is a letter, also dated 14 February, from Gelande to Mr Porter, the solicitor concerned, asking him to review the escrow account wording proposed by Eugena. There was an issue as to whether the document was actually enclosed with this letter: see paragraphs 148-150 below.

145. During February, there were attempts made by the Defendants to renegotiate their fees. The principal reason for this was the fact that their fees had originally been calculated on the basis of the notional budget of £300,000, but it was now plain that the value of the works was going to be considerably higher. There was a good deal of correspondence/email communication on this point and some bad-tempered evidence. The principal argument at the time that this oral evidence was given appeared to be Mr Cunningham’s contention that the new agreement, eventually set out in the Defendants’ letter to Mr Cunningham and Ms Good of 6 March 2003, comprised a contract between the Defendants and Gelande. However, this assertion, which Mr Cunningham was at such great pains to make good, was rendered largely irrelevant when Gelande’s claims against the Defendants were abandoned on 9 June 2006. For the sake of completeness I should say that it was plain on the evidence that there was no contractual relationship at any time between the Defendants and Gelande and I found Mr Cunningham’s explanations to the contrary to be wholly implausible. The further agreement between Mr Cunningham and Ms Good and the Defendants that was encapsulated in the Defendants’ letter of 6 March 2003 is dealt with in greater detail in Section H below, where I deal with the Defendants’ outstanding fee claim. For present purposes, I note that that letter was sent to Mr Cunningham and Ms Good, not Gelande, and the only references to Gelande were added later in manuscript by Mr Cunningham. Those references were never agreed or approved by Mr Farmer, or anyone else at the Defendants.

146. It had been agreed that, pursuant to the letter of intent, Gelande would pay a deposit of £40,000. This was not paid until 21 February, a full week after the letter of intent had been prepared. It appears that the following Monday, the 24th, the Defendants were still unaware that this sum had been paid. In their letter of 24 February the Defendants told Mr Cunningham:

“It is vitally important that you pay Eugena the £40,000 deposit agreed with them and resolve the escrow account wording in order to avoid them getting nervous or delaying their start on site.”
The reference to the escrow account arose because, although Mr Cunningham had promised to get back to Eugena on their draft wording some days previously, he had not done so.

147. On 24 February 2003, the Defendants also sent Mr Cunningham and Ms Good a draft copy of MW 98 and the bespoke amendments. Mr Farmer said that he had hoped to produce this document a week earlier (17 February) but pressure of work delayed it for a week. The bespoke amendments ran to two pages. A figure of £500 had been filled in for liquidated damages, although it had not been previously discussed. The Claimants sought to make something of the late identification of this figure at the trial. However, as we shall see, it caused Eugena no difficulty. Moreover, it seemed to me that, given that Gelande were going to be the employer under the contract, but had no interest in the property whatsoever, it was difficult to see how any genuine pre-estimate of their loss could be anything other than Nil. Any point about the liquidated damages figure therefore went nowhere.

148. On 26 February 2003, Mr Cunningham sent his solicitor, Mr Porter, a copy of the escrow agreement prepared by Eugena. If a copy had been sent with the letter of 14 February, then this was the second time that it had been sent to Mr Porter. It was Mr Cunningham’s evidence that he had, from the word go, spotted deficiencies in the draft wording proposed by Eugena and had made those deficiencies plain to the Defendants in a telephone call in early February, even before he purported to send the draft wording to his solicitor for the first time on 14 February.

149. I regret that I must conclude that that evidence was untrue. It was not only denied by Mr Farmer, but it was also plainly contrary to all of the documents. There is nothing to suggest that, during February, or indeed March, Mr Cunningham ever came back to the Defendants with any views on, or criticisms of, the escrow wording proposed by Eugena. Furthermore, I regard it as wholly implausible that, if Mr Cunningham had identified difficulties with the wording of the escrow agreement, he had not immediately passed on his concerns to Eugena: after all, this was an agreement that would be entered into by Eugena and Gelande, and, as Mr Cunningham himself accepted, the Defendants were irrelevant to it. It was also contrary to such a case that he had twice sent the Eugena wording – to which he said he objected – to his solicitor, without any indication in the covering letters/notes that he had already rejected or had any concerns about that wording.

150. I find that the only credible explanation of the documents is the one suggested by the Defendants, namely that, although Mr Cunningham had meant to send his solicitor a copy of the escrow account wording on 14 February but, in his rush to go away for a few days, he had failed to enclose it. That is why, as Mr Cunningham himself said, his solicitor said that he did not have a copy. Therefore, a fortnight later, on 26 February, he had to re-send it to his solicitor. At this stage, I find that Mr Cunningham had no points on, or criticisms of, the escrow wording suggested by Eugena.

151. On 19 and 24 February, and again on 27 February, Mr Farmer of the Defendants chased Mr Cunningham for the appointment of the structural engineer. In the latter email it was said that this instruction was now “urgent…if we are to avoid delay to Eugena on site”. Mr Cunningham responded the following day to say “this cannot happen”. He then approved the instruction of the engineer.
The point was made that this was the first time that the Defendants had told Mr Cunningham that the appointment of the structural engineer was urgent and that, once they had made that plain, he immediately appointed the structural engineer. The complaint was that, if they had told him of the urgency before, the engineer would have been appointed earlier and there would have been no question of any delay to Eugena. I reject that criticism. As the earlier documents demonstrated (see paragraphs 112-118 above), Mr Cunningham had been told on a number of occasions that he would need a structural engineer at the outset for the opening up works. His response was to say that he would not appoint an engineer until the contract documents had been agreed. He now had a contract, albeit limited in scope, with Eugena and that included the opening up works. Therefore, even on his own case, Mr Cunningham knew by mid-February, when he sent out the letter of intent, that he had to appoint a structural engineer. He was asked again to appoint the engineer on 19 February, and chased on 24 February. Again he did not respond. It appears that he only acted when he was told that there was a risk of delay if he did not. I find that that was one of the consequences of Mr Cunningham’s policy of only incurring expense when he absolutely had to.

It appears that there may have been some delay to Eugena as a result of the absence of the structural engineer at the end of February. On 24 February, their first substantial day on site, Eugena issued a number of Requests For Instruction (“RFI’s”). A number of these required answers that could only be given by the structural engineer. Following his appointment later that week, the structural engineer was unable to be on site until the first week in March. However, even on Eugena’s case, as their letter of 4 March 2003 made plain, the areas of work affected were limited to the beams and lintels.

Eugena’s letter of 4 March 2003 was, in effect, the beginning of a delay claim. It is certainly right that its author, Mr Tate, the contracts manager, appeared to be under the impression that there was already a full building contract up and running between the parties, because the potential delays canvassed in the letter were all in respect of the construction works, whilst, as we know, Eugena were not yet instructed to carry out any such works, by reason of the express prohibition in the letter of intent.

There was evidence of three meetings during the February/March period at which it was intended that Mr Cunningham, Mr Farmer and Eugena would agree the works to be omitted from the contract work scope. The evidence was that for the first of these meetings, Mr Cunningham was only there at the beginning and then left. At the second he arrived late. The third, which was the site meeting on 5 March, Mr Cunningham did not attend at all. Minute 5.01 recorded:

“Adjustment to tender figures. [The Defendants] and Eugena are to meet to consider costs savings to reduce the overall budget to £525,000. [The Defendants] to issue a revised scope with annotations indicating how the original tender return was reduced to £605,000.”

In the action column, this item was listed for action by the Defendants and Eugena. However, it does not appear that there was a further meeting to discuss these proposed omissions.
156. Eugena were still waiting to hear whether or not Mr Cunningham had any concerns about their proposed escrow agreement. Nothing at all had happened on the Claimants’ side in respect of this important matter. Then, extraordinarily, on 7 March 2003, Mr Cunningham emailed his solicitor asking him “if you could review the attached document as provided by Eugena Ltd”. The document attached was said to be the “Escrow Agreement”. The evidence was that Mr Porter, the solicitor, required an electronic version of the Eugena draft. This was therefore the third time – or, at the very least, the second – that this document had been sent to his solicitors by Mr Cunningham. I find that, at this stage, therefore, neither Mr Cunningham, nor his solicitor, had yet commented on the draft escrow agreement, despite the fact that it had been sent to them by Eugena a month before.

157. On 7 March, Eugena wrote to the Defendants pointing out that the works were in delay. They identified a number of reasons for that including the absence of a revised letter of intent raising their permitted expenditure level. They also complained, not unreasonably, that they had issued the draft wording for the escrow account on 11 February 2003 and had not received any comments on it, or any confirmation that the escrow account had been set up. There was a further reference to the need for structural engineering design on the project and the absence of answers to the RFIs. On 11 March, they sought to increase the value of the letter of intent to £530,000.

158. Mr Porter raised a number of points on the escrow agreement with Mr Cunningham on 11 March 2003. It does not appear that these comments were passed on by Mr Cunningham either to the Defendants or to Eugena. There was no explanation for this omission. On 19 March 2003, Eugena wrote to the Defendants again, complaining about the absence of any reaction to the escrow wording. The following day, 20 March, Mr Farmer wrote to Mr Cunningham enclosing a copy of that letter and saying that it was “imperative” that the escrow account be set up as soon as possible.

159. By this time a number of other things had happened. On 13 March, Eugena confirmed to the Defendants that they accepted the amendments to MW 98 as drafted by the Defendants. Mr Cunningham had yet to provide the same confirmation. The following day, Eugena provided a notice, purportedly in accordance with clause 2.2 of MW 98, seeking an extension of time of two weeks. The precise reasons for that extension of time were not identified in the letter, nor was there any calculation of how that period was arrived at. On 18 March, the Defendants provided a copy of the claim to Mr Cunningham and Ms Good saying that the delayed information related to structural matters and that “the basis of their claim appears valid”. On the same day, the Defendants responded to the RFIs, answering a number of them with the words “awaiting engineer’s details”.

160. The Defendants’ letter to Mr Cunningham and Ms Good of 18 March 2003 is important for another reason. The letter is the first time that the Defendants expressed their concern in writing over the delays in resolving the contractual issues. In the third paragraph the Defendants say this:

“The current delay in agreeing both the Escrow account and signing the contract, in the absence of a further letter of intent, is currently preventing Eugena from confirming appointments of sub-contractors and I am expecting a further claim in this
respect. I cannot stress too greatly the urgency of these contractual matters and ask that the account be set up and the contract agreed and signed as a matter of urgency.”

161. This plea correctly recognised that, as regards the contract terms and the escrow account, both such matters were in the Claimants’ court; they were in possession of proposals on both points which they urgently needed to address. Eugena had, of course, agreed the contract terms and amendments and had proposed, many weeks before, their preferred escrow wording. They, like the Defendants, were waiting for the Claimants’ response on both points.

162. On 19 March 2003, Mr Porter, Mr Cunningham’s solicitor, gave him some written advice about the Defendants’ proposed amendments to MW 98. It does not appear that Mr Porter took issue with any element of the proposed amendments. However, Mr Cunningham still did not contact Eugena or the Defendants to say that he agreed the proposed amendments.

163. On 19 March 2003, Eugena wrote to the Defendants in stark terms. They said they had reached the level of commitment identified in the letter of intent. They also complained about the absence of any agreement on the wording of the escrow agreement. It appears that, certainly by this stage, because they had not had any response to their proposal, Eugena were assuming that there were no difficulties with their proposed wording of the escrow agreement. The letter concluded that unless these matters were sorted out within seven days, Eugena would leave site. On the same date, Eugena made an application for payment in the sum of £47,076.30.

164. On the following day, 20 March, the Defendants wrote to Mr Cunningham in equally clear terms. Their concern over the delays, apparent from their letter of 18 March, was plainly increasing. They enclosed a copy of Eugena’s letter of 19 March. They said that it was imperative that the escrow account be set up as soon as possible (paragraph 158 above). As regards the contract works themselves, they advised that, either a revised letter of intent for £525,000 was needed, or Gelande had to agree and sign the full building contract. As to the delays that had now occurred, Mr Farmer said:

“The nature of the potential delay due to contractual matters remaining at large is not easily quantifiable. Currently, Eugena cannot place orders for sub-contract work and materials and this may have an immediate effect as the sub-contractors are on two weeks lead in and have already been lined up to start.”

165. On the same day, the Defendants wrote to Eugena in respect of the delay claim of two weeks (paragraph 159 above) to say that they were minded to grant an extension of time. Entirely correctly, the Defendants then went on to say that, at that stage, it was inappropriate to agree an extension of time because the full impact of the delay was not yet known. On 24 March, the Defendants responded to Eugena’s valuation claim and issued a first interim certificate in the sum of £47,076.

166. On 26 March, Eugena issued a further notice of delay. On 27 March, they wrote to Mr Cunningham to say that the matters raised in their letter dated 19 March had not
been resolved and they confirmed that their works would be suspended from 28 March onwards. The letter went on to say that Eugena would be vacating the site from 28 March, and removing all their resources.

167. On the same day, 27 March, Mr Cunningham sent Eugena a new draft escrow agreement. This was the first time that this proposed wording had been suggested to Eugena. It was in significantly different terms from the wording originally proposed by Eugena. It is perhaps unsurprising that Eugena responded, on 31 March, to say:

“We are in receipt of your email dated 27 March 2003 enclosing proposed amendments to escrow wording issued to you some eight weeks ago.

The amendments you propose are unreasonable and it is unrealistic for you to seek to impose them on us at this late stage.

For the avoidance of doubt, we are only prepared to enter into the escrow agreement the wording of which was issued to you some time ago.”

168. It appears that, belatedly, Mr Cunningham then became aware of the difficulties that these delays had created in his relationship with Eugena. On 31 March he drafted a letter of intent which purported to cover construction works to the value of £500,000. This was apparently sent by fax to Eugena on 2 April. Eugena immediately responded, saying they were unable to accept the facsimile as authorisation to commence construction works. Six reasons for this were set out in Eugena’s letter and they included:

i) Eugena’s requirement that Gelande pay their remobilisation costs;

ii) Eugena’s requirement that Gelande agree to their proposed escrow account wording;

iii) Eugena’s requirement that Gelande provide proof that the escrow account has been set up;

iv) The need for certain formal requirements to be completed, such as the provision of the new letter of intent as an original document, signed and written on Gelande headed paper, and the issue of the contract and the amendments.

169. It appears that, through the good offices of Mr Farmer, Eugena were persuaded to allow their solicitors to deal directly with Mr Cunningham’s solicitors in respect of the proposed escrow wording. These negotiations were identified in Mr Farmer’s fax of 7 April. There were then detailed discussions about the escrow account. However, as late as 11 April, Mr Porter was still proposing entirely new points to his opposite number on the proposed wording of the escrow agreement.

170. On 11 April 2003 it appears that Mr Cunningham finally realised that he was going to be blamed for the delay in the agreement of the escrow wording. Typically, he
therefore went on the offensive. He sent an email to Mr Farmer complaining (for the first time) that the first version of Eugena’s escrow wording that he had received was “barely readable”. This was just wrong, although it was made worse by Mr Cunningham’s embarrassing oral evidence in support of the allegation, which suggested that the document had been “enhanced” by photocopying. In the email, he also said that he had not received the contract “to which the escrow account was related” until three weeks after the escrow wording proposed by Eugena. He sought to blame Eugena for the delays in relation to the agreement of the escrow wording. He also referred to the two week delay as a result of the failure to secure a structural engineer, which he suggested was the responsibility of the Defendants.

171. On 9 April 2003, Eugena produced a loss and expense claim in the sum of £10,350. However, six days later, they wrote again (in a letter wrongly dated 15 March) which purported to claim in excess of £50,000 in relation to delay. This letter seemed to indicate that the original £10,000 figure was in relation to the suspended period. This new claim sought a separate sum of £37,431.25 in respect of a period of five weeks identified as “experienced delay”. Additional sums were sought in respect of legal costs and remobilisation.

172. On 22 April 2003, the Defendants wrote to Mr Cunningham giving their view of the claim. They stated that the “experienced delay” related to the delay caused by the late appointment of the engineer and was, on the information that they had, a period of 2/3 weeks. They made the point that the period of delay would be determined by the Defendants, not Eugena. They concluded the letter by saying:

“We need to meet, at your offices, as early as possible next week to try to resolve these matters and get this contract back on course. I am very concerned that a listed building is now opened up with partial demolition and windows removed, with no work ongoing. If we fail to bring Eugena back onto the job, the delay in appointing another contractor will be detrimental to the fabric of the building and the increased costs may compromise the viability of this project.”

173. On 28 April 2003, there was another meeting at Earthport’s offices. The purpose of the meeting was said to be the determination and agreement of all outstanding matters. The contract was agreed in the MW 98 form with the entirety of the Defendants’ amendments being accepted. It appears that there was no debate about this at the meeting.

174. There was then a lengthy discussion about the escrow agreement. The particular disagreement at the meeting concerned the words “held in trust” in the proposed wording, a point raised by Mr Cunningham, and apparently of concern to him because of his potential liability to Eugena if Gelande went into liquidation. However, after extensive discussions, a way round the difficulties of the wording was agreed and a convoluted (but doubtless entirely workable) agreement was arrived at in respect of the escrow account.

175. The discussion then moved on to Eugena’s claims for the cost of delay. The figures were taken from the Eugena letter of 15 April. However, an impasse was quickly reached. The minutes make this plain:
Mr Cunningham stated that neither he nor Gelande were in any way responsible for any delay to this project and that under no circumstances would either he or Gelande pay any additional monies for delay or legal fees.

Eugena stated that they were unable to proceed without agreement on these costs.

Agreement could not be reached in respect of these costs and, by mutual agreement, it was decided that Eugena would carry out no further works as specified in the contract, but would return to site to fulfil their existing obligations, the valuation of which would be carried out and certified in accordance with the contract.”

That was the end of Eugena’s involvement on the project, although, as noted above, their dispute with Gelande went on to litigation. It was almost the end of the road for the Defendants as well. On 28 April, they complained to Mr Cunningham about his non-payment of their fees, stating that it was:

“particularly unfair and unreasonable of you to withhold payment without stating openly that you intend to withhold payment, or giving reasons for not paying our fee application.”

It appears that there was some indication by Mr Cunningham on 28 April that he might pay some of the outstanding fees but he did not and thus, on 2 May 2003, the Defendants wrote to say that as a consequence of the non-payment of their fees, they felt they had no option but to suspend their services with immediate effect.

F2 Why Was There No Contract Between Eugena and Gelande?

(a) Introduction

For the reasons which I have already explained, it seems to me to be of critical importance to determine precisely why the full building contract, which on 31 January all parties confidently expected would be promptly agreed and entered into, failed to materialise. To the extent that the Claimants suffered loss and damage as a result of the events of the early part of 2003, it was because Eugena left site at the end of April, never to return. How did such a situation come about?

It is clear from the documents, and the oral evidence that I heard from Mr Farmer of the Defendants and Mr O’Sullivan of Eugena, as well as the evidence of Mr Cunningham, that the deal foundered because of the delays between 31 January and 28 April (a period of three months) and the mistrust, on both sides, that developed during, and as a result of, that period of delay. By 28 April, it seems clear to me that neither Eugena, nor Gelande (in the person of Mr Cunningham) were particularly sorry that they were not going to be contracting with one another. A good deal of personal antipathy appears to have arisen between these two parties. The antipathy was plainly the result of the delays between 31 January and 28 April. Thus the causes of the delay during that period were the causes of the mistrust and antipathy that led to the decision by Eugena that, with their delay claim rejected in its entirety,
they would not contract with Gelande. I therefore analyse below the causes of that delay.

(b) The Escrow Agreement

179. The contemporaneous documents and the oral evidence demonstrated beyond doubt that the overwhelming cause of the delay during the three months of February, March, and April 2003 was the failure to agree the escrow wording. I note that, in a signed statement in the Gelande insolvency proceedings (another piece of satellite litigation in which Mr Cunningham has been involved) he himself said that “the contract was never signed or finally agreed principally because of a dispute over the escrow wording…” I am in no doubt that it was the Claimants, and in particular Mr Cunningham, who were responsible for that delay and the plain antagonism that it generated.

180. Eugena wanted an escrow account because they wanted some security to be provided on behalf of Gelande, who were otherwise a company about whom they knew nothing, with no obvious assets or resources. They provided a copy of their proposed escrow wording on 11 February, three days before the letter of intent was issued on 14 February. They had every reason to believe that the Claimants would come back promptly with any points on the wording and then, once the wording had been agreed, set up the escrow account.

181. That simply failed to happen. The delays on the part of the Claimants were extensive and wholly unjustified. Almost a month was lost whilst Mr Cunningham sent, or purported to send, various copies of the same proposed agreement to his solicitor. Even when his solicitor finally provided him with advice as to the escrow wording, he did not pass on those comments to Eugena. He only responded on the escrow wording at the end of March, because Eugena were suspending their work on site. Thereafter, a further month’s worth of delays ensued because, during the negotiations between the solicitors, Mr Cunningham’s solicitor raised new points on the proposed wording that had not arisen before. Even more damningly, it appears that the eventual sticking point, namely the question of the monies being held in trust, was a concern to Mr Cunningham because of the potential liquidation of Gelande, the company whom he said was his agent, and whom he was supposedly representing in the discussions. It could hardly have filled Eugena with very much confidence in the stability or reliability of Gelande, who were being put forward as their prospective employer, when they saw that company’s representative, Mr Cunningham, worrying about his exposure if Gelande could not meet their obligations.

182. Of course, on 28 April, the parties were able to agree a form of words that finally dealt with their differences over the escrow wording. But I find as a fact that:

i) with goodwill on both sides, this form of wording could have been agreed by no later than mid-February 2003;

ii) the failure to agree this form of words by mid-February 2003 at the latest was solely the responsibility of the Claimants, and Mr Cunningham in particular;
iii) the 7+ weeks delay caused as a result of the failure to agree the escrow wording was the responsibility of the Claimants, and Mr Cunningham in particular.

(c) Failure To Agree Delay Costs

183. Of course, as the minutes of the meeting of 28 April made plain, the immediate cause of the decision by Eugena not to contract with the Claimants was Mr Cunningham’s uncompromising position, advanced at that meeting, that Gelande would not pay a penny in respect of the delay costs incurred by Eugena. He apparently justified that by saying that neither he nor Gelande was responsible for any delay.

184. For the reasons which I have set out above, Mr Cunningham was plainly wrong to make this assertion. He was, in truth, personally responsible for the delays that occurred during this period because of his failure, despite a number of chasing letters from the Defendants, to deal with and agree the escrow wording. It was therefore ridiculous for him to adopt the stance that he did at the meeting. To put it another way, he was solely responsible for the consequences of the uncompromising stance that he adopted, which was Eugena’s decision not to contract with Gelande.

185. There is some evidence that Eugena would have taken less than the £50,000 claimed in consequence of the delay. It is, in any event, common sense that a contractor and an employer in the position in which Eugena and Gelande found themselves on 28 April would – if they really wanted to – have negotiated some sort of settlement of the delay claim that had arisen. However, as the minute made clear, Mr Cunningham would not pay a penny in respect of the delay for which he was personally responsible. Accordingly, in all the circumstances, it seems to me that Eugena’s consequential decision to have nothing further to do with Gelande could not be categorised as unreasonable and that such a decision was the foreseeable consequence of Mr Cunningham’s unjustified stance.

(d) Other Causes Of Delay

186. It is right to say that there were other, concurrent, causes of the delay during the period from 31 January to 28 April 2003. Those are analysed in greater detail in Section F3 and F4 below. However, I find that any delays thereby caused were not critical, and were not the cause of the mistrust that eventually led to the breakdown of relations between Eugena and Gelande, and Eugena’s decision to walk away from the project. For the reasons which I have given, the critical cause of the delays, and the ensuing mistrust, was the failure to agree the escrow account, which was a failure that was entirely the Claimants’ responsibility.

187. I now turn to deal with the individual criticisms made by the Claimants about the Defendants’ conduct following the issuing of the letter of intent. I deal with those criticisms under two broad heads: the alleged failure on the part of the Defendants to get the full contract agreed by Gelande and Eugena (Section F3 below); and the alleged failure on the part of the Defendants to administer the letter of intent contract properly (Section F4 below).
F3 The Alleged Failure To Get The Contract Agreed

(a) Failure To Get The Escrow Wording Agreed

188. Remarkably, it is part of the Claimants’ pleaded case that the Defendants were at fault for failing to get the escrow wording agreed. This was wholly at odds with Mr Cunningham’s oral evidence, which was to the effect that he accepted that this was not a matter on which he was looking to the Defendants for advice. It is also plain from the contemporaneous documents that the escrow wording was a matter for Eugena and Gelande and, possibly, their respective solicitors. It was not a matter on which the Defendants could, or held themselves out as being able to, give advice. It was not a matter on which the Claimants actively sought advice from the Defendants. All that the Defendants could do was to seek to impress upon Mr Cunningham the importance of getting the escrow wording agreed. As set out in paragraphs 146, 160 and 164 above, Mr Farmer of the Defendants made strenuous efforts to get Mr Cunningham to see the potentially disastrous consequences of his delay in progressing this aspect of the negotiations. Mr Cunningham failed to heed those warnings until beyond the last minute. Accordingly, for the reasons which I have already given, this was not, and could not be, a failure on the part of the Defendants.

189. I should say one further word about this aspect of the case. As I have observed at paragraph 170 above, it appears that, by 11 April, Mr Cunningham was aware that the delays in agreeing the escrow wording were going to be a major source of contention. Thus, on that date, Mr Cunningham sent an email in which he sought to rewrite history and blame everybody else but himself for the delays. He continued that approach in the witness box, when he sought to blame the Defendants for the delay, by maintaining that, in some unminuted telephone conversation in February, he made clear to the Defendants the difficulties with the escrow wording proposed by Eugena. I have rejected that evidence as untrue. However it seems to me to be of relevance because, together with the email of 11 April, it demonstrated Mr Cunningham’s belated appreciation of the fact that this delay was, in truth, his responsibility, and thus explained his increasingly desperate efforts to try and shift the blame elsewhere.

(b) Failure To Agree Price

190. The Claimants say that the Defendants failed to agree the final contract price with Eugena and that therefore this was a cause of delay during the relevant period. This allegation is maintained by Mr Palos in his report. However, it is plain that Mr Palos was misinformed as to the parties’ agreed position on price at the end of January.

191. Mr Palos apparently worked on the basis that the contract price was dependent on negotiations between the Defendants and Eugena in which the Defendants would have to persuade Eugena to reduce the price that they had quoted (£605,000 odd) down to the £525,000 budget figure. It is not clear where this suggestion came from. It is wrong on the facts. The renegotiation of the pricing levels had already happened at the meeting in early December 2002, when Eugena had arrived at their adjusted tender figure of £605,000 odd. Nobody suggested that there was any scope for further reductions in price thereafter. Thus Mr Palos’ report on this potentially important debate was based on an incorrect factual premise.
192. Instead, what the Claimants, the Defendants and Eugena all knew was that, in order to arrive at a final contract price, they had to agree a list of omissions from the contract work scope. For the reasons set out at paragraphs 95-101 and 155 above, it is plain that before, at, and after the meeting on 31 January 2003, all parties considered that this was a relatively straightforward exercise, which would involve the omission of various peripheral items, like the security gates. There was no evidence that any of the three parties considered that it was going to be difficult to agree those workscope omissions. There is also nothing to suggest that anybody foresaw, or could have foreseen, any difficulties in such negotiations. Indeed, I note that Mr Cunningham had no difficulty in issuing the second letter of intent (albeit by fax) increasing the amount of the financial limit to £500,000.

193. It might fairly be said that, even if it was the case that all parties expected this exercise to be relatively straightforward, it was still the fact that, at the end of April, it remained outstanding. On the evidence, it would appear that this delay was principally the responsibility of Mr Cunningham because, of the three meetings arranged at which this aspect of the negotiations was going to be addressed, he had failed to attend one and only attended the other two in part: see paragraph 155 above. I do not accept the proposition that this agreement could have been reached without Mr Cunningham’s full participation. It was ultimately for Mr Cunningham to say what items of work should be omitted and what items retained. He was emphatically not the sort of man to trust anyone else to carry out that task on his behalf.

194. However, I do not regard the failure to agree the workscope omissions, and thus the price, as causative of delay or difficulty. It was seen by all parties as a relatively straightforward, almost administrative matter. The reason why it did not happen during the three month period with which this part of my Judgment is concerned was because Mr Cunningham did not give his full attention to the point, and only he could agree the necessary omissions.

195. I do accept the suggestion that Mr Farmer should have been rather more pro-active in dealing with this loose end. Whilst I acknowledge that he could have entered the £605,000 as the contract price, and then valued the omissions by way of a separate instruction, it was clearly better (as all parties accepted) if the omissions could be valued and agreed prior to the completion of the contract documents. I consider that, notwithstanding all that was going on at the time, Mr Farmer should perhaps have made further efforts in late March/April to get the figure agreed. However, for the reasons which I have given, nothing turns on the fact that he did not do so. The reason that the contract did not happen was nothing whatsoever to do with the alleged failure to agree the value of the necessary omissions. Even assuming that figure had been agreed on or before the 28 April, Eugena would still have walked away from the project.

(c) Failure To Complete Design

196. On the pleadings, it appears to be suggested that the Defendants failed to complete their designs after the letter of intent had been issued so as to enable the work to proceed without delay. I can deal with this submission shortly. For the reasons explained in Section D2(c) above, I have rejected the suggestion that, at the time of the letter of intent, the designs were inadequate or incomplete. There is nothing in the evidence to suggest that, apart from the question of the structural engineer, with
which I deal separately at paragraphs 198-203 below, there was any aspect of the
design which required further work and/or which caused delay between 31 January
and 28 April.

197. Accordingly, to the extent that the Claimants still rely on the suggestion that the
Defendants failed to develop the design after the letter of intent and that delay was
caused thereby, I reject such a contention. There was simply no evidence to support
it.

(d) Failure To Get A Structural Engineer Appointed In Sufficient Time

198. At Section E3(e) above I have dealt with, and rejected, the allegation that the letter of
intent was premature because, at the time that it was sent out, a structural engineer
had not been appointed. However, the Claimants contend that, after the meeting on
31 January, the Defendants failed to give proper advice so that Mr Cunningham did
not appoint an engineer until 27 February, which resulted in delay to the project.

199. The evidence of Mr Farmer was that, although he had told Mr Cunningham of the
need for an engineer, Mr Cunningham had made plain that he would not appoint such
an engineer until the contract documents were issued. That is also borne out by the
minutes of the meeting on 31 January 2003. That was also entirely consistent with
Mr Cunningham’s overall policy of not incurring expenditure unless and until it was
necessary to do so.

200. After the meeting on 31 January, the appointment of the structural engineer remained
outstanding. This was so even after the letter of intent was issued which, since it
was a contract document, ought, on Mr Cunningham’s approach, to have triggered the
appointment of the engineer. Again, therefore, it seems to me that the principal
responsibility for the failure to appoint the structural engineer remained with the
Claimants. It was their decision not to appoint the engineer until 27 February, which
resulted in his belated attendance on site on 7 March. To the extent, therefore, that
this caused delay to the project, it seems to me that that was the responsibility of the
Claimants. For the reasons set out in paragraphs 151 and 152 above, the appointment
on 27 February was only triggered by Mr Farmer spelling out in words of one syllable
that the appointment was urgent, and that a failure to appoint immediately would
cause delay. That is again entirely consistent with Mr Cunningham’s policy of not
incurring expenditure unless and until he had to.

201. I consider that, with the benefit of hindsight, Mr Farmer should perhaps have given
his dire warning about the consequences of non-appointment a few days earlier, so as
to increase the possibility that the engineer attended on site a week or so earlier than
he did. I say that because Mr Cunningham was patently a difficult client who was
always going to rely on every dot and comma of the written advice he received if
things went wrong, regardless of his plain understanding of the position at the time.
Mr Farmer should therefore have done the written spelling-out exercise some days
before he did, even if he was confident that Mr Cunningham understood fully the
possible consequences of a delay in making the appointment.

202. However, for the avoidance of doubt, and given that the Defendants had advised him
on a number of occasions on the need for a structural engineer, I reject the suggestion
that the Defendants were negligent because they did not warn Mr Cunningham in
more colourful language earlier about the consequences of any non-appointment. Mr Cunningham was, I find, well aware of those consequences but, in pursuance of his policy, would not incur expenditure until the last moment or beyond. He was told by the Defendants, in terms, on 19 February, that they needed his approval to instruct the engineer. There was a further chaser on 24 February. Mr Cunningham’s failure to act on this advice can only be explained by his decision to incur no liability for fees until the contract was signed.

203. Further and in any event, for the reasons explored in greater detail in Section F5 below, it seems to me that, even if it could be said that the Defendants were negligent in failing to advise Mr Cunningham earlier about the specific consequences if there was no structural engineer, and even if such advice had led to the appointment of a structural engineer earlier, it would have made no difference to the progress of the project. The structural engineer was relevant to the progress of the construction works, and Eugena could not start those construction works because of the prohibition in the letter of intent. This was never removed; nor could it be, on the evidence, until the escrow account wording was agreed. Thus I accept the submission made by the Defendants that, under the letter of intent, Eugena would have run out of work at precisely the same moment, whether or not the structural engineer had been appointed earlier or not. Without the agreement of the escrow wording, Eugena could not start the construction works.

(e) Failure To Get Agreement on Contract Terms

204. The final allegation made by the Claimants is to the effect that the Defendants were negligent in failing to get the contract terms agreed earlier. On the facts, it seems to me that this allegation is unsustainable.

205. It appears that, on Mr Farmer’s own admission, the contract terms and the amendments were issued to the parties about a week later than he would have liked (see paragraph 147 above). Of course, given that the parties knew that MW 98 was going to be used, what really mattered were the amendments to those terms. Eugena responded on 13 March (paragraph 159 above), saying that they accepted the amendments proposed by the Defendants. However, for reasons which are wholly unexplained, the Claimants failed to respond in similar fashion. Indeed, as late as 19 March, the Claimants were taking advice on those draft amendments from Mr Porter (see his fax to Mr Cunningham of that date). At no time prior to the 28 April meeting did they indicate that they were happy with and accepted those amendments. Accordingly, if any delay flowed as a result of the failure promptly to conclude the contract terms and the amendments, then such a delay was the responsibility of the Claimants.

206. However, in my judgment, no delay flowed as a result of this matter. The amendments were simply not an issue. When they arose at the meeting on 28 April, they were immediately confirmed as having been agreed. Thus, it does not seem to me that any delay flowed as a result of the failure to get the contract terms agreed any earlier.
(f) Summary

207. For the reasons set out above, the real obstacle to the agreement of the contract was the escrow wording and that was solely the responsibility of the Claimants. There can be no criticism of the Defendants in respect of the state of the design, the agreement of the omissions from the proposed contractual workscope, and the agreement of the contract terms/amendments. As to the question of the structural engineer, it seems to me that, whilst the Defendants can, with hindsight, possibly be criticised for their delay in spelling out the consequences of non-appointment, it could not be said that the Defendants’ conduct amounted to negligence in this respect. The advice that they tendered to the Claimants throughout was to appoint a structural engineer. The Claimants did not do so because of their policy of not appointing further consultants unless it could no longer be avoided.

208. Moreover, in respect of the structural engineer, and indeed all of these other criticisms of the Defendants made by the Claimants, it seems to me that, even if they could be made out, they are irrelevant because they did not cause delay. When Eugena ran out of work in March under the letter of intent, the important matter that was outstanding was the escrow agreement, which was the responsibility of the Claimants. By the time that was agreed, on 28 April, the deal-breaker was the costs that Eugena had incurred as a result of the delay in agreeing the escrow wording. None of that was the Defendants’ responsibility, for the reasons set out above.

F4 The Alleged Failure To Administer The Letter Of Intent Properly

(a) Introduction

209. It seems to me that, although Ms Packman did not quite put it in this way in her closing submissions, a number of the allegations made by the Claimants against the Defendants in respect of the Defendants’ conduct after the meeting on 31 January can be broadly categorised as criticisms of their administration of the letter of intent contract. That is to say, there are alleged criticisms of the Defendants, not because of their failure to get the contract agreed, but because of their failure to deal with the events unfolding on site in a proper manner. I therefore now turn to address these various criticisms.

(b) Assumed The Minor Works Form Was Incorporated Into The Letter Of Intent Contract

210. It is clear that the Defendants operated the letter of intent contract on the basis that it incorporated the terms of MW98. Mr Farmer confirmed in his evidence that that was the case. In his detailed judgment in the Eugena v Gelande litigation His Honour Judge Hegarty QC, sitting as a Judge of the High Court, found, at paragraph 91, that the letter of intent contract incorporated the terms of MW98. The judge went on to say at paragraph 92:

“Despite the limited nature of the works envisaged by the letter of intent, the machinery of MW98 was perfectly workable in its application to those works, as was demonstrated by the way it was actually operated in the weeks which followed.”
211. For these reasons, I am in no doubt that the Defendants intended the letter of intent contract to incorporate MW 98 (so that when the main contract was entered into, it could easily subsume the letter of intent contract) and that moreover, as Judge Hegarty QC found, such an arrangement was “perfectly workable”. What criticisms, therefore, can the Claimants make of the Defendants in consequence?

212. First, the Claimants complain that the Defendants did not make it clear to them that the letter of intent contract was going to incorporate the MW98 terms. There is some force in that criticism. There was no evidence that this was ever explained by the Defendants, and I accept that it would not have been obvious to Mr Cunningham and Ms Good when reading the draft letter of intent. But it is quite impossible to see that any loss could or did stem from this. After all, as Judge Hegarty QC confirmed, the letter of intent contract worked perfectly well with the incorporation of the MW98 terms. Indeed, it is much easier to see what problems might have arisen if the MW98 terms had not been incorporated into the letter of intent contract. Thus, I find that there were no adverse consequences to the Claimants simply because they did not appreciate that the MW 98 terms were incorporated into the letter of intent contract.

213. Secondly, it is suggested that the incorporation of the MW98 terms into the letter of intent contract was, in some way, adverse to the Claimants’ interests. Again, for the same reasons, I reject that submission. It was very sensible for there to be a series of rules regulating the parties’ relationship under the letter of intent contract and it was plainly necessary to ensure that those were the same as those that would be operative when the full contract was entered into. Moreover, for the reasons already given, there can be no criticism of the MW98 terms themselves: they are, after all, widely regarded as being the set of JCT conditions most favourable to the Employer.

214. For all these reasons, therefore, whilst I accept that the Defendants should have made it clear to the Claimants that the letter of intent contract incorporated the MW98 terms, I do not consider that this omission amounted to negligence or, more importantly, gave rise to any loss. Indeed, it might be said that the absence of the MW98 terms in the letter of intent contract would have been a much more serious ground of criticism of the Defendants.

(c) Issued An Incorrect Valuation

215. Two introductory points need to be made when considering this criticism of the Defendants’ interim certificate of 24 March, in the sum of £47,076.

216. First, I accept the Defendants’ evidence that this certificate was the result of a careful process of discussion/negotiation with Eugena. There was a meeting on site attended by Mr Farmer and Mr Overd of Eugena. They discussed the work that Eugena had carried out and between them arrived at the figure of £47,076. That sum was then the subject of Eugena’s interim application No.1 and the same sum was then certified.

217. Accordingly, this is not a situation, as Mr Palos apparently believed it to be, in which the architect had simply certified the exact sum that had been the subject of the contractor’s interim application. The contractor’s application was based on an agreed amount, following a detailed consideration of the value of the works done on site.
Accordingly, Mr Palos’ principal criticism of the certificate – that it was in precisely the same sum as the amount applied for – falls away.

218. Secondly, it appeared that Mr Palos’ approach was based on a detailed back-calculation of the real value of the work on site, which he had undertaken for the purposes of the on-going Eugena v Gelande litigation. Of course, I quite understand why Mr Palos was undertaking that detailed exercise in that litigation. However, as Mr Mort correctly pointed out during his cross-examination of Mr Palos, there is a difference between a detailed calculation of the value of the work on all the information available, carried out long after the event (which is the exercise on which Mr Palos was engaged in the Eugena v Gelande litigation), and the assessment of an acceptable, or non-negligent, band of valuation figures that might be arrived at by a reasonably competent architect. It was this latter assessment which mattered for the purposes of the negligence claim against the Defendants in these proceedings, but it was plain that Mr Palos had never given any consideration to this question at all. Thus there was no evidence that the valuation carried out by the Defendants in March 2003 was, or could have been, negligent.

219. It appears that Mr Palos maintained that the correct valuation was £34,345. The differences between Mr Pallos’ figure, and the £47,076 arrived at by the Defendants, were not easily identifiable. There was an apparent difference on the preliminaries, but Mr Palos had taken the wrong date, so his figure was too low. Similarly, his report ruled out any allowance for scaffolding, but he accepted that there had to be such an allowance, which he himself put at £4,618. The other differences were in respect of very small sums. Accordingly, given the relatively modest difference between the two opposing figures, and the evidence which demonstrated that Mr Palos’ figure was obviously too low anyway, it is quite impossible to conclude that a valuation of £34,345 would not have been negligent, but a valuation of £47,076 was negligent.

220. For all these reasons, therefore, I reject the case that the valuation produced by the Defendants and the subject of interim certificate 1 was negligent. I should also note, for completeness, that the difference between Mr Palos’ figure and the Defendants’ figure is not claimed as damages in the Re-Amended Particulars of Claim. And even if it were, it would not be recoverable by Mr Cunningham and Ms Good in any event; it is an item of loss that could only have been suffered by Gelande, the employers of Eugena.

(d) No Final Valuation

221. One of the pleaded allegations against the Defendants was that they failed to carry out a final valuation of Eugena’s work. This allegation can be disposed of shortly. It was not appropriate for the Defendants to carry out any further detailed assessment of Eugena’s work until it was clear that Eugena were either going to enter into a full contract with Gelande or leave site. At the meeting on 28 April, it was clear that there was going to be no contract. But at precisely the same time, the Defendants were complaining that the Claimants had failed to pay their fees as invoiced. In those circumstances, the Defendants suspended work a few days later.

222. In accordance with those facts, therefore, it seems to me that it would be wrong to criticise the Defendants for failing to carry out a final valuation of Eugena’s work. Doubtless, if the contractual relationship between the Claimants and the Defendants
had continued, such a valuation would have been carried out. But it appears that, by 8 May 2003, the Claimants were already in discussion with AWH as the replacement consultants for the Defendants. In those circumstances, it was not a breach of contract for the Defendants not to carry out a final valuation of Eugena’s work prior to their suspension of work.

(e) Entertained/Accepted The Delay Claim

223. This is rather an unusual allegation. To be fair to Ms Packman, it was one which pre-dated her involvement in the case: indeed, it has formed a major part of the Claimants’ attack on the Defendants since the commencement of this litigation.

224. As I understand it, the argument runs in this way. It is said by the Claimants that the Defendants were wrong to indicate their acceptance of the Eugena delay claim and that, in so doing, they encouraged Eugena to believe that they had strong claims against the Claimants. Indeed, this particular allegation was, in the past, used to found a claim that the Defendants were responsible to the Claimants for all the costs of the Eugena v Gelande litigation. By the time of the trial, that allegation had been abandoned; in my judgment, it was untenable. However, the criticism still remains that the Defendants were wrong to entertain/accept Eugena’s delay claim, and it is said that, in consequence of this encouragement, Eugena were intransigent in their discussion of the delay claim on 28 April.

225. First, it is important to identify precisely what it was that the Defendants accepted. On 14 March, Eugena made a claim for an extension of time of two weeks as a result of the absence of a structural engineer. On 18 March, the Defendants told the Claimants that such a claim appeared valid and he wrote to Eugena on 20 March to say that he was “minded to grant” that extension of time. However, he made the point that an extension of time could not be agreed until the full impact of the delay had been understood.

226. It seems to me that Mr Farmer acted properly in responding to the delay claim in that way. He considered that it was impossible to say precisely what, if anything, the critical delay caused by the late appointment of the engineer would be at that early stage, but he was indicating to both Eugena and Gelande that there may have been some delay to the project as a result. That was a fair conclusion, although, for the reasons set out at paragraphs 198-203 above, it does seem to me that, in the final analysis, any such delay may not have been critical. Furthermore, Mr Farmer had a duty, as the architect, to be fair and to administer the contract in a non-partisan way. If, as he was quite entitled to do, he considered that there might have been an entitlement to an extension of time on the part of Eugena because of the delay in the appointment of the structural engineer, he was duty bound to say so. Thus the criticism of Mr Farmer’s conduct is not only wrong on the facts, but it is misconceived in principle, because it appears to suggest that Mr Farmer should have abandoned his duty to act fairly in order to act as an unrestrained advocate of the Claimants’ position.

227. Of course, technically, given that Eugena were not permitted to start the construction works pursuant to the letter of intent, it might have been rather difficult to grant them an extension of time in respect of such work. However, it was clear from the evidence, and I find, that what Eugena and the Defendants were doing, when
considering questions of delay and extensions of time, was attempting to identify what the actual completion date of the construction works was likely to be. The precise mechanism by which that date was arrived at (being either a renegotiated completion date taking into account the events of February/March/April, or a contract with the completion date in August and an agreed extension of time granted immediately on entering into the contract) seems to me to be irrelevant to the present dispute.

228. The other claim which the Defendants received from Eugena in relation to delay was the loss and expense claim of 9 April, which quickly became the bigger claim set out in the letter of 15 April. The Defendants’ only public response to that document (i.e. to Eugena) was their letter of 22 April, which simply required the costs to be “broken down in greater detail for submission to my client”. I cannot see how such a response could possibly be criticised.

229. Accordingly, this allegation stands or falls on the Defendants’ indication that they were “minded to grant” an extension of time as a result of the delays in the appointment of the structural engineer, although, as the Defendants expressly warn, that could not be done until “the full impact of this delay is understood”. On the facts, I conclude that such a stance was entirely proper; indeed, as a matter of principle, I consider that it would have been quite wrong for the Defendants to provide any other indication, given that it was a fact that a delay may have been caused as a result of the late appointment of the structural engineer, but it was not yet clear whether or not that delay was critical. For those reasons, I therefore dismiss this criticism of the Defendant.

(f) Encouraged Eugena To Believe They Had A Full Contract

230. It is the Claimants’ case that, as a result of all the previous criticisms, and in particular the points about the incorporation of the MW98 form and the acceptance of the delay claim, the Defendants wrongly encouraged Eugena to believe that they had a full contract for the whole of the project. Again this allegation originally assumed some importance in the Claimants’ pleadings, and was another way in which the costs of the entire litigation with Eugena had been sought against the Defendant. It appears to be based on the fact that, in that litigation, Eugena maintained that they were entitled to claim the benefit of a full contract, and were not limited by the work scope or the £50,000 identified in the letter of intent.

231. It is difficult for me to form a view as to how and why, in their action against Gelande, Eugena were maintaining that they had a full contract. It appears from the pleadings that this was based, in large part, on the events of March 2003, and the second letter of intent. It does not appear that this argument relied to any great extent on the original letter of intent itself. Moreover, Judge Hegarty QC dismissed Eugena’s claim that they were entitled to claim the benefit of a full contract in that case.

232. However, for the avoidance of doubt, I should say that, to the extent that Eugena were claiming that they were not bound by the limited work scope set out in the letter of intent, and/or the financial limit of £50,000 also set out in the letter of intent, I consider that such an argument was always likely to fail. In my judgment, the letter of intent was clear. It was (or should have been) obvious to everybody that, at least
on the basis of that letter alone, Eugena could not carry out works in excess of the sum of £50,000.

233. Accordingly, I reject the suggestion that, in some way, the Defendants encouraged Eugena to believe that they had a full contract, without any limitations as to work scope or expenditure. That was so obviously not what the letter of intent said that I struggle to see, other than by reference to later events and the second attempted letter of intent (with which I have not been concerned) how this allegation could seriously have been advanced.

234. All of the other criticisms of the Defendants dealt with in this Section of my Judgment stem, in one way or another, from the fact that the Defendants administered the letter of intent contract on the basis that the MW98 terms were incorporated. For the reasons which I have given, there was nothing inherently wrong or disadvantageous to the Claimants in such an approach. But I reject the suggestion that such an approach encouraged, or could reasonably have encouraged, Eugena to believe that they were no longer bound by the limits on workscope and expenditure set out in the letter of intent of 14 February 2003.

(g) Summary

235. Accordingly, for the reasons set out above, I reject the criticisms that the Defendants failed to administer the letter of intent contract properly. It seems to me that they administered it fairly and in accordance with the terms of MW98, which were incorporated into it. It is difficult not to conclude that these criticisms were all designed to try, in some way, to render the Defendants liable for all the alleged cost consequences to the Claimants of Eugena’s involvement with this project, whether those consequences could be said to be anything to do with the Defendants or not. Accordingly, I reject this important aspect of the Claimants’ pleaded case in its entirety.

F5 Causation

236. It is convenient to say a few words here about the Claimants’ case on causation arising out of their criticisms of the Defendants during the period February-April 2003. I have, as indicated above, divided up those criticisms into two broad areas: the failure to get the contract signed, and the failure to administer the letter of intent properly.

237. As to the failure to get the contract signed, I have rejected any criticisms of the Defendants’ conduct in this regard. Moreover, I have made plain that, even if there were criticisms that could be made of the Defendants’ conduct, those had no critical effect at all because the reason why the contract was not signed was the delay in the agreement of the escrow wording, the mistrust that arose as a result, and the Claimants’ wrongful refusal to accept any of the financial consequences of that delay. Thus, even if any of the individual criticisms discussed at Section F3 above were made out, I find that they caused no loss or damage to the Claimants because any such loss and damage was the result of the Claimant’s failure to agree the escrow wording by the middle of February 2003.
238. That leaves the allegations at Section F4 above, namely the criticisms of the Defendant’s administration of the letter of intent contract. I have rejected those criticisms. However, even assuming that those criticisms had been made out, I do not consider that any of these criticisms caused any recoverable loss. They did not, of themselves, give rise to expense or loss to Mr Cunningham or Ms Good. As to their alleged effect on Eugena, it seems to me that any claims made by Eugena in their litigation with Gelande were entirely a matter for them: to the extent that they were misconceived, then Gelande will recover their costs of such claims against Eugena in that litigation.

239. For these reasons, therefore, I have concluded that, even if these criticisms of the Defendants’ conduct were justified, they have not caused any loss and damage.

G. THE ALLEGATIONS OF LOSS

G1 Introduction

240. For the reasons set out above, I have concluded that the allegations of breach of contract and/or negligence against the Defendants have not been made out. In addition, I have concluded that, even if those criticisms had been made out, no foreseeable loss and damage would or could have arisen as a result of them. It is therefore strictly unnecessary for me to consider the four heads of loss claimed in the re-amended Particulars of Claim. However, given that I have formed particular views about those four heads of loss, it is appropriate for me to set out those brief conclusions and I do so below.

G2 Loss 1: Costs Of AWH

241. It is pleaded by the Claimants that AWH’s work duplicated services already carried out by the Defendants because of:

“(a) the need to re-tender;

(b) the need to change to the JCT IFC in place of the MW98;

(c) the need to reduce the number of provisional sums and produce proper construction details, work which should have been carried out by the Defendants.”

I deal below with each of those alleged reasons why the AWH work duplicated the work carried out by the Defendants. In my judgment, each of these contentions is incorrect.

(a) The Need To Re-Tender

242. The need to re-tender arose because there was no main contract between Gelande and Eugena. That in turn was due to the facts and matters set out in Section F above: overwhelmingly, the failure to agree the escrow wording. That was the Claimants’ responsibility; it was nothing to do with the Defendants.
Furthermore, AWH were appointed by Gelande because the Defendants had suspended works as a result of the non-payment of their fees. A re-tender process was therefore always going to be necessary. For the reasons set out in greater detail in Section H below, I consider that the Defendants were entitled to suspend works. In those circumstances, if (which has not been demonstrated) there were duplicated costs as a result of the appointment of another consultant, that is another and separate reason why such fees were not the responsibility of the Defendant.

(b) The Need To Change The JCT Form

This allegation is plainly misconceived. There was, in my judgment, no need to change from MW 98. Even if there was, there is no evidence that such a change led to any duplicated work at all. It was a simple and straightforward swap. I find that no additional work was carried out by AWH in consequence.

(c) The Need To Reduce The Number Of Provisional Sums

This submission is incorrect. There was no need to reduce the number of provisional sums because, on a refurbishment of a listed building, it is quite impossible, before any detailed opening up, to be accurate as to the precise scope of the work. Furthermore, as Mr Mort demonstrated in cross-examination, there was no real difference in the percentage of provisional sums in the documents sent out by the Defendants and in the documents sent out by AWH: see paragraphs 59 and 61 above. The number of provisional sums – the scale of the uncertainty – remained the same, which is precisely what I would expect of a project of this type.

To the extent that it is suggested that AWH produced proper construction details where none had previously existed, I am bound to conclude that there was simply no evidence of that. I therefore reject any such suggestion.

(d) Summary/Liability

For all these reasons, therefore, it seems to me that there can be no claim now against the Defendants in respect of the fees paid to AWH. Those fees cannot be explained by reference to duplication of work, nor by any alleged default on the part of the Defendants.

Finally on this point, I ought to say that the relatively desperate nature of this claim can be demonstrated by one particular part of the amended pleading. Paragraph 35(1)(iv)(a) seeks to claim against the Defendants the sum of £2,256, which are said to be the costs of a further re-tendering process after Noble & Taylor withdrew their tender. This was an event which was nothing whatsoever to do with the Defendants and happened long after they had left site. On the other hand, it is difficult not to draw the inference that Noble & Taylor withdrew – as Eugena had before them - because of the difficulties that they were experiencing in working with Mr Cunningham. On any view, such an item cannot be recovered from the Defendants.

(e) Quantum

There are two further points about the quantum of AWH’s fees. First, Mr Palos accepted that a significant part of these fees had not been paid. Ordinarily, that
would not matter because, provided that a liability to pay the fees had been incurred, that would be sufficient for passing the claim on to the Defendants. But in this case, given the difficulties that so many people seemed to have experienced in getting paid by Mr Cunningham, I would have been uneasy about allowing any claims for damages, by reference to AWH’s fees, which had not in fact been paid by Mr Cunningham.

250. The second point is that, to the extent that these fees had been paid, the details of precisely what was done by AWH, and the charges made, are most unclear. There are very brief summaries in the schedule and no further detail provided in the supporting invoices. I accept, without repeating, the criticisms of the individual invoices set out at paragraph 190 of Mr Mort’s closing submissions. Again, therefore, I would have been reluctant to make any order in relation to these items in any event, since it is so unclear precisely what they cover.

**G3 Loss 2: Wasted Expenditure**

251. The second head of claim is a claim for wasted expenditure on works carried out by Eugena. The argument is that, because Eugena did not complete the contract, the value of some of the works that they carried out was wholly wasted. The calculation of the wasted cost figure by Mr Palos arrived at the sum of £16,271.11.

252. Three points arise which make a detailed evaluation of that figure unnecessary. First, to the extent that there was wasted expenditure on the work carried out by Eugena, that arose because of the failure on the part of Eugena and Gelande to agree a contract and, for the reasons set out above, that was caused by the failure to agree on the escrow wording until 28 April and the delay and mistrust that arose in consequence. That was not the responsibility of the Defendants.

253. Secondly, the money paid and/or due to Eugena represented money paid by or a liability on the part of Gelande. Thus, if somebody has not received full value for money because of the departure of Eugena, then that party is Gelande. However, Gelande make no claim for wasted expenditure against the Defendants: that claim was abandoned on 9 June 2006. There is nothing to say that this wasted expenditure was actually a loss suffered by Mr Cunningham or Ms Good; indeed, one asks rhetorically, how could it be, when neither Mr Cunningham nor Ms Good were employing or paying Eugena, or had any liability to pay them?

254. Thirdly, Mr Cunningham expressly accepted in cross-examination that, at the time of the meeting on 31 January, he was aware of the risk that, if there was no full contract, there may well be some wasted expenditure. That is precisely what happened here. There can be no claim for something which everyone knew might happen.

255. Accordingly, it seems to me that, even if breach of contract/negligence and causation had been made out against the Defendants, for the three reasons set out above, Mr Cunningham and Ms Good could not recover against the Defendants this alleged wasted expenditure.
G4 Loss 3: Stigma Effect

256. The third item of loss is the claimed sum of £25,000, said to represent the additional costs of the project because the Claimants’ dispute with Eugena had the effect of stigmatising the project. It is said that this stigma arose as a result of the Defendants’ default.

257. Even assuming default on the part of the Defendants, and assuming that that default led to recoverable loss, it seems to me that there are a whole host of reasons why such loss could not encompass this alleged stigma effect.

258. First, to the extent that there was a stigma effect, it was as a result of Eugena’s departure from the property. That came about as a result of the failure on the part of Eugena and Gelande to agree a contract. That was not the Defendants’ responsibility: see above. Secondly, it seems clear to me that the history of the project after the cessation of the Defendants’ involvement demonstrated ongoing difficulties with the payment of the fees and costs of all those employed by the Claimants. That again was not and could not be the Defendants’ responsibility.

259. Further and in any event, the £25,000 is entirely artificial. Of course, I accept that, if the project had actually been carried out in a sum that was greater than the Eugena tender, it might be possible at least to argue that the additional amount was the result of the stigma on the project. But the Noble & Taylor tender, and the Acorn tender, were both lower than the Eugena tender. In other words, there appears to be no stigma effect at all, because the later contractors were prepared to carry out the project for less, rather than more, than Eugena.

260. Further and in any event, since the works at the property have not been carried out, it seems to me that this figure is so notional that it would be wrong for any award of damages to be made on the basis of it. In addition, it would be loss suffered by Gelande, not Mr Cunningham and Ms Good.

G5 Loss 4: Delay

(a) Introduction

261. It should be remembered that, in the original pleading, the delay claim was the biggest single item of loss by some distance, apparently based on the liquidated damages figure (proposed for the Eugena/Gelande contract) of £500 per week. As I have pointed out, that claim was sensibly abandoned by Ms Packman. The claim that she originally sought to put in its place, based on diminution in value, was, so it seemed to me, doomed to fail and I refused to allow it. That left the Claimants with two delay claims: one for general damages, and one for specific costs. Both claims appear to operate on the basis that, but for the Defendants’ default, the works would have been completed in about July 2003 and that, instead, if Noble and Taylor had completed the works, they would have been completed in about September 2004. This 14 month period appears to form the basis of the delay claim in this case.
(b) General Damages

262. Obviously, the general damages claim fails because there is no breach of contract/negligent and no relevant causation. In addition, I find that the delays were due to the failure of Gelande and Eugena to agree a full contract, which was not the Defendants’ responsibility in any event.

263. If I had been minded to allow any sort of general damages claim, then it would have been assessed in the relatively modest sums recorded in the reported cases. An analysis of awards of general damages in this sort of situation can be found in my Judgment in Bella Casa v Vinestone [2006] BLR 72; [2006] T.C.L. R. 2. In line with those authorities, had a claim been made out, I would have awarded Mr Cunningham and Ms Good £1,500 each for that 14 month period of delay by way of general damages.

(c) Specific Costs

264. There are claims for scaffolding and on-site security. Those claims are not recoverable because there was no breach of contract/negligence on the part of the Defendants, and because they arise out of the failure of Gelande and Eugena to agree a contract, which was the Claimants’ responsibility. Further and in any event, it seems to me that those costs would have been incurred by Gelande, as the employers under the building contract. These are therefore not losses that could now be recoverable by Mr Cunningham and Ms Good in any event.

265. There are also claims for storing furniture and chattels. They suffer from precisely the same defects. In addition, these claims were not properly supported by the documents. For example there was a claim for the monthly rental of £100 for the kitchen from Mark Wilkinson Furniture Ltd, yet the documents that have been disclosed appear to suggest that there was no such storage charge in operation. Some of the other storage charges appear to be in the names of people other than Mr Cunningham and Ms Good. I would therefore have declined to make an order in respect of these claims in any event.

H COUNTERCLAIM FOR FEES

H1 The Pleaded Case

266. By a decision dated 24 October 2003, the adjudicator awarded the Defendants £18,769.41 plus VAT, a total of £21,464.60. This was made up of the sum of £12,113.63 plus VAT (£14,233.52), being the amount of their unpaid fee invoices dated 31 January 2003, 31 March 2003 and 30 April 2003, together with other items by way of interest and costs. The Defendants sought to enforce that adjudication decision. The Claimants were given permission to defend the claim but only on condition that the sum of £21,464.60 was paid into Court.

267. Accordingly, the Defendants counterclaim in these proceedings the sum of £21,464.60 by way of unpaid fees and the other items awarded to them by the
adjudicator. I consider that claim by reference to the relevant agreement, and the facts.

H2 The Agreement

268. The relevant agreement was the revised agreement sent by the Defendants to Mr Cunningham and Ms Good on 6 March 2003 and signed by Mr Cunningham in March 2003. I have already made the point at paragraph 145 above that this agreement was made between the Defendants on the one hand, and Mr Cunningham and Ms Good on the other: I find that there was never any agreement between the Defendants and Gelande.

269. The agreement contained the following provision as to fees:

“The fee will be calculated as follows:

1 Fee payable on contract sum of £525,000 at 11.75% equals £61,687 plus VAT and expenses.

2 Any increase to tender price to be payable as a flat rate of 10% for the sake of simplicity.

3 Total maximum fee payable for works to main house, boundary fence and garden wall is £70,000 plus VAT and expenses. The final contract value for this scope will form the basis of our final fee calculation, subject to a minimum fee of £61,687 plus VAT and expenses. Any addition to our scope of works will be charged at the hourly rates stated in our original agreement, and will be clearly identified as a separate item.

January £2,750
February £2,750
March £2,750
April £2,750
May £2,750
June £2,750
July £2,750
August £2,750 (to be adjusted plus/minus as noted in points 1, 2 and 3 above)”

270. Both Ms Packman and Mr Mort demonstrated that these internal calculations were not always entirely consistent. However, it seems to me clear that the parties were agreeing that, if the project went ahead, the fees payable to the Defendants would be somewhere between £61,687 plus VAT and £70,000 plus VAT.

271. In addition, at the time that the revised agreement became operative, the Defendants had been paid the sum of £44,000. This was made up of the £39,000 paid during 2002, and a sum of £5,000, which was the payment on account made by Ms Good on 5 February 2003. The total of the monthly invoices (of £2,750 each) set out in the
revised agreement was £22,000. That would have made a total payment to the Defendants, on the basis of this revised agreement, of £66,000, which was almost precisely half-way between the minimum and the maximum sums payable. In addition, I note that, if the £5,000 was treated as a payment on account, and if it was deducted from the figure of £66,000 identified above, then that would give a total of £61,000, which was the minimum that could be recovered by the Defendants under the agreement. I find, therefore, that the new fee agreement was generally consistent and workable.

H3 The Facts

272. The invoices are confusing because the agreement was not reached until March 2003 and there were a number of invoices which, unhappily, bear the same date but are for different sums. However, it seems to me clear that, once the revised agreement had been entered into, Mr Cunningham and Ms Good would have known that they were liable to pay the balance of the invoice dated 31 January 2003, which covered January and February 2003, in the total sum of £5,500 (2x £2750) plus expenses, less the £5,000 paid on account.

273. On 31 March 2003, the Defendants sent the Claimant an invoice in respect of the March payment and expenses. Accordingly, by no later than 31 March, Mr Cunningham and Ms Good would have realised that the agreed monthly sums were now due to the Defendants, and that, with due allowance for the payment on account, three months’ worth of fees were now due. Had they had any doubt about the point, such doubt would have been dispelled when the Defendants chased for payment during April. A further invoice was sent at the end of April.

274. The question of the payment of the Defendants’ outstanding invoices, which of course covered work going back to the start of the year 2003, was raised by Mr Farmer with Mr Cunningham on 28 April. It appears on the evidence that Mr Cunningham indicated that he might make a further payment. However, by the following week, it had become apparent to the Defendants that no such further payment was going to be made. Accordingly, on 2 May 2003, they suspended work. Almost immediately, the Claimants appointed AWH.

275. For the avoidance of doubt I find that the Defendants were entitled to suspend work. They had carried out work in January, February, March and April on behalf of Mr Cunningham and Ms Good and had provided invoices at the end of January, March and April in respect of the services that they had provided. Save for the single interim payment of £5,000, those invoices had not been paid. Pursuant to their agreement with Mr Cunningham and Ms Good, the Defendants were therefore entitled to suspend work.

H4 The Defendants’ Entitlement

276. The adjudicator awarded the Defendants the sum of £21,464.60 in respect of their outstanding fees, interest, costs and the like. This was calculated by reference to the invoices of January, March and April 2003, discussed above. Save for one point, there has been no evidence which would allow me to depart from the decision of the adjudicator. It seems to me that, subject to that exception which is explored below, it was entirely right. For the avoidance of doubt, I find that the adjudication was rightly
brought against Mr Cunningham and Ms Good, and that Gelande were not an appropriate party to the adjudication, there being no contractual nexus whatsoever between Gelande and the Defendants.

277. I also reject the suggestion that there should be some sort of abatement of the sums invoiced because the project was grinding to a halt during the relevant months; I have no doubt that the problems that were being experienced only added to the Defendants’ workload over the relevant period. Of course, if the Defendants’ fees had been paid, and the project had continued, the Defendants might have been out of pocket by the time of the completion of the works. But that was a risk that they ran when they switched to a fixed monthly amount and a maximum entitlement; in the event, no risk eventuated because Mr Cunningham and Ms Good did not pay the fees as agreed, and the Defendants were entitled to suspend work. In those circumstances, there can be no question but that Mr Cunningham and Ms Good are liable for the monthly amounts to which they expressly agreed when Mr Cunningham counter-signed the letter of 6 March 2003.

278. The exception referred to in paragraph 276 above is the £5,000 payment on account identified at paragraphs 271 and 272 above. It seems to me that that was truly a payment on account which, if the project had gone ahead in the way anticipated, would have had to have been taken into account at the conclusion of the works, when calculating the final payment due to the Defendants. Just because the project did not go ahead, and the Defendants’ claim is in relation to part of the proposed services only, that cannot be a reason to ignore the payment on account. To put the point another way, it seems to me that it would be grossly unfair to Mr Cunningham and Ms Good to find them liable for each of the three invoiced amounts without any deduction of the payment on account.

279. Accordingly, I conclude that the payment on account of £5,000 falls to be deducted from the sums otherwise due to the Defendants. I find that the Defendants are entitled to the total sum awarded by the adjudicator and paid into court, namely £21,464.60, less the sum of £5,000, giving a total entitlement of £16,464.60. Interest will be due on that sum, and I invite the parties to agree the relevant calculations.

I CONCLUSIONS

280. For the reasons set out in Section D above, I reject the criticisms made of the Defendants’ conduct prior to the meeting on 31 January 2003. Furthermore, I have found that, even if any of those criticisms could be sustained, they were not causative of any loss and damage.

281. For the reasons set out in Section E above, I have concluded that there was no reason in principle why Eugena and Gelande should not have commenced the project pursuant to a letter of intent contract. I have also explained why, on the facts, the letter of intent was not premature. I have therefore rejected the criticisms made of the Defendant in connection with the letter of intent. Again, I have gone on to find that, even if any of those criticisms could be sustained, no loss and damage resulted.

282. For the reasons set out in Section F above, I have rejected the two strands of criticisms of the Defendants’ conduct after the letter of intent, namely the alleged failure to ensure that the contract was signed between Gelande and Eugena, and the
alleged failures in the administration in the letter of intent contract. I have also concluded that, even if these criticisms could be made out, they could not have led to recoverable loss.

283. For the reasons set out in Section G above, I have in any event rejected the four heads of loss that make up the Claimants’ pleaded case on loss and damage.

284. For the reasons set out in Section H above, I have found that the Defendants’ cross-claim has been made out in the sum of £16,464.60, together with interest to be agreed.

285. There will therefore be judgment for the Defendants in the sum of £16,464.60, together with interest.

286. I will deal separately with all issues of costs.