Neutral Citation Number: [2012] EWHC 2137 (TCC)

Case No: 0LS79020

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
LEEDS DISTRICT REGISTRY
TECHNOLOGY AND CONSTRUCTION COURT

Leeds Combined Court Centre
The Court House
Oxford Row
Leeds
LS1 3BG

Date: 27th July 2012

Before:

His Honour Judge Keyser QC
sitting as a Judge of the High Court

Between:

THE TRUSTEES OF
AMPLEFORTH ABBEY TRUST
- and –

TURNER & TOWNSEND
PROJECT MANAGEMENT LIMITED

Claimants
Defendant

MARTIN BOWDERY Q.C. (instructed by Milners of Crown House, 85-89 Great George Street, Leeds, LS1 3BR) for the Claimants

PETER FRASER Q.C. (instructed by Simmons & Simmons LLP, of City Point, One Ropemaker Street, London, EC2Y 9SS) for the Defendant

Hearing dates: 5th, 6th, 7th, 8th, 9th, 12th and 13th March and 2nd April 2012

Judgment
H.H. Judge Keyser Q.C.:

Introduction

1. The claimants are the Trustees of the Ampleforth Abbey Trust (“the Trust”). The purposes of the Trust include the furtherance of education at Ampleforth College, a well-known school in North Yorkshire. For the purposes of this judgment it is unnecessary to explore or explain the distinctions and the relationships between the Trust, the College and the Abbey. At the time to which these proceedings relate the Procurator of the Trust—the employee with responsibility for managing the operational, administrative and estates affairs of the Trust—was Mr Peter Bryan, a chartered accountant with a background in finance.

2. The defendant, Turner & Townsend Project Management Limited (“TTPM”), is a practice of construction professionals forming part of Turner & Townsend Group. Other parts of the Group provide services in quantity surveying, costs management and contractual management, and in this case as in others TTPM worked in conjunction with other parts of the Group to provide to its client an integrated service in a range of disciplines—a “one-stop shop”, as it has been put. In general, for simplicity’s sake, I shall refer simply to TTPM without distinguishing between TTPM and other parts of the Group, in particular Turner & Townsend Costs Management (TTCM), that were involved in the work to which these proceedings relate.

3. Between 2000 and 2005 TTPM acted for the Trust as project managers on three construction projects for the provision of new boarding accommodation at Ampleforth College. This litigation relates to the third of those projects, in respect of what have been called “the H5 works”. The building contractor for the H5 works was Kier Northern, a division of Kier Regional Limited (“Kier”). Kier commenced works on site in December 2003 and completed them in November 2004. The works were satisfactory as to quality but were completed significantly later than had been envisaged. A dispute arose between Kier and the Trust: Kier contended that it was entitled to extensions of time and to additional payments in respect of the prolongation of the works; the Trust sought liquidated damages of £750,000 for delay. At a formal mediation, agreement was reached on the basis that Kier did not receive additional payments and the Trust did not receive liquidated damages.

4. A striking thing about the H5 works is that from commencement to completion they were carried out by Kier under letters of intent that the Trust issued from time to time. The intended building contract mentioned in the letters of intent was executed only long after the works had been completed and then on terms, agreed at the mediation, that excluded any entitlement on the part of the Trust to liquidated damages for delay.

5. In these proceedings, the Trust claims against TTPM damages for professional negligence. It alleges that, if TTPM had acted with the care and skill reasonably to be expected of a project manager, it would have procured Kier’s execution of the building contract and that in those circumstances Kier would have been liable to pay liquidated damages for delay and the Trust would have achieved a more advantageous outcome of the dispute with Kier.
6. TTPM denies that it was negligent in its management of the H5 works. It also denies that anything it might have done would have led Kier to execute the building contract and contends that, even if the building contract had been executed, the Trust would have been in no better position in its dispute with Kier. By a counterclaim it seeks payment from the Trust of unpaid fees relating to the H5 works.

7. In the course of the trial I heard evidence of fact for the Trust from Mr Bryan and from a solicitor, Mr Andrew Marsh, who as a partner in the firm of Beachcroft Wansboroughs acted for the Trust in its dispute with Kier. For TTPM I heard from a number of witnesses of fact. Mr Robert (Rob) Bullen had been closely involved in the previous two construction projects and was the project manager for the H5 works until he was transferred from TTPM to the Group’s management services division, TTMS, in August 2003. For some time after his formal transfer, however, he continued to provide significant levels of support to TTPM’s team on the H5 works in order to facilitate the handover to his successor, Mr James Mell (who did not give evidence). Mr Alan Talabani was the quantity surveyor for the H5 works and was employed by the Group’s cost management division, TTCM. Another quantity surveyor at TTCM, Mr Craig Kimber, reported to Mr Talabani. Mr James Fletcher was the director of TTPM with overall responsibility for the H5 works until April 2004, when his role was taken over by another director, Mr Stewart Binns. Finally, I heard evidence from Mr John O’Callaghan, the Commercial Director of Kier.

8. I am grateful to counsel, Mr Martin Bowdery QC for the Trust and Mr Peter Fraser QC for TTPM, for their formulation of the issues that fall to be determined and for their extensive written and oral submissions, to which the short summary later in this judgment does scant justice.

9. In view of the length of this judgment, I shall provide in paragraph 10 a short summary of my decision, which will demonstrate the bare bones of the analysis that follows. Then I shall set out in chronological order sufficient facts to explain how the events giving rise to this litigation unfolded. Despite the length of the narrative, I shall not recite large amounts of the witness evidence. Finally, I shall identify and discuss the issues that arise, mentioning such other particular facts and parts of the evidence as are in my view most relevant to the determination of those issues.

A summary of my decision

10. (1) TTPM owed to the Trust a duty to exercise reasonable care and skill for the purpose of procuring from Kier an executed building contract (paragraphs 72 to 77).

    (2) TTPM was in breach of that duty, in that it failed to exercise sufficient focus on the matters holding up execution of the contract or to exert sufficient pressure on Kier to finalise the contract (paragraphs 97 to 126).

    (3) That breach of duty caused the Trust loss, because if TTPM had not been in breach of duty:
(a) the Trust would have taken sufficient steps to ensure that, so far as lay within its power, it procured a contract (paragraphs 135 to 140);

(b) there would have been a real and substantial chance of Kier executing a contract that contained a provision for liquidated damages (paragraphs 129 to 134, and 141);

(c) the existence of such a contract would have been a material benefit to the Trust in its dispute with Kier when completion of the H5 works was delayed (paragraphs 142 to 146, and 170 to 186).

(4) Regarding the quantum of the Trust’s loss:

(a) the probability is that, if there had been a contract in existence, the Trust and Kier would have negotiated a reasonable settlement of their dispute. The value of such a settlement to the Trust, over and above the settlement it negotiated in the absence of a contract, would have been £340,000, taking into account the probable price that the Trust would have had to pay to achieve the execution of the contract (paragraphs 187 to 191).

(b) the Trust is entitled to recover two-thirds of that amount, having regard to the size of the chance that Kier would indeed have signed the contract (paragraphs 150 to 169, and 192).

(c) Although the terms of TTPM’s contract with the Trust included a limitation clause, TTPM is not entitled to rely on that clause to limit its liability for damages to the Trust (paragraphs 193 to 202).

(d) Therefore the quantum of damages is £226,667 (paragraph 203).

(5) TTPM is entitled to recover £37,167 for additional fees on its counterclaim (paragraphs 204 to 208).

The main facts

11. By a memorandum of agreement made in March 2000, the Trust appointed TTPM as project manager for the first of the three construction projects, known as “the H2 works”. The wide range of services to be provided by TTPM was set out in a “Schedule of Services” appended to the memorandum. These services encompassed not only project management—including determining the type and form of the building contract and overseeing the formal award of contracts—but quantity surveying and planning supervision.

12. A contractor for the H2 works, Clugston Construction (“Clugston”), was selected and a form of JCT contract was identified as suitable for use. However, while certain matters of necessary agreement remained outstanding between the Trust and Clugston, the H2 works were commenced in September 2000 pursuant to a letter of intent drafted by TTPM and issued by the Trust. Shortly afterwards, the contract
documents were issued to Clugston and duly executed. The contract provided that Clugston should pay to the Trust liquidated damages of £51,500 for each week or part of a week that practical completion was delayed. In the event, practical completion was delayed by some five weeks and, at the end of the H2 works in August 2001, the Trust deducted from its payment to Clugston liquidated damages of £257,500.

13. The second construction project, known as “the H3 works”, commenced in late 2001. Again the project manager was TTPM and the contractor was Clugston and the works commenced under a letter of intent issued in early December 2001 before the contract documents were executed in the latter part of January 2002. The greater part of the liquidated damages deducted by the Trust in respect of the H2 works was returned to Clugston as “incentive payments” under the contract for the H3 works; £50,000 of the incentive payment was to be paid, and was paid, to Clugston upon its execution of the contract documentation.

14. Shortly after the completion of the H3 works the Trust began to make arrangements for a further project, the H5 works, for the provision of residential accommodation. These works involved the construction of a three-storey accommodation block containing sixty-four single student bedrooms, twenty double student bedrooms, six dormitories and a housemasters’ block. The student accommodation at H5 was specifically intended for girls: for the first time in its history the College was to become co-educational for students of the ages of thirteen and upwards, and the provision of this new accommodation was intended by the Trust to form a major plank of the College’s efforts to recruit girls.

15. Relations between the Trust and TTPM had been good throughout the earlier projects, and the Trust did not actively consider appointing different project managers for the H5 works. Mr Bryan invited TTPM to submit a fee bid in relation to the H5 works. His evidence, which I accept, was to the effect that he invited the fee bid because he wanted to know what fees would be payable to TTPM and when they would be payable, not because he expected any alteration in the terms of the engagement; he took it for granted that the services to be provided by TTPM would remain unaltered from what they had been in respect of the H2 and H3 works, unless TTPM told him expressly to the contrary.

16. On 27th November 2002 Mr Bullen wrote to Mr Bryan, enclosing a fee proposal “including cash flow for fees and indicative project programme”. There was also enclosed with the letter an eleven-page document headed “Terms of Appointment”, which purported to stipulate the terms that would apply to the parties’ relationship in respect of the H5 works. Mr Bryan said candidly that he had not looked closely at the Terms of Appointment because he expected that, if the terms of TTPM’s engagement were to differ in any material respect from those which had obtained in respect of the earlier projects, TTPM would have drawn his attention to the fact. There were no discussions between the parties concerning the Terms of Appointment or the scope of the services set out in the fee proposal.

17. On 20th March 2003 Mr Bryan wrote to Mr Bullen by email to confirm that he had “confirmed the fees” of TTPM and the various consultants with Father Abbot. It is in issue between the parties whether acceptance of the fee proposal implied acceptance of the accompanying Terms of Appointment. The other members of the design team also remained unchanged from the earlier projects: Associated Architects were the
architects; Shire Consulting Ltd ("Shire") were the structural engineers; and Halcrow Gilbert were the mechanical and electrical consultants. As the building contract was to be a “design and build” contract, it was intended that, upon execution of the building contract, each of the consultants would enter into direct contractual relations with the building contractor; TTPM alone would remain employed by the Trust.

18. An initial design meeting had been held on 18th November 2002; Mr Bryan, Mr Kimber and Mr Bullen were present, as was a representative of Associated Architects. The minutes of the meeting record that Mr Bryan stated that the budget for the H5 works would be fixed and that the Trust wanted, if possible, to have one house ready for March 2004 and the other available for May or June 2004. Although details developed and changed over time, both the existence of a budget and the presence of a sense of urgency on the part of the Trust remained constant. The budget became fixed at £5m, which was the amount of a term loan facility given to the Trust by Allied Irish Bank ("AIB") for the purpose of funding the works. TTPM costed the works at £4.9m. The urgency of the project related to the desire to have the entirety of the accommodation ready for use by students at the start of the academic year in September 2004. As time passed and the commencement of the works became increasingly delayed, hopes of completion by that date were put aside. However, in the interests of persuading parents to send their children to study at the College the Trust nonetheless wanted to ensure that those parents would be able to see evidence of substantial building works at an early date.

19. Progress towards commencement of the H5 works was delayed by, in particular, difficulties in selecting the specific site on which the new accommodation would be built. However, by early July 2003 TTPM was in a position to issue tender documentation for the construction works. It had been decided that Clugston would not be invited to tender for the H5 works but that larger contractors, operating nationally, should be approached. Accordingly on 7th July tender documentation was issued to Kier, Willmott Dixon and Laing O’Rourke, with a return date of noon on 1st September.

20. Kier’s tender return was the lowest, but at £5,568,058 it was nonetheless significantly in excess of the budget. The possibility of a re-tender was considered but was rejected because it would lead to delay and additional cost and would not guarantee that further tenders would be within the budget. In a Preliminary Tender Report dated 11th September 2003 Mr Talibani explained that it would be necessary to bring the project within budget by means of a strategy of value engineering ("VE"). Priced VE returns were received from the three contractors by mid October. Kier’s revised tender was within budget, at something slightly in excess of £4.7m. The VE exercise had resulted in the scaling down of the works, resulting among other things in a slight reduction of places for students. By an email on 15th October Mr Bullen warned of the urgent need to appoint a contractor and make an order because “the Abbey will not accept any failure on our parts to achieve a start on site pre-Christmas 2003 with a completion date end November 2004.” A number of matters remained unresolved with Kier, including the finalisation of the contract sum following the VE exercise, and it was clear that it would not be possible to complete the contract before works started on site. On 31st October 2003 Mr Bullen sent to the design team an email that read in part as follows:
“As you are aware, it has now been decided that we will ‘run’ with Kier on H5 and we have agreed the ‘technical solution’ for constructing the building.

There are still a number of commercial/technical issues to resolve over the course of the next week, but we must be in a position by the 7th November 20003 where we can place a Letter of Intent with them in order to enable them to make as early a start on site as possible. Alan [Talabani] will be leading the negotiations on resolving this in terms of a fixed price, however could you all please assist him in doing this by issuing information ASAP where possible.”

21. While discussions were ongoing with a view to finalising the terms of a letter of intent, on 11th November 2003 Kier wrote to Mr Talabani with a list of comments on the Trust’s proposed contractual terms. Clause 24.2.1 of the draft contract provided for liquidated damages of £50,000 per week for late completion. Kier’s comment on that provision was: “We would wish to agree that L and AD’s do not exceed 1% of Contract price.” TTPM responded on 13th November, expressing disappointment that matters of contractual detail were being raised belatedly. The response in respect of clause 24.2.1 of the draft contract was: “Level of LAD’s to remain as ER’s [Employer’s Requirements]. This issue is not negotiable.”

22. On 14th November a Pre-Contract Meeting took place between representatives of the Trust, TTPM and Kier. Part 4.1 of the minutes of that meeting records that modifications had been agreed to the letter of intent; these reflected a basic programme for the works and an agreement that liquidated damages would be waived for a period of two weeks following the agreed date for practical completion.

23. Pursuant to that agreement, on 17th November 2003 the Trust issued the First Letter of Intent to Kier. As with all the subsequent letters of intent, the contents and the drafting of the First Letter of Intent were attended to by TTPM and the role of the Trust was simply to issue it. In his witness statement Mr Bryan stated that the Trust “acted on instructions from” TTPM; although strictly that reverses the relationship, it gives expression to the reality of the Trust’s dependence on TTPM. The First Letter of Intent and the letters of intent subsequently issued were not mere expressions of intention to contract in the future; they were in the nature of offers to contract on strictly limited terms and on a short-term basis, coupled with an expression of intention to enter in due course into a full and formal building contract, the terms of which would not however bind the parties until it was executed. Because the letters of intent are central to these proceedings, I shall set out much of the text of the First Letter of Intent.

“We confirm that it is our intent to enter into a contract with you for the above project. The form of contract will be the JCT Standard Form of Building Contract With Contractor’s Design 1998 Edition with Amendments 1, 2 and TC/94/WCD as modified by Article 8 (sectional completion).

The programme dates are as follows:

- Site Possession Date — 1st December 2003
- Start on Site Date — 15\textsuperscript{th} December 2003
- Practical Completion Date — 26\textsuperscript{th} November 2004.

The following matters remain outstanding:

1. Finalisation of the Contract Sum. The current tender sum of £4,747,112 to be amended to reflect the latest version of the VE savings menu as discussed at the meeting of 24/10/2003.

2. Finalisation of Drawings and Specifications.

3. Agreement of documentation forming contract documents.

It is our intention that[,] once these matters are agreed, they will be reflected in a written contract document. Neither of us will be bound by the intended contract unless and until the written document is executed by each of us.

In the meantime, please proceed from Monday 10 November with the following works:- [a list of works was set out].

In the event that the intended contract is not concluded between us, we will reimburse you your reasonably incurred expenditure upon the project up to a limit of £75,000.00 excluding VAT, or such other amount as we may agree in writing, and you will not be entitled to any further payment whether by way of quantum meruit or otherwise. The timescale covered by this letter of intent is from 10 November 2003 to 15 December 2003.

In consideration for the Works carried out by you pursuant to this letter of instruction, payment shall be in accordance with the payment conditions within the JCT Standard Form of Building Contract With Contractor’s Design 1998 Edition with Amendments 1, 2 and TC/94/WCD as modified by Article 8 (sectional completion).

Each of us shall have the right to refer any dispute arising under these arrangements to adjudication in accordance with the Royal Institute of British Architects adjudication rules.

In the event that the intended contract is concluded, then such contract shall apply retrospectively in place of these arrangements, and payments made under these arrangements shall be treated as on account of our payment obligations thereunder.”

24. Pursuant to the letter of intent, Kier commenced works on site in early December 2003. At this stage, although the VE exercise was substantially complete, the costs of the works provided for had not been finalised in all respects, because the Trust had not accepted all aspects of Kier’s re-tender but had asked Kier to continue to review the design.
25. It was at about this time that Mr Bullen cut down significantly on his residual role with the H5 works, having already handed over day to day management of the project to another of TTPM’s project managers, Mr James Mell. Mr Mell was recently qualified, having graduated in 2001. In early December 2003 Mr Bullen sent an email to one of his colleagues, in which he expressed reservations about Mr Mell:

> “Have been thinking about Ampleforth … I don’t think the replacement PM is up to the job!!! Have not decided how to play this with Jim Fletcher as yet because I do not want to prolong my involvement with the project—I’ll let you know how it goes.”

At the trial, Mr Bullen said that those remarks should be attributed to his own arrogance and his very positive experiences of working with the Trust and Mr Bryan. He insisted that Mr Mell was sufficiently experienced to deal with the project and that there were no issues concerning his technical competence; such concerns as he had related more to the fact that Mr Mell was a quieter character than he and, consequently, to Mr Mell’s ability to maintain the good relationship with the Trust.

26. On 4th December 2003 Mr Mell sent an email to the design team, identifying the design information required by Kier before it could finalise the price and the contract and emphasising the importance of providing the information without delay and thereby avoiding slippage of the programme. On the same day, Mr Talabani sent an email to Mr Colin McNeil, a director of Kier, in which he said that, if the contract were not in place by mid December, he would prefer to proceed by a further letter of intent than to enter into a contract with a large number of provisional items outstanding. Mr McNeil was in agreement with that course. On 15th December Mr Talabani sent an email to Mr Bryan:

> “As Kier are not yet in a position to confirm fixed costs for all of the VE items, we [are] not yet in a position to conclude the formal contract documents for H5. We therefore need to issue a revised Letter of Intent as the previous one expired today.”

27. Accordingly on 19th December the Trust issued Letter of Intent (Revision A); it was dated 15th December 2003. This was in the same terms as the First Letter of Intent, save for a number of specific revisions: the list of works was expanded; the reimbursement figure of £75,000 was replaced with a figure of £382,500; and the timescale covered by the letter of intent extended until 19th January 2004.

28. When it tendered for the H5 works, Kier was not aware that the Trust was proposing to fund the project by means of borrowing from a bank. In December 2003 the matter was discussed between Mr McNeil and Mr Talabani, and Kier requested a letter from the lender. At Mr Bryan’s request, on 22nd December AIB wrote to Kier to confirm that it and the Trust were close to finalising a loan facility to finance the cost of developing the proposed new accommodation block, with only a small number of procedural issues outstanding; it was anticipated that those would be resolved within a couple of days. On 5th January 2004 Kier replied that it required to know as soon as funding was formally in place and asked that it be advised as soon as matters were concluded.
29. The period covered by Letter of Intent (Revision A) expired on 19th January 2004. Kier’s Progress Report No. 2, dated 21st January 2004, stated: “FURTHER LETTER OF INTENT REQUIRED IMMEDIATELY.” Issues regarding the VE position were delaying the finalisation of the contractual documentation, but on 28th January Kier informed Mr Mell that it was confident that the remaining issues could be concluded within an anticipated timescale, and on 30th January Mr Talabani informed Mr Mell that Kier’s fixed costs for the VE items, which would enable the contract sum to be calculated, would be issued on 2nd February; meanwhile, he would prepare a further letter of intent for Mr Bryan to issue to Kier.

30. Accordingly, the Trust issued the third letter of intent, Revision B, which was dated 30th January 2004. The reimbursement limit was stated to be £1,200,000 and the period covered by the letter of intent was from 19th January to 27th February 2004.

31. TTPM received Kier’s consolidated and final VE Schedule on 3rd February 2004. Its response was given by Mr Talabani’s letter of 26th February, which indicated that the revised contract sum appeared to be £4,951,365, raised a number of specific queries in respect of the VE Schedule, and said:

“Please respond to these items at your earliest convenience so that the outputs can be incorporated in the Contract documents. If not, they will not form post contract variations as the execution of the Contract Documents should not be delayed further. A draft copy of the Contract documents will be dropped off at your offices this evening. Please forward any comments you may have on these to Alan Talabani at the above address.”

The contract documents were delivered by TTPM to Kier either on 26th February or very shortly afterwards. After the end of February 2004, no further changes were made to the VE schedule or to the contract price.

32. On 2nd March 2004 Mr McNeil sent to Mr Talabani an email in the following terms:

“Thanks for the contract docs which have been the subject of discussions S Phillips/yourself.

Their checking, the receipt of warranties and finalising consultants appointments incl the issue of the extra fees they seek for VE work, will all take more time and it is to be noted that the current Letter of intent expired Friday 27th Feb.

I will have for you in short timescale a request for further cover to take us to 26th March, the date by which realistically we should have all these outstanding matters resolved.

I have again to record disappointment that despite conversations with Allied Irish, with Peter Bryan including letters, and direct contact from our Regional Financial director, no letter in the reqd form has been received re Loan facility being in place for Ampleforth and the building works which relate to the subject Contract.”
I am having serious problems in appeasing our masters in HQ that our position is secure bearing in mind that various unfulfilled promises via P Bryan and the bank direct, have been given.”

The reference to “warranties” was to the terms of the warranties that would be given to the Trust by sub-contractors and consultants whose contractual relationship was to be with Kier. (A distinct issue concerning warranties subsequently arose when AIB required, as a precondition of its agreement to advance funding for the project, a warranty from Kier.) The reference to “extra fees” for VE work related in particular to the demand of Shire that either Kier or the Trust pay them additional fees for the time they had spent on the VE exercise; I shall say more of that below. For the present it may be noted that Mr McNeil expected that all outstanding matters would be resolved by the end of March 2004.

33. On 8th March and again on 11th March Mr McNeil spoke to Mr Mell by telephone and repeated his request that AIB provide written confirmation of the loan facility. In the second conversation he stated that Kier would issue a seven-day notice to walk off site if the confirmation were not produced. Mr Bryan’s evidence was to the effect that the Trust considered Kier’s request impertinent and insulting; the Trust was well-endowed, its financial position was beyond question and the particular manner of funding for the project was none of Kier’s business. That stance was reflected in Mr Mell’s email to Mr Talabani on 12th March, which was written after discussions with Mr Bryan. Mr Bryan also stated that Kier’s request gave rise to a Catch-22 situation, because AIB was unwilling to provide confirmation of funding before a signed construction contract was in place. As a matter of practicality, it might be thought that the situation required no more than communication and co-ordination and was hardly a Catch-22.

34. Nonetheless, on 11th March 2004 the Trust issued Letter of Intent (Revision D). (There does not appear to have been a Revision C.) The reimbursement limit was stated to be £1,885,000 and the timescale covered by the letter of intent was from 10th November 2003 to 31st March 2004. The matters recorded as still outstanding were only “Finalisation of Drawings and Specifications” and “Agreement of documentation forming contract documents”; the first outstanding item mentioned in the First Letter of Intent, namely “Finalisation of the Contract Sum”, had by now been resolved.

35. In mid March 2004 TTPM sought to address the outstanding matters with Kier. The impasse regarding confirmation of funding from AIB was the subject of a conversation between one of TTPM’s directors, Mr Nick Townsend, and a director of Kier. Mr Townsend asked Kier to be pragmatic about the situation and received the assurance that Kier would not leave site over the issue, although the letter of confirmation would be required eventually. On 16th March Mr Talabani met with a representative of Kier in order to discuss the contract documents. His email of that date to Mr Mell and Mr Bryan concluded: “We are still aiming for signed and executed contracts in place by the end of March. This should then enable AIB to issue formal confirmation of funding.”

36. The position as between Kier and the Trust, except with regard to the confirmation from AIB, was summarised by Mr Talabani in his letter of 22nd March 2004 to Mr Simon Phillips of Kier.
“1. **Warranties** — Warranties will be required between the Employer and the following key sub-contractors and consultants. Standard Form of Wording to follow shortly.

- All sub-consultants
- Piling sub-contractor
- Steelwork sub-contractor
- Green Roof sub-contractor
- Mechanical & Electrical sub-contractor
- Lift sub-contractor
- Floor planks sub-contractor

Warranties will also be required between Kier Northern and the Abbey’s funder. Once I receive exact requirements, I will forward to yourselves.

It is unlikely that the Warranties will be in place by the end of this month, however I suggest that we proceed with the signing and execution of the Contract Documents and insert the warranties retrospectively.

2. **Consultants Fees** — As promised we will speak to Shires regarding their claim for additional fees and let you know accordingly. Can you please forward copies of your consultants appointment documents, when completed.

3. **LAD’s** — I attach for your comment the wording regarding the 2 week project float period. Please let me know your comments asap.

4. **VE Items/Revised Contracts Proposals** — Please forward all design information to reflect the chosen VE items. This can be incorporated into your revised Contractors Proposals and Contract Sum Analysis.

5. **Contract Documents** — I will incorporate all the amendments we made to these and bring 2 sets with me to our meeting [on 25th March].”

37. On 23rd March 2004 the solicitor who was acting for the Trust in its dealings with AIB sent Mr Bryan an email concerning AIB’s requirements before it executed a funding agreement. On 25th March Mr Bryan forwarded the email to Mr Talabani and asked: “Please can we get all these bits and pieces sorted? It would be especially nice to have a contract.” On 1st April Mr Talabani responded in respect of AIB’s requirements. He said that he had issued to Kier a proposed form of warranty that it should give to AIB and he asked for confirmation whether AIB wanted warranties from the architect or from TTPM and how AIB wanted to progress the matter of
taking a Parent Company Guarantee in lieu of a performance bond under the building contract.

38. On 2\textsuperscript{nd} April Mr McNeil wrote by email to Mr Talabani:

“The outstanding contractual issues include:-

1. Warranties in approved wordings not received.
2. Consultant appointment issues not yet resolved.
3. Consultant fee supplements not yet agreed.

We regret that we cannot park these matters to post contract signing stage. …

Following W Kay’s [a Kier director] meeting with Peter Bryan yesterday, it appears a letter from AI is closer, so progress is being made.

Can you arrange to let us have the revised letter of intent by return.”

39. Mr Talabani replied on 16\textsuperscript{th} April 2004, having in the meantime informed AIB that Kier would prefer to use the JCT standard form of funder warranty than that proposed by AIB. His email said:

“Apologies for not getting back to you earlier. I respond to your notes below as follows:

1. Warranties—Agreed, these have not been forwarded to yourselves yet. I have been waiting for a response from AIB which has not come yet. I will issue all warranties during next week (except for the funder one—which requires AIB comments).

2. Consultant appointment /. Fee supplements—I must say that I am a little disappointed that these have not been resolved yet. The consultant appointment details were included in the tender documents that were issued to you back in August last year, and have not really changed since then. Around December last year you told me that some of the designers were not playing ball and asked T&T to have a word with them, which we did, and my understanding was that it had then been resolved.

Consultant appointments aside, I was under the impression that Kier were happy that the contract could be executed with the warranties inserted retrospectively. That appears to not be the case now. Whilst it is obviously preferable to have everything in place prior, it is not unheard of to insert warranties at a later date and therefore I do not see this as a reason to hold up the executing of the contract.
What is clear is that at the moment, the letter of intent which you are working to has expired and the contracts are not in place. We will therefore issue a revised letter of intent to you early next week. I know I said this last time, but can we please make sure this really is the last one that we have to issue. If there is anything else you need from us to make this happen, please let me know.

My understanding re the AIB letter following the meeting between Peter / William is that the Abbey had given the AIB authority to discuss the matter directly with Kier and that you would contact them directly to seek confirmation of funding, assurances etc.”

40. Mr McNeill replied on 19th April:

“I am sorry you appear to have been under the impression that we could fully sign up without warranties seen and agreed. Our rule book prevents this Alan and I cannot think how an alternative resolve could have got into your mind, or who could have put it there.

That said therefore we need to agree on these before the contract is concluded—let’s hope that can be before the expiry of the next LoI commitment.

Whilst W Kay was given to expect a letter from AI in the sentiment discussed that is not with us yet.

The agreement of Appointments with Consultants has been a protracted one and correspondence exchange continues between us. AA and Shires have still some issues to resolve with us, Halcrows too but less so.”

The reference to Kier’s “rule book” is a reference to Kier’s “Standing Orders and Guidelines”, issued in July 2001 and remaining in force until a revised version was issued in September 2004.

41. On or about 16th April 2004, the Trust issued Letter of Intent (Revision E), which bears that date. The reimbursement limit was stated to be £2,542,500 and the timescale covered by the letter of intent was from 10th November 2003 to 30th April 2004. The matters recorded as still outstanding were unchanged from Revision D.

42. On 20th April Mr Talabani informed Mr McNeil that AIB did not require any form of warranty or performance bond from Kier and that he would provide drafts of the warranties required by the Trust from the key subcontractors and the “subconsultants”. Those draft warranties were sent to Mr McNeil on 22nd April. By a letter dated 29th April Kier requested “some minor amendments” to the drafts and awaited the Trust’s response. On 6th May Mr McNeil wrote to Mr Talabani by email:

“You will by now have received Jonathan Holt’s letter commenting on a number of issues emerging from the warranty wordings previously received from you. This will require to be agreed.
The good news is that the above now remains the only issue to resolve, matters of payment security, dealing with consultants’ applications for additional fees etc now resolved.

A further letter of intent to formalise the current position will therefore be required, and JH is currently working on a revised value. I shall contact you as soon as this figure is known.”

On 7th May Mr Talabani gave a response to Kier’s proposed amendments to the warranties, agreeing to some of the proposed amendments but not to others, and wrote to Mr McNeil by email:

“As we are nearly there now, can I suggest we just execute the Contract Docs asap rather than re-issue a letter of intent. As we are so close, I would really rather not have to go back to Peter [Bryan] to issue yet another letter.”

Mr McNeil replied:

“We are exposed at this time [i.e. because the latest letter of intent had expired].

I have asked Jonathan [Holt] to elicit a very quick response to your counter-views on warranties.

I agree that executing the docs is desirable, but that would depend on speed of resolution on warranty wordings.”

43. The subcontractors and sub-consultants were also making observations on the terms of the warranties being sought from them. For example, by a letter dated 9th May 2004 Associated Architects informed Kier that they were prepared to give standard-form industry warranties but not bespoke warranties. The outstanding issues regarding the warranties had not been resolved by the middle of May.

44. A further outstanding issue was the question of Shire’s demand for additional payment. That demand had been made in a letter to Kier, copied to Mr Bullen, on 24th February 2004. However, both Mr Bullen’s witness statement and the terms of his email to Mr Mell on 23rd March 2004 show that it did not come to his attention for some time. Mr Talabani was aware that a request had been made for further payment; see Mr McNeil’s email to him on 2nd March (paragraph 32 above). At all events, on 2nd April Mr Mell asked, “what [is] this about Shire additional fee?” and Mr Bullen replied: “ Apparently Shire want an uplift to 0.6% [of the tender sum] (from 0.5%) on their fees due to the virtual complete re-design they’ve had to do on H5. Talabani’s standard response is ‘no f**king way’!!!” (It is unclear whether Mr Bullen was repeating Mr Talabani’s specific response or was making his own response in the terms that Mr Talabani was accustomed to use.) On 8th April Mr Mell informed Shire by email that the request for additional fees was refused. Shire immediately replied that the refusal was unreasonable and made it clear they would pursue the matter. On 14th May Mr Mell asked for a breakdown of Shire’s claim, while making it clear that he did not think it likely that the Trust would approve the payment of additional fees.
45. On 20th May Shire informed TTPM and Kier that they would provide the required information in the first week of June. An internal email at Kier commented: “Until this matter is resolved we cannot formalise the appointment.” Mr McNeil emailed Mr Talabani:

“The trail remains hot Alan.

No imminent sign of this contract being signed so I have to ask again for an extension to the letter of intent to the value advised w/c 03/05.

Can you pl advise as quickly as poss.”

Mr Talabani forwarded that message to Mr Mell with the comment:

“They’re blaming this issue on not sorting the cont docs. [In context, this sentence must mean: They are using this as a reason why they cannot execute the contract documents.] Not on really as I have told them go proceed without and if it has to be paid post contract, we’ll raise as a variation.”

46. On 25th May Mr Talabani wrote to Mr Phillips of Kier:

“If the contract docs are within spitting distance, I’d rather push to get them executed rather than issue revised l of i’s etc.”

Mr Phillips replied:

“Given that the L of I is limited not only by value but also date this does need to be revised.

We would given the current level of cost exposure accept an amended L of I extending the date to the end of July 04.

Is there any reason now why a L of I for the full contract value (unlimited by time) cannot be issued.”

47. On 27th May 2004 Mr Talabani and Mr Kimber had meetings with their counterparts at Kier and voiced their concerns over the delay in executing the contract. A further meeting was arranged for 10th June because, as Mr Talabani recorded in an email to Mr Mell, Kier could not meet any earlier. In an email on 7th June 2004 Mr Talabani summarised how the position stood as at that date.

“The latest situation re contract docs is as follows (items with an * are still to be resolved):-

- Warranty wording—this has now been agreed between T&T and Kier.
- * Shires—are not signing their agreement until the £5k issue has been resolved. Can you please let me know how these discussions go.
• Halcrow final fee level—this has now been agreed between T&T and Kier.

• AA landscaping fee—this has now been agreed between T&T and Kier. Can you please let me now what element of the £5.1k has been paid by [The Trust].

• * VE changes schedule—Kier were going to forward this full document by Friday 4/6/2004. This has not arrived as of this morning. I have chased this already.

• LAD wording—this has now been agreed between T&T and Kier.

• * AA appointment—terms/wording still not resolved [that is, between the architects and Kier]. Can you please let me know how these discussions go.

I know the above is not great but short of threatening them with violence, I don’t know what to do. The ‘final’ contract docs have been with Kier for 3 months now. I am leaning hard on Kier, but of the outstanding items the VE background info schedule is down to Kier. The other 2 issues relate to AA and Shires. I suggest a strong call from TTPM to urge them on.

As the current letter of intent expired at the end of April, I would suggest for completeness we re-issue one taking us up to the end of June 04. If you are in agreement, I will issue the revised letter to the Abbey for processing.”

(So far as concerned Shire, the breakdown of the claim for additional fees in the sum of £21,090 had been provided under cover of a letter dated 3rd June 2004 and remained under consideration by TTPM and the Trust.)

48. On 8th June 2004 Mr Mell replied to Mr Talabani:

“...I agree to the extended Letter of Intent, but we must endeavour to resolve the outstanding issues below with some urgency.”

49. Accordingly the Trust issued Letter of Intent (Revision F), which was dated 9th June 2004. The reimbursement limit was stated to be £2,542,500 (unchanged from Revision E) and the timescale covered by the letter of intent was from 10th November 2003 to 2nd July 2004. The matters recorded as still outstanding were unchanged from Revisions D and E.

50. On 5th July 2004 Kier requested a further letter of intent, as its “cost commitment/exposure [was] grow[ing] throughout the project”. The main problem at this date remained Shire’s claim for additional fees as set out in its letter of 3rd June. By a letter dated 6th July, Shire told TTPM that it was unwilling to sign the contract for its appointment by Kier until such time as that claim was agreed. On 12th July Mr Talabani assured Kier that the requested letter of intent would be issued “in the light
of the Shire issue”. Letter of Intent (Revision G) was dated 12\textsuperscript{th} July 2004. The reimbursement limit was stated to be £4,250,000 and the timescale covered by the letter of intent was from 10\textsuperscript{th} November 2003 to 31\textsuperscript{st} August 2004. The matters recorded as still outstanding were unchanged.

51. On 16\textsuperscript{th} July 2004 Mr Talabani, who was about to take a fortnight’s paternity leave, sent an email to colleagues at TTPM, noting points for action on projects with which he was dealing. The relevant part of his email was in the following terms:

“Ampleforth H5—Craig—Meeting with Craig to sort variation costs, then we’ll all get together after I’m back to mop up. Rev’d let of intent issued so don’t worry about cont docs.”

The Trust refers to this email as an illustration of what it says is Mr Talabani’s complacency: so far as he was concerned (says the Trust) the absence of an executed contract was a matter of little importance, for he was happy simply to issue letter of intent after letter of intent without any awareness of or concern for the potential consequences for the Trust. I shall return to this point in the context of a consideration of the case on breach of duty.

52. On 23\textsuperscript{rd} July Kier wrote to TTPM regarding the execution of the contract documents. Again, the Trust refers to this letter as evidence contradicting any assertion that Kier was unwilling to sign the contract and was looking for reasons to avoid doing so.

“Whilst we note that a revised Letter of Intent has been issued to cover the amended value of £4,248,488.00 up to the end of August 2004, it is disappointing that matters outwith the control of Kier Northern are preventing not only the execution of the Contract but also the Consultant Appointment Documents.

\textbf{Contract Documents}
T&T / AA&C to confirm that documentation provided by ourselves in respect of the VE exercise … are acceptable for inclusion with the contract documents.

Whilst we have exchanged correspondence and discussed the proposed wording of the two week LAD free period, this has yet to be formalised for inclusion within the Contract.

\textbf{Consultant Appointments}

\textbf{Associated Architects}
T&T / AA&C to confirm that the proposed amendment to the main contract detailed within our email dated 1\textsuperscript{st} June 2004 is acceptable.

AA application for Landscaping Fees, noting that such works are currently excluded from the Contract and Appointment Documents.

\textbf{Shire Consulting}
Resolution of Shire Consulting request to TTPM for additional fees associated with the VE exercise, …

We would respectfully request your earliest attention to these matters …
It may be noted that the letter was written in the name of Mr Simon Phillips, Kier’s Managing Quantity Surveyor, to Mr Talabani, with whom he had met several times and exchanged informal emails, but that it was written as a formal letter and in formal terms.

53. By a letter dated 17th August 2004, Mr Mell informed Mr Bryan of TTPM’s recommendation that an additional payment of (only) £4,800 to Shire be approved.

54. On 18th August, Mr Phillips sent an email to Mr Talabani, asking whether any progress had been made on resolving the outstanding contractual issues and asking for an update by close of business on 20th August. It appears likely that some discussion took place, although there is no record of it. Some discussion also took place between Mr Bullen and Shire, and Shire made it clear that they were looking for payment of all or substantially all of the additional fees claimed. When, on 25th August, Mr Mell asked Mr Talabani for an update regarding the contractual documents and told him of the advice to pay £5,000 to Shire, Mr Talabani replied on 26th August:

“The only thing holding up executing the contract docs is Shires appointment.

What is the point of giving them £5k if they have already told Rob that they want all of it and will not settle for a substantially smaller amount? Have you spoken to them after Rob did last week?

In the light of the above, I suggest we issue a letter of intent for the whole value up to the end of the job. Then Shires can go fuck themselves.”

The Trust says that this email displays inappropriate arrogance and belligerence on Mr Talabani’s part and shows that, in order to avoid giving in to Shire, he was willing entirely to disregard the importance of obtaining an executed contract with Kier. It is also suggested that Mr Talabani’s attitude occasioned misgivings within TTPM. In this regard mention is made of an email sent in September 2004 by Mr Bullen to Mark Edge, when Mr Edge was about to take over as project manager from Mr Mell; in a post-script, Mr Bullen said:

“Watch out for Talabani, he get[s] on with Peter [Bryan] as well but is liable to taking the mickey where i [he] can and deliver a slackish service because he thinks he’s well in—I gave him a few stern words and he was ok—just need to keep an eye on him…”

55. On 10th September 2004 Mr Phillips wrote by email to Mr Talabani, confirming that, further to their recent discussions, TTPM would arrange for the Trust to issue a letter of intent for the full contract value. On 14th September Mr Talabani sent to Mr Bryan for his approval a revised letter of intent for the full value and duration of the H5 works. He said:

“Please note that despite this T&T and Kier will endeavour to progress execution of the contract as soon as possible … I’m just keen that we don’t allow Shires to hold us all to ransom.”
Accordingly the Trust issued Letter of Intent (Revision H) dated 14th September 2004. The works covered by Revision H included an additional item: “(xii) Progress all aspects of Works for the main scheme”; and thereby included the entirety of the H5 works. The timescale covered by the letter of intent was from 10th November 2003 until 26th November 2004, which was the date for practical completion. The reimbursement limit was stated to be £4,951,365, which was the intended contract price.

56. On 15th September 2004 Mr Talabani told Mr Phillips that the new letter of intent would be with him shortly and suggested a meeting “to plan a way forward excluding the Shire issue”. Mr Phillips replied:

“Irrespective of any other matters which have yet to be formalised, we cannot execute the Contract Documents until the Shire issue is resolved.

I note that Shiire have written to TTPM (copied to Peter Bryan) on 13 September 04 expressing their continued concern that the matter is preventing execution of the Appointment Docs.

Please discuss with TTPM/Abbey and confirm their intentions in this regard.”

The reference to Shire having written to TTPM is to a letter dated 13th September, in which Shire stated that they had received no response at all to their letter of 3rd June and asked for an urgent response so that the matter could be resolved and they could sign a contract with Kier. Mr Mell advised the Trust that Shire was not willing to accept payment of a reduced amount and that in his view, if any payment were to be made, it should be limited to a goodwill payment of £5,000. Mr Bryan replied: “I am prepared to pay the goodwill gesture but no more.” Mr Mell sent to Shire a suitably worded letter to that effect on 17th September. On 23rd September Shire rejected the offer of payment only of part of its claim. TTPM remained unpersuaded of the merits of the claim.

57. On 17th September 2004 Kier made a formal request for a 4-week extension of the completion date, “based on an entitlement of two weeks due to exceptionally adverse weather conditions … and two weeks due to late issue of Employers Instructions …” Mr Bryan expressed alarm on hearing of the request. Kier’s revised programme would result in completion of the main accommodation block by 23rd December 2004 and completion of the houseparents’ accommodation in late January 2005, putting in jeopardy the planned occupation of the new accommodation before the start of term on 5th January 2005. TTPM responded to Kier, asking for documentation to substantiate the request for an extension of time. In a memorandum on 22nd October, Mr Bryan expressed the view that the risks of trying to have the house ready by the start of term were too great and proposed that occupation of the building be deferred until the half-term in February 2005. (The Trust adopted that suggestion and wrote to parents accordingly.) On 3rd November Kier produced its Progress Report No. 12, which stated that the main accommodation block was 5 ½ weeks behind programme and the housemasters’ block some 10 weeks behind programme.

58. By mid November Mr Edge, who was by now the project manager, and Mr Bryan were discussing “Kier’s approach to the works and the LADs” (Mr Edge’s email of
19th November). Also on 19th November, Mr Edge wrote by email to Steven Allen at Kier, noting that the contract documents were with Kier for signing and asking him to chase them up. Mr Phillips responded on 22nd November:

“Whilst we have a draft set of Contract Documents, there are a number of issues yet to be resolved by the Abbey prior to the signing/exchange of Contracts[,] for example additional fees claimed by Shire Consulting and AA for Landscaping Works.

Alan Talabani is aware of these and other issues and should be able to brief you further.”

59. On 30th November Kier made a formal request for an extension of time for a total of 9 weeks, citing a number of reasons for the request, including exceptionally inclement weather. Mr Edge responded on 2nd December, agreeing to a total extension of only 2 weeks for inclement weather but rejecting all other requests made by Kier. Accordingly he issued a Notification of Extension of Time, extending completion of the works “beyond the Date for Completion stated in the Contract … so as to expire on 10th December 2004”.

60. On 13th December TTPM issued a “Certificate of Non-Completion “in accordance with Clause 24.1 of the contract”. On 5th January 2005 Kier asked for reconsideration of its requests for a greater extension of time, complaining that “the issue of Certificate of Non-Completion is [not] appropriate at this time nor should this give rise to financial penalty as a result.” Financial penalty for delay was indeed in the minds both of the Trust and of TTPM. After the issue of Payment Certificate No. 13, Mr Binns wrote to Mr Bryan (the letter bears the date 7th December 2004 but was probably written on 7th January 2005):

“The project is currently 28 days in delay and liquidated damages inserted in Appendix 1, Clause 24.2.1 of the contract was £50,000 per week. As such the total amount of liquidated damages recoverable amounts to £200,000.”

61. On 19th January 2005 Mr Edge wrote to Kier, giving formal notice of the intention to deduct payment against the latest Payment Certificate in accordance with the provision of the Contract dealing with liquidated damages. This drew a prompt response to Mr Bryan from Kier’s Commercial Director:

“The above mentioned Works are being undertaken pursuant to a letter of instruction (current version H) dated 14 September 2004.

The sum of £164,516.80 as set out in your Project Manager Turner & Townsend’s letter dated 7 January 2005 … remains outstanding. You have no right to withhold the sum outstanding, or any part of it.

In such circumstances, the ‘Construction Act’ gives us the right to suspend performance of the Works if your failure to pay continues for a period of 7 days from this notice.
We therefore look forward to receipt of the outstanding payment by return.”

Mr Bryan asked Mr Edge for advice and suggested that, in the light of the accusation of contravention of the Construction Act, a solicitor be instructed.

62. Mr Edge referred the legal issues for consideration by TTPM’s Contract Services Department and, pending receipt of advice, produced a Current Status Report dated 24th January 2005. The Report identified the main reasons for delay on the works as being the geographical remoteness of Ampleforth, which discouraged sub-contractors in a buoyant market from working there, and the incorrect manufacture of every window for the building. The anticipated date of completion was anywhere from 25th February to 18th March 2005, and the potential claim for liquidated damages for delay was therefore £550,000 to £700,000. The effect of such a claim would be severely damaging for Kier, in view of the low profit-margins on the project. “For these reasons we expect [Kier] to vigorously defend their position with the possibility that the matter may be taken to litigation/arbitration.” (That expectation was justified.) The Report considered the grounds on which Kier was requesting an extension of time and rejected them, subject only to the need for further consideration of the effects of adverse weather. The importance of clarifying the contractual position was noted; in particular, section 6 posed the question: “Are the Contract clauses applicable?” Section 7 of the Report, headed “Suitability of Damages Estimate”, said:

“Damages are accruing at a rate of £50k per week. It is understood that the estimate of damages is valid and TTCM do not consider this to be an issue.”

The Report also noted that the dispute between Shire and the Trust had been resolved. In fact, agreement had been reached during the preceding week, by Shire’s acceptance of the Trust’s revised offer, made on 17th January, of £10,000 plus VAT.

63. TTPM’s Contract Services Department produced some tentative observations regarding the Trust’s developing dispute with Kier on 26th January.

“The main issue is the line in the letter of intent that states ‘Neither of us will be bound by the intended contract unless and until the written document is executed by each of us.’ This may mean that the terms and conditions of the contract do not apply and the contract may be interpreted to be completed in a reasonable time. In this situation no liquidated and ascertained damages will apply.”

64. In the light of this and the other observations made by the Contract Services Department, the Trust instructed Beachcroft Wansbroughs (“BW”) to advise in respect of the recovery of liquidated damages. BW’s preliminary advice, delivered at a meeting on 27th January, was not optimistic but thought the claim for liquidated damages arguable on the basis of Kier’s conduct in continuing the works after the expiry of the latest letter of intent, which might amount to an implied agreement to the terms of the JCT Contract. A subsequent advice given in writing on 8th February was more optimistic and expressed the view that it was more likely than not that a contractual entitlement to liquidated damages had arisen and that a claim for liquidated damages could be maintained. However, in April WB, having had the
opportunity of considering the papers in greater detail, advised at greater length by letter, expressing the view that “regrettably, there is a real risk that Kier’s view of the position is correct, in that the LOI governs the relationship between the Abbey and Kier and the LAD clauses are not incorporated.” (A file note from May said more bluntly: “they do not have much of a case of pursuing the LADs”.) The letter ended by raising the prospect of a claim by the Trust against TTPM.

65. On 28th February 2005 TTPM submitted to Mr Bryan its claim for the additional fees that form the basis of the counterclaim in these proceedings. Mr Bryan replied, accepting that some additional fees were payable but asking to discuss the amount and suggesting that the final level of fees be linked to the amount of damages recovered from Kier. TTPM provided a breakdown of its fees but refused the suggestion that they should be in any way contingent on the result achieved in respect of Kier.

66. Practical completion of the H5 works was achieved on 21st March 2005. On 14th July Mr Bryan made a formal demand of Kier for payment of liquidated damages of £750,000. Kier responded that there was no contractual basis for the demand, that the sums claimed did not represent a genuine pre-estimate of loss and that the Trust, by its design team and TTPM, was responsible for the delays in completion. Kier in turn demanded additional payment for the works. The dispute rumbled on throughout the year.

67. In January 2006 TTPM produced a further Current Status Report; its views on the merits of Kier’s request for a further extension of time remained unaltered and it expressed the view that the Trust’s claim for liquidated damages was sound, provided only that the provision for liquidated damages applied to the relationship between the Trust and Kier. By this time, however, the Trust had obtained a very clear adverse opinion from Mr Ben Patten of Counsel:

“My firm view is that relations between Kier and the Trust are governed by the letters of intent. The Trust has no entitlement to deduct liquidated and ascertained damages. Kier has no entitlement to seek payment in excess of the cap [in the letter of intent].”

68. In that context the dispute between the Trust and Kier proceeded to formal mediation on 7th and 8th February 2006. Kier’s position statement for the purposes of that mediation argued: that as no formal contract had been executed the responsibility for design in respect of the H5 works remained with the Trust; that, because there had been significant corrections to or variations of the design, the cap on recoverable costs stated in the letters of intent ceased to apply and Kier was entitled to receive payment in respect of its reasonable costs and expenditure over and above that cap; that the total due to Kier in respect of the H5 works was £5.78m; and that the Trust was not entitled to deduct liquidated damages, because there was no contractual basis for such a deduction and because the proposed rate of £50,000 per week was not a genuine pre-estimate of loss. By contrast, the Trust’s position was that Kier’s recovery was capped at £4,951,365 and that liquidated damages of £750,000 fell to be deducted.

69. The mediation produced a settlement of the dispute, on terms that Kier was to be paid only £4,951,365 but no liquidated damages were to be deducted, and that Kier would execute the Contract.
70. On 22\textsuperscript{nd} March 2006 BW produced a Checklist of the steps to be taken pursuant to the settlement. The Checklist set a target date of the week commencing 27\textsuperscript{th} March 2006 for the execution of the formal Contract documentation. That proved optimistic. It was not until 4\textsuperscript{th} April 2008 that Kier executed the formal Contract.

\textit{The issues}

71. Mr Bowdery and Mr Fraser helpfully drafted a list of eleven issues that arise, or might arise, for determination. In the discussion that follows, I shall make some reference to the particular issues formulated by counsel. However, in broad terms the main questions arising for determination in the light of the facts set out above and the statements of case are the following:

(1) Was TTPM in breach of contract or negligent in respect of the efforts made and not made to procure an executed building contract from Kier during the period from late February to late September 2004?

(2) If yes, did TTPM’s breach of duty result in the failure to procure an executed contract?

(3) If yes, did the lack of a contract deprive the Trust of an opportunity of obtaining a better outcome vis-à-vis Kier than it achieved at the mediation in 2006, and what is the value of that lost opportunity?

(4) Is TTPM entitled to rely on the terms of a limitation of liability clause that was contained in its Terms of Appointment provided to the Trust in November 2002 (paragraph 16 above)?

(5) What, if any, is TTPM’s entitlement to payment of further fees pursuant to its counterclaim?

I shall discuss the detailed issues by reference to these five main questions. As will become apparent, I consider that question (2) in particular requires some refinement.

\textit{Was TTPM negligent or in breach of contract?}

\textbf{Some law}

72. There was an implied term of the contract between the Trust and TTPM that TTPM would exercise reasonable care and skill in the performance of its functions: section 13 of the Supply of Goods and Services Act 1982. It is common ground between the parties that TTPM owed to the Trust a substantially similar duty of care at common law.
Mr Fraser relied on the well-known statement of McNair J in *Bolam v Friern Hospital Management Committee* [1957] 1 W.L.R. 582, 586-7, in the context of alleged clinical negligence, regarding the standard of care and skill required of a professional person at common law:

“[W]here you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is … the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art. … I myself would prefer to put it this way, that he is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art. … Putting it the other way round, a man is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion who would take a contrary view.”

In *Bolitho v City and Hackney Health Authority* [1998] A.C. 232, another case of alleged clinical negligence, the House of Lords confirmed that McNair J’s formulation of the test for the standard of care applied to any person professing some skill or competence. Lord Browne-Wilkinson, with whom the other members of the Judicial Committee agreed, went on to consider the approach of the courts when faced with a conflict of expert opinion. At 241-2 and 243 he said:

“[I]n my view, the court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant’s treatment or diagnosis accorded with sound medical practice. In the *Bolam* case itself, McNair J. [1957] 1 W.L.R. 583, 587, stated that the defendant had to have acted in accordance with the practice accepted as proper by a ‘responsible body of medical men.’ Later, at p. 588, he referred to ‘a standard of practice recognised as proper by a competent reasonable body of opinion.’ Again, in the passage which I have cited from Maynard’s case [*Maynard v West Midlands Regional Health Authority* [1984] 1 W.L.R. 634], Lord Scarman refers to a ‘respectable’ body of professional opinion. The use of these adjectives—responsible, reasonable and respectable—all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter.”

“In cases of diagnosis and treatment there are cases where, despite a body of professional opinion sanctioning the defendant’s conduct, the defendant can properly be held liable for negligence … In my judgment that is because, in some cases, it cannot be demonstrated to the judge’s
satisfaction that the body of opinion relied upon is reasonable or responsible. In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion. In particular, where there are questions of assessment of the relative risks and benefits of adopting a particular medical practice, a reasonable view necessarily presupposes that the relative risks and benefits have been weighed by the experts in forming their opinions. But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible.

“I emphasise that in my view it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable. The assessment of medical risks and benefits is a matter of clinical judgment which a judge would not normally be able to make without expert evidence. … [I]t would be wrong to allow such assessment to deteriorate into seeking to persuade the judge to prefer one of two views both of which are capable of being logically supported. It is only where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the bench mark by reference to which the defendant’s conduct falls to be assessed.”

It may be noted that, when Lord Browne-Wilkinson invoked “logical analysis”, he was clearly referring to canons of reasonableness and rationality in a broad sense and not, narrowly, to processes of syllogistic reasoning.

75. It ought to be borne in mind that the touchstone of an allegation of professional negligence is simply “the standard of the ordinary skilled man exercising and professing to have that special skill”; the Bolam test, as is clear from the terms in which McNair J expressed himself, is by way of the “unpacking” of the implications and application of that test in a common situation. But not every allegation of professional negligence raises questions of competing schools or bodies of professional thought or practice. In some cases evidence as to what should or should not have been done in a given situation is “not truly evidence of practice but of personal re-action”—see the judgment of H.H. Judge Humphrey Lloyd Q.C. in Royal Brompton Hospital NHS Trust v Hammond (No. 9) [2002] EWHC 2037 (TCC) at paragraph 16—or, at most, of identification of the factors and considerations that would present themselves to a competent professional faced with the case in point. I shall say more on the role of expert evidence later in this judgment. Regarding the application of the Bolam test, Ward LJ had this to say in Michael Hyde & Associates Ltd v J.D. Williams & Co Ltd [2001] P.N.L.R. 233 at paragraph 25:

“There are qualifications to it as follows.

1. One such qualification is provided by Bolitho as quoted above, namely:

‘But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is
entitled to hold that the body of opinion is not reasonable or responsible.’


‘[The judge] was entitled to take the view that the evidence of [the architect’s experts] did not constitute evidence of a responsible body of architects accepting as a proper practice that no warning of inflation need be given when providing an estimate of the cost of proposed works. It seems to me that the learned judge had ample evidence before him which entitled him to find that there was a failure on the part of Mr Nye to draw the attention of the client to the fact that inflation was a factor which should be taken into account when considering the ultimate cost and that the failure constituted a breach of the Hedley Byrne type duty to the defendant.’

3. The third qualification is expressed by Lloyd L.J. in Gold v. Haringey Health Authority [1988] 1 Q.B. 481, 490:

‘If the giving of contraceptive advice required no special skill, then I could see an argument that the Bolam test should not apply.’”

**TTPM’s duties and alleged failures**

76. It is unnecessary for the purposes of this judgment, and it may be impossible in any event, to define with precision the expression “project manager”. In general terms, a project manager will act as the representative of the employer for the purpose of co-ordinating the different aspects of a construction or engineering project. In the Royal Brompton Hospital case, at paragraph 23, the judge accepted that project management was “an emergent professional discipline”, the requirements of which would depend to a large extent on the terms of engagement in each particular case, but said that “a central part of the role of the project manager [was] as co-ordinator and guardian of the client’s interests”. One case that concerned the project manager’s role as guardian of his client’s interests was Pozzollanic Lytag Ltd v Bryan Hobson Associates [1998] EWHC 285 (TCC), [2000] B.L.R. 233, where the question arose whether the engineer appointed as project manager had a duty to ensure that all insurances required of the contractor by the contract documents were in place. Dyson J held that the project manager in that case did have such a duty; he had regard primarily to the terms of the engagement but also to the range of the services that would generally be understood by the construction industry as falling within the scope of “project management” in the absence of some qualification in the terms of engagement. In response to the engineer’s contention that it lacked the expertise to assess the adequacy of the insurance, Dyson J said at paragraph 32:

“If a project manager does not have the expertise to advise his client as to the adequacy of the insurance arrangements proposed by the contractor, he has a choice. He may obtain expert advice from an insurance broker or lawyer. Questions may arise as to who has to pay for
Alternatively, he may inform the client that expert advice is required, and seek to persuade the client to obtain it. What he cannot do is simply act as a ‘post-box’ and send the evidence of the proposed arrangements to the client without comment.”

77. In the present case, there is no dispute of substance between the parties as to the activities encompassed by TTPM’s contract with the Trust in respect of the H5 works. TTPM was engaged to perform the full range of duties of a project manager, and these included facilitating, assisting and being involved in the procurement of the building contractor and the building contract. In this regard, there is some difference of terminology between the memorandum of agreement executed by the parties in respect of the H2 works and the Terms of Appointment that accompanied TTPM’s fee proposal for the H5 works. The memorandum of agreement provided that TTPM would “oversee the formal award of contracts, to include insurance validation, signatures, warranties etc.” The Terms of Appointment provided that TTPM would “participate in contractor selection and appointment”. It has not been suggested that there is a relevant distinction, for the purposes of the resolution of the present dispute, between those two forms of words, and I think that there is none. (The distinction between the two sets of terms is relevant to an issue concerning limitation of liability and I shall mention it again in that context.)

78. The Trust did not contend that TTPM was wrong to advise that the H5 works be commenced under a letter of intent; it was accepted that, in view of the perceived importance of achieving early completion and, specifically, early commencement of the works, it was acceptable to advise commencing them under a letter of intent rather than waiting until a formal building contract could be executed. The case advanced by the Trust against TTPM in respect of breach of contract and breach of the duty of care owed by TTPM at common law is set out in paragraph 34 of the amended particulars of claim and in response 10 of the Trust’s Part 18 further information, which taken together identify a number of things that TTPM ought to have done but did not do in the period from the end of February 2004 to mid September 2004:

(1) Advised the Trust of the limited protection afforded to it by letters of intent as compared with an executed contract, in particular with regard to the availability of liquidated damages and the possibility of holding Kier liable for design defects, and of the increasing risk that the repeated issue of letters of intent would make it less likely that Kier would execute the contract.

(2) Taken, or advised the Trust to take, resolute action to procure Kier’s execution of the contract by, in particular: (a) taking positive action to remove specific obstacles, such as the dispute with Shire over additional fees (which should have been dealt with by a negotiated settlement and not by the issue of a letter of intent to cover all outstanding work); (b) identifying, by list if need be, all outstanding matters such as VE changes and warranties and maintaining constant pressure on Kier to address them; (c) bringing commercial pressure to bear on Kier at a senior level; (d) threatening to withhold payment until Kier had dealt with the outstanding matters; (e) threatening not to issue further letters of intent.
Expert Evidence

79. In respect of the allegations of breach of duty, I received evidence from two expert witnesses: for the Trust, Dr David Aldridge, B.Eng, Eng.D.; for TTPM, Mr John Hinchliffe, M.Sc, FRICS, FCI Arb.

80. Dr Aldridge prepared two reports, the first of which, dated 1\textsuperscript{st} April 2011, addressed issues concerning breach of duty. He has since 2005 been a director of Acutus Programme Management Ltd, a consultancy providing expert services in project and programme management, delay and disruption analysis and related areas. He has worked in those areas since 1997, when he completed an engineering doctorate in environmental technology. I shall have more to say about his expertise later in this judgment.

81. Mr Hinchliffe also produced two reports; his first report, dated 1\textsuperscript{st} April 2011, deals with matters relating to breach of duty, but he also addresses some relevant matters in sections 5 and 6 of his second report, dated 22\textsuperscript{nd} December 2011. He has been the managing director of Cambridge Projects Ltd, a multi-disciplinary project management consultancy, since 1994 and a director of WT Partnership, an international firm of project managers and cost managers, since 2005. He has practised as a project manager for more than twenty years.

82. So far as concerns matters relevant to the question of breach of duty, the experts were able to agree only on two points of substance, namely (1) that in the circumstances of this case TTPM was not to be criticised for advising commencement of the works under a letter of intent and (2) that, if TTPM gave no advice to the Trust in respect of the application of letters of intent and their advantages and disadvantages to the Trust, it thereby fell short of the standard to be expected of a reasonably competent project manager. (This is an interpretative paraphrase of the conclusion in paragraph 6 (a) of the joint statement dated 21\textsuperscript{st} January 2011.) All other relevant matters, including importantly the question what substantive advice TTPM should have given and what action it should have taken, remained in issue between them. The experts also disagreed as to the likely result of any further efforts that TTPM might have made to procure an executed contract, but I shall deal with their views on that question of causation separately.

Dr Aldridge’s evidence

83. Both in cross-examination and in submissions, Dr Aldridge’s standing and conduct as an expert witness were subjected to attack by Mr Fraser, who submitted that he “[did] not have sufficient (or indeed any) expertise to provide an admissible expert opinion to the Court on what a reasonably competent project manager would and would not do in any particular situation” and that the manner in which Dr Aldridge had approached his duties as an expert meant that “the Court [should] discount Dr Aldridge’s evidence in its entirety”. Mr Fraser referred to the principle that, save in exceptional cases, allegations of professional negligence cannot be sustained unless they are supported by evidence from a “relevant professional with the necessary expertise”; see the judgment of Coulson J in Pantelli Associates Ltd v Corporate City Developments No. 2 Ltd [2010] EWHC 3189 (TCC), at paragraph [16].
First, Dr Aldridge’s relevant experience in the specific field of project management was called into question. After completing his studies, Dr Aldridge spent a little over two years until about 1999 working in project management roles for O’Brien Kreitzberg; then until about 2003 he carried out a variety of roles, including project management and project advice, for Precept; in his remaining two years at Precept he worked mainly as an expert witness, although the projects with which he was involved continued to throw up project management issues; since then, his focus has been on programming rather than active project management. His evidence was that he had worked on only one project where a letter of intent was used; in the remainder of his projects, there had been a contract in place throughout. He had never been in a position of advising, or having to consider advising, his client to “call the contractor’s bluff”, that is, by insisting on an executed contract in the face of a contractor’s threat to leave site unless a further letter of intent were issued. He said that he had been involved in examining information in connection with “hundreds and hundreds” of projects and in not one of them had the project continued to its end under a letter of intent. He had, some years ago, read of one other case in which a letter of intent had been used throughout the project; that project had gone “badly wrong” (though he did not say in what respect).

Second, Mr Fraser criticised the manner in which Dr Aldridge had gone about his tasks as an expert witness in the case. There were two grounds of criticism: (1) that Dr Aldridge had failed for several months to pay close attention to documentation from Kier that had been supplied to him, with the result that there was a late amendment of the particulars of claim and an adjournment of the original trial date; (2) that, although the timetable for the trial had provided for the experts to give evidence after the witnesses of fact, Dr Aldridge had not read the transcript of Mr Bryan’s evidence before he began his own evidence. It was said that these two matters demonstrated a “complete lack of compliance by Dr Aldridge with his duty to the Court”; in particular, his failure to acquaint himself with Mr Bryan’s evidence was a breach of his duty “to consider material facts which could detract from his concluded opinion”: The Ikarian Reefer [1993] 2 Lloyd’s Rep 68, 81-82. In this connection, Mr Fraser referred to criticism of Dr Aldridge made by Akenhead J in a judgment in 2011. Further, after the conclusion of the hearing he brought to my attention another judgment, that in Walter Lilly & Co Ltd v Mackay and another [2012] EWHC 1773 (TCC), in which Akenhead J was critical of the evidence given by Dr Aldridge.

I do not consider either that Dr Aldridge lacks the expertise necessary to give opinion evidence in respect of project management in this case or that the manner in which he has approached his task means that I should attach less weight to his opinions, far less that I should entirely disregard them.

In my judgment Dr Aldridge was properly competent to give expert evidence in respect of the steps that ought to have been taken by a project manager. He has considerable experience of project management, albeit that his direct involvement as a project manager was at an early stage of his career. Subsequent work as an expert and engaged with programming issues has involved continued engagement with project management issues. I accept Mr Bowdery’s submission that, although programming and management are distinct, they are not wholly separable and an unbridgeable dichotomy between them is artificial. Indeed, both experts in this case have given
opinions on programming and on management issues. Dr Aldridge’s limited experience of letters of intent on projects that he himself has managed may be relevant to the weight to be given to his opinion when placed against that of Mr Hinchliffe but does not mean that he is a competent expert. It may, indeed, be an ideal of project management to have the minimum possible recourse to letters of intent. The fact that Dr Aldridge has not been in the position of having to “call a contractor’s bluff” is similarly not indicative that he lacks relevant expertise, and in the light of the comments made later in this judgment it will be seen that I do not think that Dr Aldridge’s lack of this particular experience is of any relevance at all. I also accept the point made by Mr Bowdery for the Trust, namely that it is relevant, though in no way determinative, that Mr Hinchliffe exchanged reports and held discussions with Dr Aldridge as his counterpart and prepared a joint statement with him and did not at any stage raise the objection that he was not dealing with a competent expert.

88. As regards Dr Aldridge’s conduct in these proceedings, I make the following short points. First, none of the criticisms affect my judgment as to Dr Aldridge’s candour and good faith as a witness. Second, my present concern is with the substantive merit of Dr Aldridge’s expert opinions; I would discount them only because I considered them flawed, not as a form of sanction. Third, for these reasons I gain no assistance for present purposes in considering what has been said about Dr Aldridge’s manner of producing evidence, or what criticisms have been made of the substance of his evidence, by a different judge in a different case. Fourth, the delay in considering the Kier documents may well have led to unfortunate procedural consequences but is not, in my judgment, relevant to the substantive merits of Dr Aldridge’s opinions in respect either of those documents or, more particularly, of the different issues pertaining to breach of duty. Fifth, although it would have been preferable for Dr Aldridge to read the transcript of Mr Bryan’s oral evidence, and he may be criticised for not having made time to do so, I do not find the point to be of great assistance when it comes to assessing the expert evidence. The truth is that any relevant point said to arise out of Mr Bryan’s evidence could have been put quickly and efficiently from the available transcripts. Indeed, Mr Fraser did put the passages he relied on and Dr Aldridge dealt with them.

89. Dr Aldridge’s opinion on issues of breach of duty was to the following effect.

(1) The risks to the Trust increased with the issue of each new letter of intent, because (a) the risk of delayed completion grew as the extent of the works was enlarged and the payment covered by the letters of intent increased, and no provision was made for compensation in the event of delay, and (b) there was not the detailed provision regarding the scope and quality of the works and the respective responsibilities of the parties. TTPM failed to advise the Trust of these risks and apparently failed to appreciate them, because it was quite happy to continue discussing the issue of further letters of intent with Kier and then advising the Trust accordingly: Mr Talabani’s email to Kier on 4th December 2003 and his advice to Mr Talabani on 15th December 2003 illustrate the point.

(2) It was “very unusual” to permit the issue of more than two letters of intent and almost unheard of to complete a project under letters of intent. TTPM should not have agreed to issue any further letters of intent after, at the latest, the third letter of intent, Revision B, which expired on 27th February 2004. Thereafter
the proper course was to “work hell for leather to get a contract signed” and to advise the client not to issue further letters of intent. If at that stage the contractor threatened to walk off site unless a further letter of intent were issued, the client should be advised to “call [the contractor’s] bluff” (an expression used by Dr Aldridge when cross-examined). It was true that, if a building contractor left site during the currency of a job, attempts to find a new contractor would be time-consuming and expensive and would be likely to extend the duration of the works. However, this did not justify exposing the client to the risks of proceeding without a contract. Further, it was a false alternative to suppose that the contractor, faced with a refusal of further letters of intent, would either sign the contract or leave site—the other possibility was that, during a very short period of exposure, the contractors would address the outstanding issues in respect of the contract documents. In this regard he observed that there were periods on the H5 works when Kier was working without a letter of intent. Dr Aldridge was not inclined to place great weight on Mr Bryan’s oral evidence, to the effect that he would not have taken the risk of Kier leaving site: first, Mr Bryan had been under the impression that, as further letters of intent were issued and the works proceeded, the provisions of the contract were extending to more and more of the project; second, the proper advice to Mr Bryan would have been that there was little likelihood of Kier leaving the site.

(3) By the expiry of the third letter of intent at the end of February 2004 the contract price had been agreed and the issues regarding the VE exercise had been resolved, and none of the remaining matters ought to have been incapable of prompt resolution, at least for the purposes of enabling the contract to be executed. However, TTPM wrongly continued to proceed on the basis that it was acceptable to issue further letters of intent and, indeed, preferable to do so than to execute a contract that contained provisional items. The communications from Mr Talabani at the time of the issue of Revision D and immediately prior to the issue of Revision E (see his email to Kier on 16th April 2004) show that, although he was saying that a contract ought now to be executed, he was willing to continue to procure the issue of further letters of intent rather than to insist that outstanding matters be resolved.

(4) When it appeared that only the warranties remained outstanding (see the communications on 6th and 7th May 2004), Mr Talabani still failed to force the issue. Although TTPM clearly wished to procure a contract, it neither proposed any practical measure by which to achieve that result nor advised the Trust that the continued lack of a contract was exposing it to risk; instead it agreed to propose the issue of a further letter of intent, Revision F. This conduct was the more unjustified because TTPM correctly considered that there were no matters that ought at this stage to have led to further delay in executing the contract.

(5) By June 2004 the only significant matter delaying the contract was the dispute with Shire. The proper advice to give to TTPM was that the value of a signed contract far outweighed a few thousand pounds of consultant fees. Either a negotiated settlement should have been arrived at with Shire, or an agreement should have been made to indemnify Kier in respect of Shire’s fees.
(6) When on 5th July 2004 Kier asked for yet another letter of intent, TTPM made no effort at all to procure a contract but advised the Trust to issue Revision G. The issue of the final letter of intent, Revision H, was not the result of any reasoned analysis by TTPM, nor even a response to Kier’s demands, but was instigated by TTPM as a method of thwarting Shire’s claim for additional fees. Thereafter TTPM made no serious effort to procure the execution of the contract.

(7) TTPM’s lack of urgency appears to be explained by its mistaken belief that the letters of intent were sufficient to enable the Trust to rely on the terms of the proposed JCT contract and, in particular, to claim liquidated damages in the event of delay. The Trust continued to issue letters of intent both because it was encouraged to do so by TTPM and because TTPM failed to advise it of the limited protection provided by letters of intent in the absence of a contract. If TTPM did not understand the risks of the continued use of letters of intent, it should have sought internal advice from its Contract Services Department; if it still felt unable to advise the Trust on the risks of continuing to use letters of intent, it should have explained the fact to the Trust, so that it could consider taking legal advice.

“The simple reality appears to be that TTPM did not understand the risks associated with continually proceeding under an increasing LOI. As a result, it not only failed to reasonably manage the process to ensure the contract was implemented … but it failed to generally ‘provide the services as expected of a firm of project management, cost management and planning supervisor consultants in a proper professional manner … with all reasonable skill and care’” (report of 1st April 2011, para 7.4.6).

(8) Regarding particular issues arising from the claim:

(a) Although merely to make an action list would be unlikely to achieve very much, there was some value in “tabulating the information and making sure that the parties kept them (sic) on their mind properly”. The important point was that “[TTPM] should have been holding meetings to resolve those action lists and should have got the parties together to resolve them as well.”

(b) Although resolution of the issues between Kier and, respectively, Associated Architects and AIB would have required negotiation and agreement between those parties, “All of these things are not difficult to resolve in and of themselves. They require work to be resolved but, as considered at the time by Mr Talabani and various different others in the documents, none of them were considered to be irresolvable within short periods of time. The fact that they weren’t [resolved] seems to me to be because there was no real pressure to resolve them, no need to resolve them quickly. And, of course, Kier, as a canny contractor, will seek to improve its position and get the best deal it possibly can while it has no pressure to sign the contract.”
(c) TTPM failed to advise the Trust of the risks it faced if the dispute over Shire’s claim for additional fees remained an impediment to execution of the contract with Kier. If necessary, the Trust should have been advised to pay Shire’s claim in order to remove that impediment.

Mr Hinchliffe’s evidence

90. Mr Hinchliffe’s opinion on issues of breach of duty was to the following effect.

(1) In 2003 and 2004, the standards reasonably to be expected of a project manager were not as high as they are today. TTPM must be judged by the standards of the time, not by those of today.

(2) Letters of intent were “almost always” properly to be used as a temporary measure to get the contractor onto the site. (This was referred to as their “classic” purpose.) Use of letters of intent to complete a project took one to “rare territory”, though “perhaps not unchartered”; he had experience of two previous projects that had been completed under letters of intent, though in both cases the works had been commenced and completed before the employer had acquired the relevant legal interest in the site. Mr Hinchliffe accepted that as the project progressed the letters of intent had been used for purposes other than their classic purpose and that the circumstances of the present case were exceptional.

(3) Although it would have been negligent to fail to give advice as to the risks of using letters of intent for their classic purpose; however, he was “not sure” (a form of words he used more than once) that it was negligent to fail to give further advice regarding the risks of using letters of intent for other purposes, “bearing in mind that the client was aware of what was happening”. In particular: the wording of the letters of intent would have made it clear to any reasonable employer that there was no contract in place; and “the Trust were of a view that the risks involved in stopping the job were such that they couldn’t embark on any other course than continue with the letters of intent.”

(3) Mr Binns’ acknowledgment (in a telephone conversation with a solicitor from BW on 4th May 2005) that after three letters of intent TTPM should have pressed for a contract represented “the conventional approach”. However, “once the train was underway, there was very little opportunity to do anything else than issue further letters or halt the project.”

(4) Although it was to be expected that a contract would be signed within seven months of the commencement of the works, TTPM did everything it reasonably could to procure a written contract from Kier; there was no further step that it ought to have taken, and it was not able to force Kier to execute the contract. The reason why no contract was signed was not TTPM’s lack of effort but rather a sequence of issues that required to be resolved—in particular, the Shire claim and the warranty sought by AIB. By the time those issues were resolved, TTPM was “faced with Kier’s implacable attitude to not signing the contract”. The advantages to the contractor of having an executed contract were greater in the early stages than they were once much of the
works had been completed under letters of intent, and in the present case the
problems encountered by Kier in the performance of the H5 works served to
make a contract commercially unattractive after May 2004.

(5) A simple refusal to issue further letters of intent would have been a very risky
course for the Trust to take, because of the risk that Kier would leave site in
circumstances where it faced the prospect of incurring a loss on the project
and being exposed to liability for liquidated damages.

(6) TTPM was not to be criticised for failing to bring commercial pressure to bear
on Kier at senior director level, because such pressure was unlikely to have
borne fruit in circumstances where there was no likelihood of significant
amounts of future work coming to Kier via TTPM and there was accordingly
no incentive for Kier to take a commercially disadvantageous decision.

(7) If TTPM’s belief that the letters of intent gave to the Trust a right to deduct
liquidated damages was an error, it was an error that might have been made by
a reasonably competent project manager, concerning as it did a difficult and
disputed matter of law and of the construction of the letters of intent. Further,
even if advice as to the possible non-recoverability of liquidated damages
ought to have been given, it should only have been given in respect of the final
letter of intent; the question did not arise in respect of the earlier letters of
intent, which were issued for only a part of the H5 works.

(8) TTPM was not negligent in failing to use the letters of intent to impose
liability for design upon Kier. It was reasonable to suppose that they did
impose such liability. However, any attempt to make the matter explicit by
expressly including design liability in the letters of intent would probably have
resulted in Kier refusing to accept such terms or insisting on additional
payment as its price for doing so.

(9) Although hindsight might suggest that the best commercial advice to the Trust
would have been to pay Shire’s claim for additional fees, the matter had to be
viewed in the light of a tight budget, which had been stretched to the limit and
carried no contingency sum, and a bullish approach by Mr Bryan on behalf of
the Trust. TTPM is not to be criticised for not giving advice to pay Shire’s
claim. In this regard, Mr Talabani’s suggestion that, rather than pay Shire, the
Trust should simply issue a letter of intent for the full value of the works was
inappropriate and inappropriately expressed, but in substance it reflected the
difficulty of the situation.

The Trust’s submissions on breach of duty

91. For the Trust, Mr Bowdery submitted that the starting-point was an understanding of
the exceptional nature of what had happened: the factual and expert evidence all
showed that it was almost if not actually unheard of for a significant construction
project to be completed by means of a series of letters of intent. The explanations
proffered for the failure to obtain an executed contract were unpersuasive. The
evidence did not justify a conclusion that Kier had been in bad faith and trying to find
excuses not to sign the contract—that Kier was “as slippery as soap”, to use the expression that cropped up at the trial. Similarly, the failure to procure a contract could not be justified by reference to the risk that, if subjected to pressure, Kier would have walked off site; there was no threat to leave site unless a further letter of intent were issued, and Kier had worked for significant periods without the comfort of a letter of intent. Rather, if TTPM had acted with reasonable care and diligence, a contract would have been executed before the time came when it was against Kier’s self-interest to sign the contract.

92. Mr Bowdery submitted that, once the letters of intent were no longer being used for their classic purpose, TTPM was in breach of duty by failing to advise of the risks of continuing to proceed under letters of intent: the letters of intent did not entitle the Trust to liquidated damages; they did not enable the Trust to require completion of the works by a certain date; they did not impose liability on Kier for failure to comply with the design standards of the proposed contract; and, as more works were completed and more payments made under letters of intent, the incentive for Kier to execute the necessary contract was reduced. This failure to advise was perhaps borne of a failure of understanding, as Mr Talabani clearly laboured under the misapprehension that the terms of the intended contract applied to the works completed under letters of intent, at least as regards the right to recover liquidated damages. That lack of understanding was shown most clearly in the decision to issue the final letter of intent. Insofar as it might be said—as was said by Mr Hinchliffe—that the true effect of the letters of intent, in particular regarding the recoverability of liquidated damages, was a difficult legal question on which project managers might hold different views, the answer was twofold: first, it was TTPM that drafted the letters of intent and acted on the basis of a specific understanding of them, in circumstances where it put itself forward as providing a “one-stop shop” that included legal expertise in respect of building contracts; second, if TTPM was not itself competent to understand the legal effect of the letters of intent and give advice in that regard, it should have advised that professional legal advice be sought, in view of the practical importance of the matter to the Trust.

93. The letters of intent from Revision D onwards should not (submitted Mr Bowdery) have been issued, and the decision to advise the issue of the final letter of intent was “beyond negligence” and a matter of “blind fury” on Mr Talabani’s part; there was no evidence to support the contention that a reasonable or responsible project manager would have advised such a course. TTPM’s contention that it was too dangerous to refuse to issue further letters of intent, because of the risk of Kier leaving site, was not to be accepted, because it implied that no reasonably competent project manager would ever push for a contract if there was the slightest risk that the contractor would walk away. If the barest risk of such a result was sufficient to preclude robust negotiations between project managers and contractors, no contract would ever be concluded. The proper course was—as Mr Binns had said in substantial agreement with Dr Aldridge—to stop issuing letters of intent and push for a contract.

TTPM’s submissions on breach of duty

94. For TTPM, Mr Fraser submitted that the allegations of professional negligence were unsupported by admissible expert evidence or, at least, by expert evidence to which
significant weight could be attached: see above. It could not be said that what TTPM had done fell outside the range of opinion or conduct of reasonably careful and skilful project managers. In particular, it was not to be accepted that the only acceptable course of conduct would have been the “great and dangerous game” of advising the Trust to refuse to issue any further letter of intent and instead “call the contractor’s bluff” at the risk that the contractor would walk off site. TTPM was right to take very seriously the risk—highlighted by its threats in March 2004 and January 2005—that Kier would leave site unless it were given further letters of intent, in circumstances where the extra delays and expense resulting from the need to obtain a new contractor would have been catastrophic for the Trust.

95. With regard to particular matters of complaint against TTPM, Mr Fraser submitted that TTPM had kept pressure on Kier and had sought to address particular obstacles to the signing of the contract. However, it bore no responsibility for issues concerning Kier’s demand for comfort in respect of the funding and AIB’s demand for a warranty from Kier—indeed, TTPM had not even been made aware of the existence of bank funding until after the tender process had been completed; and, when Shire demanded additional payment as a condition of accepting appointment, neither Kier nor the Trust was willing to pay. There was discussion with Kier at an appropriately high level. Making an action list would not have made any difference, as was shown by the fact that, when an action list was drawn up after the mediation, the contract was not signed for a further two years: see paragraph 70 above.

96. Mr Fraser further submitted that there was no basis in the terms of appointment—whichever terms might be held to apply—for imposing on TTPM a duty to act as legal advisers for the Trust. Although Mr Bryan gave evidence to the effect that he expected TTPM to provide the Trust with the same degree of legal advice as would be given by a solicitor, there was no provision to that effect; if the Trust wanted legal advice, it should have taken it from a lawyer.

Breach of duty: discussion and conclusions

97. In the performance of TTPM’s role as “co-ordinator and guardian of the client’s interests”, efforts to finalise the contractual arrangements were of central importance. The execution of a contract is to be seen not as a mere aspiration but rather as fundamental. It is the contract that defines the rights, duties and remedies of the parties and that regulates their relationships. Standard-form contracts, such as the JCT contracts, are precise, detailed and structured documents; their elaborate nature reflects the complexities of the projects to which they relate and attempts to address the many and varied problems that can arise both during the execution of the works and afterwards. By contrast, letters of intent such as those used in the present case are contracts of a skeletal nature; they pave the way for the formal contract, once executed, to apply retrospectively to the works they have covered, but they expressly negative the application of most of the provisions of the formal contract until it has been executed. They do not protect, and are not intended to protect, the employer’s interests in the same manner as would the formal contract; that is why their “classic” use is for restricted purposes.
98. TTPM was not under any absolute obligation to procure the execution of a formal contract, and it was not axiomatic that the exercise of reasonable care and skill would achieve that result. However, even if the unhappy outcome in this case (a project carried on from start to finish without an executed contract) does not of itself dictate the conclusion that TTPM was negligent, it is sufficient to suggest that something went wrong with the project.

99. Two matters give added significance to the outcome in the present case. First, the consistent evidence from both the witnesses of fact and the expert witnesses shows that it is extremely unusual for a building project of this scale to proceed from commencement to completion pursuant to letters of intent. Second, to anticipate findings that I make later in this judgment in connection with causation, I do not accept that Kier had taken any formal or informal decision not to sign the contract prior to September 2004. Why, then, was no contract signed? In answering that question, one should not (in my view) allow the difficulty of constructing a detailed prescriptive account of precisely what steps should have been taken and when they should have been taken to blind one to the big picture or obscure the question whether, taken as a whole, TTPM's performance of its retainer met the required standard of reasonable care and skill. (Questions of causation are distinct from questions of breach of duty and I shall treat them separately.)

100. In my judgment, TTPM failed to take the steps reasonably required of a competent project manager for the purpose of finalising the contract between the Trust and Kier and thereby was negligent and in breach of contract. In particular, by approaching the situation on the basis that the repeated issue of letters of intent was a proper response to the continuing difficulties regarding the execution of the contract, it effectively treated the contract as a dispensable luxury, though of course it would not have put it that way. Before setting out my conclusion in greater detail and explaining my reasons for it, I shall say something about the expert evidence relating to the issue of breach of duty.

101. The assistance that I obtained from the expert evidence, though real, was limited. As I have mentioned, it is extremely rare for construction projects of any significance to be completed under letters of intent. In his criticisms of Dr Aldridge’s evidence, Mr Fraser tended to treat this fact as though it were something of a touchstone of an expert’s experience: a witness who had not come across such a situation in practice lacked the relevant experience that alone could qualify him to speak of the standard to be required of a professional in similar circumstances. I disagree. The situation in question is quite different from, say, a rarely encountered surgical procedure (the surgeon who has never come across the need for surgery in such-and-such a difficult situation and cannot speak from his or her expertise as to the acceptable technique). The situation in the present case is exceptional not because of the unprecedented nature of the construction project but because the very fact of completion of such a project under letters of intent is a mark of something having gone wrong—by no means necessarily on account of anyone’s negligence, but wrong nonetheless, because the intention and, in almost every single case, the outcome is that a building contract will be executed.

102. This is relevant not only because it dulls the edge of the criticism made of Dr Aldridge but because it affects the analysis of the nature of the expert evidence that was given. It seems to me that neither expert was, properly speaking, giving evidence
of a body of responsible practice or opinion within the profession of project managers. There was no relevant “body of practice”, other perhaps than the practice of striving in each and every case to procure a contract. What the experts were really doing was twofold: first, informing the court of the factors that would have influenced the judgement of a professional person faced with the circumstances that existed in this case (for example: the importance of the protection provided by a contract; and the nature of the risks and disadvantages if the contractor were to walk off site); second, expressing personal opinions or reactions, and thereby enabling the court to test the respective cases against what professionals would have expected at the material time. In my view, this was not, properly speaking, a Bolam case at all. If it is necessary to categorise it, I should think that it falls within the second qualification mentioned by Ward LJ in Michael Hyde & Associates Ltd v J.D. Williams & Co Ltd, with reference to Nye Saunders and Partners v Alan E. Bristow. That is not to say that the expert evidence in respect of breach of duty was of no assistance; but I have already mentioned the nature of the assistance it gave, and this is in my judgment a case falling well within the scope of the approach mentioned by Stephen Brown LJ in the Nye Saunders case.

103. As an aside, I venture the observation that there are signs (as it seems to me) that Coulson J’s judgment in the Pantelli Associates case is being used for purposes for which it was not intended. Coulson J did not purport to provide an exhaustive analysis of the situations when expert evidence was required in support of a professional negligence claim; having regard to the facts and issues in the case, it was unnecessary for him to do so. The decision concerns not so much the need for expert evidence as the implications of the absence of such evidence in a case where it is necessary. On the issue of when expert evidence is required, reference should be made to judgments such as that of Ward LJ in the Michael Hyde & Associates case and that of HH Judge Humphrey Lloyd Q.C. in Royal Brompton Hospital NHS Trust v Hammond (No. 9).

104. To the extent, however, that expert evidence as to the standard to be expected of project managers was of assistance in this case, I was more impressed by that of Dr Aldridge than by that of Mr Hinchliffe. Notwithstanding the attack to which he was subjected, I thought that he was entirely candid and objective in his evidence (the fact that, in a different case and on a different point, Akenhead J described his approach as “subjective” is not in point) and that his analysis of the situation faced by TTPM and the Trust in 2004 had greater realism than that of Mr Hinchliffe. One rather unsatisfactory feature of Mr Hinchliffe’s evidence was that his reports did not contain any express acknowledgment of the exceptional nature of the outcome in the present case (completion without a contract); it was Dr Aldridge who made clear how dysfunctional the project was in this particular respect. Another feature of Mr Hinchliffe’s evidence was that on more than one occasion at trial, when expressing disagreement with the course adopted by TTPM, he said that he was nonetheless “not sure” that TTPM’s behaviour was negligently wrong; listening to him, I had the impression that he was being a little coy on this point—a conclusion that is not altogether without significance, in the light of my view as to the relevance of expert evidence in this case. A third feature of Mr Hinchliffe’s evidence that left me unimpressed, albeit with regard to a different issue, was the basis on which he ultimately concluded that Kier would not have signed the contract at any material time; I shall turn to that evidence in connection with the issue of causation.
105. I also reject the contention that in any relevant respect the standard of care and skill to be expected of a project manager now is different from what it would have been in 2004. It has not been convincingly explained why the standard should have changed or in what respects it has changed. The evidence before me gives no ground to suppose that the importance of a contract was less clearly perceived by the profession in 2004 than it would be now. (As mentioned below, Mr Talabani may have perceived it rather dimly, but I do not consider that this demonstrates anything about the standards of the profession.) In view of the nature of the functions under consideration, which involve the exercise of practical judgement and even common sense rather than questions of deficiency in a technical skill, I do not find it easy to understand how the applicable standard of care would be any different then from what it is now.

106. Turning to the substantive question of breach of duty, I consider that TTPM failed adequately to focus on the matters that remained outstanding before a contract could be signed, to work urgently to resolve those matters one by one, to advise the Trust of the need to ensure that a contract was signed, and to bring proper pressure to bear on Kier and on the situation generally to that end. That pressure would include letting it be known that, possibly, the third letter of intent (Revision B, which ran to 27th February 2004) or, as I should be prepared to accept, a subsequent one for a short period would be the last and that the contract would have to be executed thereafter.

107. Three preliminary observations are in point. First, to suggest that a contract should have been in place no later than April 2004 is hardly to suggest unreasonable haste. Works had started in early December 2003; by the expiry of the fourth letter of intent construction had been going on for about four months, and the works covered by the letters of intent accounted for more than 25% of the contract price. Second, it does not appear that there was any intractable problem preventing execution of the contract; the most difficult problem related to Shire’s claim for additional payment, but that too was capable of resolution if only it were addressed. (At this stage I am concerned only with issues of breach of duty, not with causation. Private reservations on the part of Kier, such as might have made it unwilling to sign a contract, fall for consideration in connection with issues of causation; though, as I shall explain later, I do not find that there were any such impediments at the material time.) Third, the time at which problems were in fact resolved is, of course, no sure guide to answering the question of when they might reasonably have been resolved.

108. It is instructive to chart the outstanding issues that from time to time were being mentioned as preventing the execution of the contract during the period covered by the Trust’s allegations against TTPM. This may be done by supplementing some dates from the narrative set out above with TTPM’s minutes of the monthly progress meetings held with the Trust, Kier and the relevant consultants.

(1) At the beginning of March 2004, the contract price and the VE schedule had been agreed. The remaining matters to be resolved were (i) finalising amendments to the contract; (ii) incorporation of the agreed VE information into the Contractor’s Proposal for inclusion in the contract; (iii) warranties to be given by sub-contractors and consultants to the Trust; (iv) Kier’s appointment of consultants, to include resolving Shire’s claim for additional fees; (v) a letter of comfort from AIB to Kier. The question of a warranty from Kier to AIB had not yet been raised by TTPM.
(2) On 22nd March 2004 Mr Talabani identified several outstanding matters (paragraph 36 above): (i) warranties by sub-contractors and consultants to the Trust; (ii) a warranty by Kier to AIB; (iii) Shire’s fee claim; (iv) amendments to the contract wording; (v) incorporation of the agreed VE information into the Contractor’s Proposal. I am satisfied that the final two matters did not involve any issue between the parties; it was simply a question of putting uncontroversial information into proper contractual form. (Thus the VE information had been settled by the end of February, although it was still being mentioned in the summer; see below.)

(3) On 2nd April 2004 Kier identified three matters that could not be “parked” until after the signing of the contract (paragraph 38): (i) warranties; (ii) consultant appointments; (iii) consultant fees. The “warranties” were those required by the Trust from the consultants and contractors as well as that which AIB required from Kier.

(4) By 20th April 2004 (paragraphs 39 and 42) the matters in issue were (i) the warranties to be provided to the Trust—Mr Talabani had still not forwarded the drafts—, (ii) the consultants’ appointments and (iii) the consultants’ fees.

(5) By 6th – 9th May 2004 the only unresolved issues were (i) Shire’s claim for additional fees and (ii) the terms of the architect’s warranty (paragraphs 42 and 43). Issues concerning all fees other than Shire’s had been resolved.

(6) The minutes for the monthly meeting on 19th May 2004 identified as outstanding matters only (i) the warranties and (ii) the consultant appointments—effectively the same as the position nearly a fortnight previously.

(7) The minutes for the monthly meeting on 19th June 2004 identified as outstanding only (i) the consultant appointments and (ii) the VE package. This accords with Mr Talabani’s email of 7th June 2004 (paragraph 47), which had identified as outstanding the issues concerning Shire and the architect and the VE schedule.

(8) The minutes for the monthly meeting on 7th July 2004 mentioned only Shire as an outstanding issue. That is also the sole issue mentioned in the letter of intent (Revision G) on 12th July 2004. The minutes for the meeting on 4th August 2004 also mention Shire as the sole outstanding issue. That is also what Mr Talabani thought on 26th August 2004: “The only thing holding up executing the contract docs is Shires appointment” (paragraph 54 above). In oral evidence Mr Talabani said that the VE package was also outstanding. That is correct, inasmuch as the agreed position had not been reduced into proper form by incorporation into the Contractor’s Proposal; but no point of agreement remained outstanding in that regard.

109. It would be unfair to TTPM to suggest that they made no efforts to address these issues. With one arguable exception, namely Shire’s claim for additional payment, they tried to resolve them. However, the course of events and sequence of communications show that TTPM did not attempt to bring matters to a head but allowed them to drag on through the summer; examples will appear below.
Underlying this lack of focus was the perceived comfort of the availability of further letters of intent. And the Trust remained willing to continue issuing letters of intent because it did not receive adequate advice.

110. At the outset of the H5 project Mr Bryan was, to be sure, given advice concerning the use of letters of intent, and I accept that he sanctioned the commencement of the H5 works in the understanding that the letter of intent fell short of the full construction contract that was intended to be executed. However, that advice was concerned with the “classic” use of letters of intent, namely to permit the works to commence at a time when the details of the contract had not been worked out. I accept Mr Bryan’s evidence that no advice was given that, the “classic” use having been outlived by the passage of time and the enlargement of the works being done under letters of intent, it was no longer appropriate to continue issuing letters of intent but that instead the proper course was to insist on a contract. In this respect I prefer Mr Bryan’s evidence to that of Mr Talabani, who said that he had specifically advised Mr Bryan not to issue further letters of intent and instead to press for the contract and that Mr Bryan had rejected that advice. First, I found Mr Bryan to be a generally impressive and consistent witness. Second, his evidence on this point coheres better with the other evidence in the case. Third, I should have expected some documentary corroboration of advice such as Mr Talabani claims he gave. Fourth, Mr Talabani’s evidence was inconsistent with the way in which TTPM advanced its case at trial, which was that advice such as he claims to have given would have been inappropriate.

111. I also find that no advice was given to the effect that, the longer the H5 works continued under letters of intent, the less was the incentive for Kier to execute the contract. The reason why such advice was not given was that TTPM, and in particular Mr Talabani, believed or assumed that, to the extent that works were done under the letters of intent, they were subject to the provisions of the (as yet unexecuted) contract. To take the specific case of liquidated damages: in 2005 it was a shock to TTPM and to Mr Bryan to learn that the final letter of intent did not entitle the Trust to liquidated damages in the event of delayed completion. I do not, in the circumstances, think that it is open to TTPM to contend that it owed no duty of further advice to Mr Bryan because he understood that the letters of intent were not the same as the contract.

112. Mr Hinchliffe expressed the view that it was reasonable for a project manager that was not a lawyer to hold what might be an erroneous view of the meaning and effect of the letters of intent. I disagree. TTPM had put together the contractual documents and the letters of intent. If it was not competent to understand the letters of intent, even with the assistance of its in-house lawyers, it should have advised the Trust of the need to obtain professional legal advice. What it could not do, in my judgment, was proceed on the basis of a particular legal understanding and then say that it was no lawyer and could not be expected to bring a lawyer’s understanding to bear. Although the situation is different from that in the Pozzollanic Lytag case the relevant considerations are similar to those enunciated by Dyson J (see paragraph 76 above).

113. In view of the importance of obtaining the contract, I consider that a reasonably competent project manager would have given to the Trust firm advice by the end of March at the latest that letters of intent were no longer appropriate and that instead every effort should be made to execute the contract. Such a conclusion draws support from Mr Binns’ acknowledgment in May 2005 that only three or so letters of intent
should have been issued and TTPM should then have “pushed for the contract”, and from Dr Aldridge’s evidence. The conclusion is not based on recognised or established professional practice in the strict sense of that expression; though, if on the contrary such a practice were thought to be exist, it could only be that letters of intent were not used repeatedly throughout a project in place of a contract. Rather, I would say that, having regard to the importance of obtaining a contract and to all other relevant factors, TTPM’s conduct in addressing every difficulty by the expedient of issuing “just one more” letter of intent was clearly below the standard reasonably required of them, having regard in particular to the manner in which it was addressing the matters that prevented execution of a contract. The difficulty with the way in which TTPM dealt with the matter was that the efforts at resolution entirely lacked focus and any sense of necessity. Correspondence, emails and discussions abounded, but they provided little incentive for the resolution of the matter when Mr Talabani continued to see further letters of intent as an acceptable pressure-valve.

114. Mr Fraser submitted that it was not incumbent on TTPM to “play the dangerous game” of an ultimatum to Kier—indeed, that it was incumbent on it not to do so—because of the risk that the contractor would walk off site. The submission draws such attraction as it has from the conjunction of the following matters: (a) the propositions, put to Dr Aldridge in cross-examination, that “the bluff-calling point [i.e. the question whether to call the bluff of a contractor threatening to walk off site unless another letter of intent is issued] comes up at every juncture once a contractor has started to work” and that “precipitating a situation where a contractor might leave site is a dangerous game of brinkmanship”; (b) Mr Bryan’s oral evidence to the effect that he would not have run the risk of Kier leaving site; (c) the tacit assumption either that one is already faced with a threat by the contractor to leave site or that the Trust’s case is that the project manager should have demanded execution of a contract when necessary matters had not been resolved. I reject Mr Fraser’s submission for the following reasons.

(1) It tends to prove too much, because it supports the unattractive position that, when faced with a contractor who appears to be in no hurry to execute a contract, the project manager should avoid all risk of confrontation by accepting the certainty of proceeding further under letters of intent, at least unless the builder takes the initiative in respect of finalising the contract.

(2) It is contrary to Mr Binns’ candid, and as it seems to me entirely reasonable, acceptance in 2005 that, where letters of intent have been used to start a project, the time will come where the proper course is to refuse to issue further letters of intent and instead to press for a contract.

(3) It is not closely related to the facts of this case; they invite a more realistic perspective. First, although Kier twice threatened to withdraw its labour—once when it was asking for a letter of comfort from AIB, and again when the Trust withheld payment in January 2005—on neither occasion did it carry through with its threat. Second, Kier never threatened to leave site because it was not covered by a letter of intent. Third, however, Kier worked on site during several periods when no letter of intent was in force: 19th to 30th January 2004; 27th February to 11th March 2004; 30th April to 9th June 2004; 2nd July to 12th July 2004; 31st August to 14th September 2004; and 26th November 2004 to 31st March 2005. (The last period is contentious, in that
the final letter of intent is capable of being treated as valid until completion of
the works.) What the facts suggest is that, far from the repeated issue of
letters of intent being a necessity, there was plenty of opportunity to address
the outstanding issues and move instead to a contract.

(4) The point has been advanced—both in cross-examination of Dr Aldridge and
in submissions—in a manner that presumes the existence of confrontation. To
some extent Dr Aldridge invited this line of attack, for it was he who
introduced the language of “calling Kier’s bluff” into the discussion. However, that simply is not the manner in which sensible efforts to finalise the
contract would begin. Similarly, although Dr Aldridge when cross-examined
agreed with Mr Fraser’s proposition that “the bluff-calling point comes up at
every juncture once a contractor has started work”, that again seems to me to
overstate the position: the furthest the matter goes is that, once a project has
started under a letter of intent, any attempt by a project manager to insist on a
contract gives rise to the potential that at some point an impasse will be
reached and a bluff might have to be called.

(5) It is in my judgment perfectly straightforward to suppose that at an opportune
time—whether when a letter of intent is about to expire or, more probably,
upon the issue of a letter of intent—the project manager makes it clear that no
further letters of intent will be issued but that the contract must be executed.
That would clearly be inappropriate if it required execution of the contract
when necessary matters had not been resolved. But no one is suggesting that
that is what should happen. Rather, the statement that no further letters of intent
would be issued would be coupled with formal identification of all
outstanding matters and urgent and concentrated efforts, within the constraint
of time, to address the matters. To suppose that the alternatives are hostile
confrontation or (as happened in this case) supine acquiescence is to lack
realism.

115. Of course, if an ultimatum is unaccompanied by practical efforts to resolve
outstanding difficulties, it will serve no purpose and might give rise to a risk of
breakdown in the relations between the employer and the builder. Precisely what
steps should have been taken cannot be stipulated; as the saying goes, there is more
than one way to kill a cat. But in essence the matter was, in most respects, relatively
simple; it appears difficult only if one supposes that Kier was at the material time
trying to avoid signing the contract—a supposition that I reject. The first thing to do
was to identify the things required to be done, how they were to be done, and within
what timescale they were to be done; this is the “action list” of which Mr Fraser was
dismissive. Of course, it does not matter in itself how such an action list is presented,
and the point is rightly made that the making of a list does not by itself advance
matters. The first stage is not for that reason redundant. At trial it was remarkably
difficult to identify with certainty what issues were outstanding at particular times.
One example is the matter of the resolution of the terms of Kier’s appointment of the
architect. Another, of a slightly different nature, arises from the fact that TTPM’s
minutes of the monthly meetings records that the only matter outstanding in July and
August 2004 was the dispute with Shire, although both Mr Talabani and Mr Kimber
gave evidence that they believed there were other matters outstanding. Clear
identification of outstanding matters has practical benefits for project management as
well as trials, because it makes it easier to assess the implications of points that arise. An example of this is, perhaps, Mr Talabani’s inconsistency from time to time as to whether at the end of August 2004 the Shire dispute was the only thing preventing a contract from being signed (compare his oral evidence with his email of 26th August 2004). More generally, the reason why it is common to make action lists of one sort or another is that a structured and programmed approach to problem-solving enables parties to focus on what has to be done and to do it within clear timescales. The manner in which matters became drawn out over a period of many months, even after the H5 works had been on foot for many months already, shows the need for a structured approach to have been taken in this particular case.

116. A deadline and an action list would also require the relevant parties to hold such meetings as were necessary in order to thrash out the problems. This would have involved direct communication at director level, if that had proved necessary. Whether or not this would have worked is a question of causation, not of breach of duty. One way in which TTPM’s case was put—for example, in cross-examination of Mr Bryan, and in Mr Hinchliffe’s evidence: see paragraph 90 (6) above—was that escalation of the levels of communication would be fruitless if Kier had its own unstated reasons for not wanting to sign the contract. There are two answers to that: first, so far as concerns breach of duty the question is what should have been done, not what it would have achieved, and it has not been suggested and could not reasonably be suggested that TTPM’s conduct in respect of the contract proceeded or should have proceeded on any other basis than that both parties were desirous of concluding a contract; second, in respect of the period from February until September 2004, I reject the suggestion that for reasons of its own Kier was not desirous of achieving the execution of the contract. It is of interest that, on the one occasion in 2004 when an ultimatum of sorts did exist—Kier’s threat to leave site unless it were given a letter from AIB—TTPM did take discussions to board level, with notable results (see paragraphs 33 and 35 above).

117. The lack of focus and urgency on TTPM’s part can be seen by looking at some of the main issues that arose during the relevant period.

118. There were two issues relating to AIB: first, Kier’s request, originally made in December 2003, for a letter from AIB regarding funding; second, AIB’s request for a warranty from Kier. Both of these issues had been resolved by 6th May 2004 and had no subsequent relevance to the delay in executing the contract. However, in my view they were perfectly capable of being resolved significantly earlier if TTPM had coordinated communications. As regards Kier’s request for a letter of comfort, there was no demonstrable reason why this should have been an independent cause of delay, let alone a cause of several months’ delay. It was important to overcome Kier’s threat to leave site unless a letter were produced; TTPM did this efficiently, as already mentioned. Otherwise, the matter was simply one of coordinating communications in such a manner that satisfactory terms of a letter were identified and could be produced in conjunction with the contract. This might well involve some form of dialectic, but that does not turn it into a Catch-22 situation. The fact that TTPM did not owe to the Trust any duties in respect of the arrangement of finance is not in point; it did owe duties in respect of putting the contract in place and was therefore properly concerned to ensure that funding issues did not prevent the finalising of the contractual arrangements. In the event, it proved possible to satisfy
both Kier and AIB. As regards AIB’s request for a warranty, Mr Talabani mentioned this in his letter of 22nd March 2004 (paragraph 36 above), which makes it clear that even at that stage, more than four months after the issue of the first letter of intent, he had not ascertained what AIB’s requirements were. The issue had, of course, fallen away within the month. I do not consider that there was any justification for this point to be a cause of delay in the execution of the contract or that the evidence discloses any reason why both issues regarding AIB could not have been identified at an early stage and dealt with by the end of March 2004.

119. Regarding warranties, Mr Hinchliffe accepted that Kier was acting reasonably and in accordance with its own *Standing Orders and Procedures* in requiring that warranties from the design team be resolved before it signed the contract. That being so, it is striking that Mr Talabani does not appear to have realised until April 2004 that warranty issues could not be “parked” until after the contract had been signed. In my view, this is one respect in which it would materially have assisted the prompt resolution of the contractual issues if TTPM had, from an early stage and in conjunction with Kier, identified clearly what matters needed to be dealt with before there could be a contract.

120. In fact, the saga of the warranties indicates something of the lack of urgency in TTPM’s approach. Commencement of the H5 works without a contract and under a letter of intent was at best a necessary evil and it should have been a priority to regularise the position by means of the JCT contract as soon as possible. This meant that it was incumbent on TTPM to identify the issues to be dealt with. The need to address the warranties was, or ought to have been, obvious; it should also have been obvious that this needed to be done promptly, not least because the finalisation of the warranties involved other parties. However, Mr Talabani did not even forward to Kier the required drafts until 22nd April 2004, apparently because he wrongly assumed that they could be dealt with later. In the event, discussions concerning the warranties and terms of the architect’s appointment continued until the early summer, although there is no apparent reason why they should not have been resolved by the end of March at the latest.

121. As for the wrangle that went on between Kier and the consultants, principally the architect, concerning the terms of appointment, I make the following observations. First, the fact that this concerned the relations between Kier and the consultants does not mean that it was not a matter that TTPM needed to address; insofar as it affected the execution of the building contract, it was a matter that TTPM were required to deal with in order to ensure that it did not affect the Trust’s interests. Second, issues concerning warranties and consultant appointment are by no means unusual but will commonly arise in construction projects; a point made by Dr Aldridge. Third, there is no evidence that the problem in the present case was unusual or was anything other than entirely tractable; indeed, it was resolved in the summer. Fourth, the terms of Mr Talabani’s email of 16th April 2004 (paragraph 39 above) show that TTPM had failed to keep fully informed of progress on this matter but—in a manner not dissimilar to its handling of the warranties issue—had proceeded on the assumption that all was well. Insofar as this was a matter that affected the building contract, TTPM should have had a sufficiently structured approach to address it promptly and should have been proactive in addressing it rather than leaving it to the builder and the architect.
122. As regards the Shire issue, it is likely that this would have remained the last outstanding matter holding up the contract. Whether or not it could be resolved is strictly a matter of causation, rather than of breach of duty; though considerations of what actions would be practically worthwhile are obviously relevant to questions of negligence. The evidence of Mr Talabani, Dr Aldridge and Mr Hinchliffe is all to the effect that, if the Shire claim for additional fees were the sole stumbling block, the sensible advice to the Trust would have been to pay the claim if that was the price of obtaining a contract. The good sense of that view appears from a comparison of the figures: the contractual figure for liquidated damages was £50,000 for each week of delay, whereas the total sum in issue with Shire was less than half that amount.

123. In the light of Mr Talabani’s evidence on this point, the terms of his email of 26th August 2004 is surprising: “The only thing holding up executing the contract docs is Shires appointment. … I suggest we issue a letter of intent for the whole value up to the end of the job. Then Shires can go fuck themselves.” Mr Talabani said in evidence that, despite the terms of the email, the position was never achieved at which resolution of the Shire issue was the sole remaining condition for execution of the contract. I reject that evidence as regards matters of substance, and I make two observations in respect of it. First, Mr Talabani’s point appeared to be that the changes resulting from the VE exercise had not been incorporated formally into the Contractor’s Proposal for inclusion in the contract. The reason for that, however, is not that there was a problem over the VE changes—they had been agreed before March and well before, even on TTPM’s case, Kier began to have cold feet about the contract—but rather that TTPM had taken a very relaxed approach to the formalising of agreed points; it did not record that the VE package was outstanding in any minute of a monthly meeting after June, and it had to be reminded by Kier more than once that it had not produced a revised copy of the contractual terms to incorporate the agreed amendments. It is quite true that Kier had been slow to put the VE changes into the required form; but, as this was a simple task and there was (as I find) no sinister reason for Kier’s tardiness, this is precisely the sort of delay that TTPM ought to have been addressing with urgency. Second, the email of 26th August 2004 speaks for itself: where Shire apparently held the key to the conclusion of the contract, its demands would be circumvented by using letters of intent to completion of the works instead of a contract.

124. I find that Mr Talabani’s approach to the Shire issue resulted from his misapprehension that the Trust’s position was protected without a contract. It is possible, also, that he did not focus on the importance of the issue because his too relaxed approach to finalising matters of detail meant that he had not achieved that level of clarity in his own mind which would have enabled him to see that (to adopt an expression used at trial) all of the other ducks were indeed lined up in a row. At all events, once the importance of having a contract was understood, a reasonably competent and careful project manager would in my judgment have advised the Trust that it should pay Shire’s claim if a failure to pay it would prevent the contract being executed. Whether the Trust would have accepted that advice is a different question; though, as will appear below, I consider that it would have accepted the advice, if it had also been advised correctly as to the importance of having a contract.

125. I also consider that the isolation of the Shire issue could and should have taken place very much earlier than it did. The demand was made on 24th February 2004. TTPM
did not respond until 8th April and took a further five weeks to ask for a breakdown of the claim. That breakdown was received in the first week of June, but TTPM had not progressed the matter by mid August. In my judgment, it ought to have been obvious that the dispute with Shire had the capacity to delay the execution of the contract; therefore TTPM should have addressed it as a matter of urgency. Once it was apparent—as it should have been by the beginning of April 2004—that no other issue was preventing the signing of the building contract, the matter should have been resolved promptly, having regard to the fact that 17th April 2004 marked a full five months since the issue of the first letter of intent.

126. In the circumstances, I am prepared to accept that the introduction of the Shire issue in late February 2004 meant that it was within the bounds of reasonableness to advise the issue of a further letter of intent in respect of a short period, although it may be that the better course would have been to refuse any letter of intent after Revision B. TTPM should have advised that further letters of intent thereafter were inappropriate and should have brought urgency and focus to bear on resolution of the outstanding issues, all of which should have been clearly identified beforehand. In my judgment, all of the issues could have been dealt with in the 7½-week period that in fact elapsed before the subsequent letter of intent was issued in mid April; the fact that some of the issues dragged on until later does not mean that they could not have been addressed earlier. Even if that were wrong, there was plenty of time to deal with matters before the end of May and, in any event, well before September.

_Causation: execution of the contract_

127. Issues nos. 5, 6, 7 and 9, as formulated by Counsel, identified the following questions in the event of a finding of breach of duty:

5. If TTPM had given non-negligent advice and/or acted without negligence, what would have been the likely outcome on the balance of probabilities?

6. If the likely outcome was that a contract would have been executed by Kier in the form envisaged by the parties, would the Trust’s negotiating position at mediation and thereafter have been significantly stronger than it was?

7. If so, did the Trust lose the opportunity to obtain the benefit of that stronger position as set out in paragraph 35 of the Amended Particulars of Claim?

8. Even if Kier had executed the building contract would the Trust on the balance of probabilities have pursued a different result at mediation taking into account the matters relied upon by TTPM, namely:

(a) The risks of large scale construction disputes involving contractual arguments, extensions of time, loss and expense and variations.
(b) The fact that Kier’s costs of the job were in excess of £4,951.365, it had lost money on the job and was determined to fight its corner for a result it considered fair.

(c) The costs, and irrecoverable costs involved in resolution of the dispute.

(d) Kier’s experience of claims and disputes as a very large contractor well versed in such matters.

(e) The value of the works completed.

128. Issues nos. 5 and 6, as drafted, proceed on the basis that, in order to establish a cause of action in negligence and a right to more than merely nominal damages for breach of contract, the Trust must establish on a balance of probabilities that, if TTPM had performed in accordance with its duties, a contract would have been signed. At trial I questioned this, both as a matter of principle and because paragraph 35 of the amended particulars of claim put all matters of causation and loss on the basis of the loss of a chance; it was averred that there was “a substantial chance (amounting to a high probability) that Kier would have signed [the] contract” and “that Kier would have paid compensation to the Trust in respect of its claim for liquidated and ascertained damages”. Mr Fraser maintained the position that considerations of loss of a chance arose only in connection with the outcome of any dispute under the contract; the execution of the contract was a matter of causation that was properly to be considered on the balance of probabilities. However, Mr Bowdery contended that, despite the formulation of Issue no. 5, the question whether or not Kier would have signed the contract was to be considered in terms of the loss of a chance. Neither Mr Bowdery nor Mr Fraser developed his submissions on this point at length, though both helpfully referred me to the discussion in chapter 8 of McGregor on Damages (18th edition, 2009). I turn to consider this question, which is (as it seems to me) of some importance in this case.

Loss of a chance

129. The question under consideration at this stage is one of causation. Questions of quantification arise, if at all, at a later stage of the analysis.

130. It helps to reduce the Trust’s case to its barest essentials. TTPM should have advised the Trust that its position would be properly protected not by letters of intent but only by a signed contract containing the liquidated damages provision and that suitable efforts should be made to procure such a contract. The questions then arise (a) whether the Trust would have taken that advice and (b) whether Kier would have signed the contract. Subject to the answers to those questions, it is necessary to consider whether a signed contract would have materially improved the Trust’s position and to place a value on any such improvement.

131. In Allied Maples Group Ltd v Simmons & Simmons (a firm) [1995] 1 W.L.R. 1602 the plaintiff entered into a corporate takeover agreement with the vendor. The trial judge held that the defendant, the solicitors who had acted for the plaintiff in respect of the agreement, had failed to give to the plaintiff appropriate advice to the effect that a further provision was required in the agreement in order to protect the plaintiff against
the risk of certain liabilities to third parties. The trial judge also found that, if the appropriate advice had been given, the plaintiff would have sought to negotiate with the vendor with a view to obtaining contractual protection against those liabilities. Neither of those findings was disturbed on appeal. But the defendant contended that it could not be shown on the balance of probabilities that the vendor would have agreed to give the contractual protection sought. The Court of Appeal held that such a thing did not have to be shown on the balance of probabilities.

132. Although the facts of the Allied Maples case were different from those of this case, I do not accept that there is any distinction of principle between them, at least for the purposes of this stage of the analysis. In both cases the questions are: (a) what would the client have done in the face of advice that it required further contractual protection and (b), if the client had sought that further protection, what would the counterparty—in that case, the vendor; in this case, Kier—have done? The fact that one case concerned a solicitor and the other a project manager is irrelevant to any principled approach to the issues that arise. There is no distinction in principle between the chance of avoiding a liability and the chance of gaining a benefit: cf. the Allied Maples case, per Stuart-Smith LJ at 1611 F. Further, confusion will be avoided by putting to one side any difference there might be, on the facts of different cases, regarding the approach to the subsequent exercise of the quantification of loss—for example, the fact that in one case the relevant contractual protection might lead to the certainty of a benefit, whereas in another case it might lead to the chance of a benefit or to a combination of benefits and burdens.

133. In the Allied Maples case, in a lengthy passage beginning at 1609H, Stuart-Smith LJ, with whose reasoning and conclusions Hobhouse LJ agreed, said this:

“In these circumstances, where the plaintiffs’ loss depends upon the actions of an independent third party, it is necessary to consider as a matter of law what it is necessary to establish as a matter of causation, and where causation ends and quantification of damage begins.

(1) What has to be proved to establish a causal link between the negligence of the defendants and the loss sustained by the plaintiffs depends in the first instance on whether the negligence consists of some positive act or misfeasance, or an omission or non-feasance. In the former case, the question of causation is one of historical fact. The court has to determine on the balance of probability whether the defendant’s act, for example the careless driving, caused the plaintiff’s loss consisting of his broken leg. Once established on balance of probability, that fact is taken as true and the plaintiff recovers his damage in full. There is no discount because the judge considers that the balance is only just tipped in favour of the plaintiff; and the plaintiff gets nothing if he fails to establish that it is more likely than not that the accident resulted in the injury.

Questions of quantification of the plaintiff’s loss, however, may depend upon future uncertain events. … It is trite law that these questions are not decided on a balance of probability, but rather on the court’s assessment, often expressed in percentage terms, of the risk eventuating or the prospect of promotion, which it should be noted depends in part at least on the hypothetical acts of a third party ...
(2) If the defendant’s negligence consists of an omission, … causation depends, not upon a question of historical fact, but on the answer to the hypothetical question, what would the plaintiff have done if [the defendant had done what it omitted to do]? This can only be a matter of inference to be determined from all the circumstances. …

Although the question is a hypothetical one, it is well established that the plaintiff must prove on balance of probability that he would have taken action to obtain the benefit or avoid the risk. But again, if he does establish that, there is no discount because the balance is only just tipped in his favour. …

(3) In many cases the plaintiff’s loss depends on the hypothetical action of a third party, either in addition to action by the plaintiff, as in this case, or independently of it. In such a case, does the plaintiff have to prove on balance of probability, as Mr. Jackson submits, that the third party would have acted so as to confer the benefit or avoid the risk to the plaintiff, or can the plaintiff succeed provided he shows that he had a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages?

Although there is not a great deal of authority, and none in the Court of Appeal, relating to solicitors failing to give advice which is directly in point, I have no doubt that Mr. Jackson’s submission is wrong and the second alternative is correct.”

At 1614 E Stuart-Smith LJ continued:

“[I]n my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.”

134. In my judgment, the correct approach in the present case is accordingly as follows.

(1) In order to establish causation of loss, the Trust must prove on the balance of probabilities:

(a) that, if it had received appropriate advice, it would have acted in accordance with that advice;

(b) that, if it had done so, there would have been a real or substantial chance, as opposed to a speculative chance, that Kier would have signed the contract including the liquidated damages provision; but it does not have to prove that Kier would have signed the contract;

(c) that the signed contract would materially have improved the Trust’s position as against Kier;
(d) that the Trust would have availed itself of its improved position.

(2) If the Trust discharges the burden of proving that it has suffered loss, the court must assess the amount of that loss. The process of quantification of damages will require both (a) a valuation of the benefit that the Trust would have obtained if it had a contract and (b) an assessment of the size of the chance that Kier would have signed the contract.

What would the Trust have done if appropriately advised?

135. On the balance of probabilities, I find that, if it had received non-negligent advice, the Trust would have acted in accordance with advice and done what was necessary, for its part, to procure a signed contract.

136. Mr Fraser submitted, to the contrary, that the Trust would have acted no differently than it did but would have continued to issue further letters of intent and avoid confrontation with Kier.

137. Some reliance was placed on the evidence of Mr Talabani that he had given to Mr Bryan oral advice that the Trust should simply refuse to issue further letters of intent and that Mr Bryan had refused to countenance such a course. However, I reject Mr Talabani’s evidence on this issue, for reasons set out above.

138. Mr Fraser also relied in particular on the following passage from the cross-examination of Mr Bryan:

   “Q. You’ve got the Trust’s and the school’s best interests, obviously, at the forefront of your mind. If Turner & Townsend had said to you, ‘We’re feeling lucky, let’s call their bluff’, and you’d said, ‘What might happen?’, and they’d said, ‘Kier might leave’, you would have said, I assume, ‘I’m not prepared to run that risk’. Is that fair?

   A. Yes, that’s fair.

   Q. Because it would, we agree, be taking an irresponsible commercial risk, wouldn’t it?

   A. Quite so.”

Mr Fraser submitted that this way of putting the matter to Mr Bryan was entirely realistic. Kier did indeed threaten to leave the site, albeit not in connection with any failure to issue further letters of intent. And in his second witness statement Mr O’Callaghan said, with reference to the possibility that the Trust might have refused to issue a further letter of intent or to make a payment due to Kier, “I do not believe that Kier would have responded at all well to that type of approach … Kier would have had to suspend the works until either a valid letter of intent was issued or payment was made. … The inevitable consequence would have been further delays to the programme.”
139. I do not consider that this evidence will bear the weight placed on it. The reasons for my view are essentially those already mentioned in connection with breach of duty. There was no requirement for a confrontational approach of the sort assumed by the questioning of Mr Bryan or the statement of Mr O’Callaghan. Mr Bryan and the Trust would, in my view, have been very willing for TTPM to pursue the kind of focussed and professional approach that would have addressed matters with urgency but without the sense of confrontation or threat implied in cross-examination of Mr Bryan. Further, when considering Mr Bryan’s evidence and his likely conduct, it is as well to remember that Mr Bryan held the belief (in which, I find, he had been encouraged by Mr Talabani and which must naturally have tended to make it seem less urgent to procure a signed contract) that the provisions of the intended contract applied incrementally to the works proceeding under the letters of intent and, therefore, that the Trust’s position would be protected if the works continued under a series of letters of intent. Moreover, as I have set out already (paragraph 114), talk of “calling Kier’s bluff” has relatively little anchorage in the actual facts of the case.

140. A distinct question arises in respect of Shire’s claim for additional fees. It is clear that both TTPM and the Trust were reluctant to allow Shire to hold them over a barrel, so to speak. But I do not accept that it is likely that the Trust would have allowed this to be the matter that prevented execution of the contract. If the situation had been reached where the Trust could clearly understand that all matters both of substance and of form relating to the contractual issues had been signed off and the last outstanding matter was Shire’s fee claim, it would probably have done what was necessary to resolve that claim, including paying the claim in full, provided it had understood that the contractual terms would only apply if the contract were executed. It was one thing for TTPM to take the view that Shire should not be paid, because that would be capitulation without even the assurance that a contract with Kier would result. It would be quite another to maintain a refusal to pay when the consequence was that no contract could be achieved with Kier. The objection that the project had a “zero contingency” is of little weight; the amount in question is only about £10,000 in excess of what the Trust did in fact pay; the agreed variations to the agreed price had resulted in savings of some £30,000; and the Trust’s financial position was healthy. If Shire’s fee claim had been the outstanding issue, TTPM would properly have advised the Trust of the overriding importance of obtaining a contract and the Trust would probably have been willing even to pay Shire in full; although evidence in re-examination and with the benefit of hindsight must be viewed with caution, I accept Mr Bryan’s evidence to this effect in re-examination as being plausible in the light of the totality of the evidence.

What would Kier have done?

141. I find that, if the Trust had acted as I have found it would have acted, there would have been a real and substantial chance of Kier signing the contract (including the liquidated damages provision). The reasons for this finding will be set out when I consider the size of that chance in the context of the quantification of damages.
Would a contract have improved the Trust’s position?

142. I find that, if the contract had been signed, the Trust’s position would have been materially improved. Again, I shall explain my reasoning and set out my more detailed conclusions when I consider quantification of the claim. At this stage, it suffices to make three short observations.

143. First, a signed contract would have improved the Trust’s position because it would have put it beyond doubt that the contract between the parties contained the liquidated damages provision. In the circumstances that in fact obtained, there was only an uncertain argument that the parties’ conduct had given rise to a contract on terms that incorporated the liquidated damages provision.

144. Second, the value of the benefit of the liquidated damages provision depends in part on the susceptibility of that provision to challenge on the ground that it constituted an unenforceable penalty. The potential for challenge on that ground does in my view have an effect on the value of a signed contract, but in my judgment there would nevertheless have been a substantial benefit in having a contract containing the liquidated damages provision.

145. Third, even if the Trust had enjoyed the benefit of a signed contract containing an apparently valid liquidated damages provision, it would not have been axiomatic that its position was improved. In particular, it might be that there was a plausible case for extensions of time or for additional payments to Kier under the contract. I take these matters into account and shall say some more about them when dealing with quantum.

146. For the present, it suffices to say, in summary, that in my judgment the benefits to the Trust outweighed any countervailing factors.

Would the Trust have availed itself of its improved position?

147. I find that, if there had been a signed contract, the Trust would have taken advantage of its improved position when it came into dispute with Kier. It will be necessary to explain the reasons for this conclusion and to consider the relationship between the Trust’s likely conduct and Kier’s possible conduct when I turn to consider the assessment of quantum.

Conclusion on causation

148. It follows from my findings that the Trust has established that it suffered loss and damage as a result of the negligence and breach of contract of TTPM.

Quantification

149. I shall address quantification of the Trust’s loss by reference to the following main questions:

   (i) What were the chances of Kier signing the contract?
(ii) How would the Trust have benefited from having a signed contract?

(iii) Does TTPM have the benefit of an effective limitation clause?

(i) What were the chances of Kier signing the contract?

150. I find that, if TTPM had discharged its duty, there was a two-thirds chance that Kier would have signed the contract (including the liquidated damages provision) and a one-third chance that matters would have turned out much as they did, viz. with works proceeding throughout without a contract. Although it cannot be said that there was literally no chance that Kier would have walked off site and the Trust would have had to find a new contractor, I regard the chance of that happening as minimal; to the extent that such a chance might have existed, I do not regard it as substantial enough to warrant a specific allowance, having regard to the necessarily broad approach involved in the assessment of the chances of having or failing to have a contract. There is no good reason to suppose that any of the matters identified by Kier and TTPM as standing in the way of a contract were intractable. As explained below, I reject the contention that Kier had unexpressed reasons of its own for being unwilling to sign the contract. It remains possible that, when concentrated efforts were made to finalise the contract, some previously unidentified problem would have been identified and would have prevented the parties concluding the contract within a short timescale. In such circumstances, the strong probability is that the matter would have proceeded in much the way it did, with continuing efforts to resolve the outstanding issues. Only an unrealistic caricature of the appropriate stance for TTPM to have taken, coupled with a failure to appreciate that the parties would necessarily have remained responsive to changing circumstances, would militate against that conclusion.

151. Kier does not appear to have had any objection to the liquidated damages provision in itself. In November 2003 Kier had said that it wished to agree that the liquidated damages (that is, per week) did not exceed 1% of the contract price. For the Trust, TTPM had made clear that the level of liquidated damages was not open for negotiation. Kier did not raise the matter again in discussions with TTPM. When Kier wrote in connection with the contract documents on 23rd July 2004 (paragraph 52 above) it mentioned “the two-week LAD-free period” but said nothing about the liquidated damages themselves; it is a reasonable inference that Kier was not proposing to argue further about the level of liquidated damages. As Mr O’Callaghan accepted there appears to be nothing in Kier’s internal documents to show that the level of liquidated damages was regarded as a sticking-point.

152. The real question is whether, at a time when the parties might otherwise have been able to execute the contract, Kier was or would have been unwilling to execute it on the ground that the contract would be against its commercial interests—whether because of its exposure to the risk of being liable for liquidated damages or for some other reason.

153. The argument raised by TTPM is that at all material times Kier had one reason or another that would have prevented it from signing a contract. Until about the end of May 2004 there were a number of issues that, although resolvable in principle, could
not by then have been resolved: the need for evidence of the Trust’s funding arrangements; AIB’s request for a warranty from Kier; warranties and conditions of appointment between Kier and the design consultants. From about the end of May 2004, however, Kier was sufficiently aware of problems with the H5 works that it was looking for reasons to avoid signing the contract and would have been unwilling to sign the contract, because the risk of liability to pay liquidated damages would have been too great.

154. TTPM’s case in respect of this latter period was supported by evidence from Mr Hinchliffe. He expressed the opinion that by June 2004 the delays with the works were such that Kier would have been unwilling to execute a contract on the terms proposed by the Trust; any contract that Kier would have accepted would have been on terms that would have been less favourable to the Trust than the terms it eventually achieved at the mediation.

155. Mr Hinchliffe mentioned in particular the fact that, having previously approved a redesign of the housemasters’ building that excluded the steel frame from the construction, in April 2004 Shire had provided to Kier a revised design that provided for the introduction of additional steel. Mr Hinchliffe saw this as the reason why, after Kier had appeared close to signing the contract in early May 2004, it then failed to do so and sought instead further letters of intent. It was significant that Kier’s internal site reports began to show significant delays from about this time; the report for 18th May showed that the works were 2½ weeks behind schedule, whereas that for 21st June showed that, although the main building was only 1½ weeks behind schedule, the housemasters’ building was 10 weeks behind. By July the recorded delay on the housemasters’ building had increased to 12 weeks, and thereafter matters grew worse. Mr Hinchliffe’s conclusion was as follows:

“[H]ad a commercially astute contractor such as Kier been in a position to execute the contract [it] would not have done so on the basis of the terms currently on the table. I consider that, had Kier entered into a single stage design and build contract, at any time from late May 2004 onwards, it would have been, as a minimum, on the basis of an additional payment for 12 weeks prolongation costs plus relief from 12 weeks LADs.

By mid September … there were major delays with sub-contractors on the main block on cladding and curtain walling, M&E, plasterwork, joinery and decorations. By this time the factors for and against signing the contract were only tipped further against Kier being willing to sign. I consider the detriment to Kier far outweighed any discernible benefit.”

156. This evidence gained support from Mr O’Callaghan. He expressed the view that by the summer of 2004—in cross-examination he suggested that he had in mind a date earlier than August but was reluctant to be specific—Kier’s board of directors would have been “very cautious” about entering into the contract, even if all other issues had been resolved, because there was a possibility of delayed completion and even one week’s delay would have resulted in Kier’s entire profit on the works being wiped out. Similarly, Mr O’Callaghan laid significant emphasis on the reintroduction of steel into the design of the housemasters’ block as a factor that would have affected the timetable for the execution and completion of the works and would have made
Kier unwilling to execute a contract unless it incorporated an extension of time for completion of the H5 works.

157. I am not persuaded that there is significant merit in these contentions. Some preliminary observations are relevant. First, Mr O’Callaghan’s evidence was to the effect that it would always be a priority for Kier to have a contract rather than to proceed with letters of intent and that, if Kier “owned” the problems that had arisen under letters of intent (by which I think he meant had responsibility for them), it would still in the “vast majority” of cases be prepared to “live with” the difficulties and sign the contract. Second, Mr O’Callaghan was keen to deny any suggestion that Kier was given to “slippery” behaviour or that those acting for Kier in 2004 were at all likely to have engaged in such behaviour. Kier’s approach might be pedantic and even difficult, but it was not disingenuous or lacking in good faith. I have seen nothing in the evidence before me to lead me to any different conclusion. Third, Kier’s stance in its communications with TTPM was that it remained committed to signing the contract, albeit that particular issues—primarily warranties at first and the dispute concerning consultants’ fees later—were holding matters up. I do not consider that the evidence justifies a finding that this was a smokescreen for an unwillingness to sign the contract at all or that Kier, a reputable construction company, was acting in bad faith.

158. Mr O’Callaghan’s evidence that Kier would have been cautious about signing a contract from summer 2004 onwards has itself to be viewed with some caution. He became involved only in the summer of 2005, specifically with regard to the efforts to resolve the dispute that led to the mediation. In that respect he was instrumental in putting together Kier’s case for an extension of time and additional payment. Part of the work involved commissioning a retrospective programme analysis from Driver Consult, which concluded that the delay in practical completion was due in large measure to the reintroduction of steelwork into the housemasters’ block. That conclusion formed the basis of Kier’s stance at the mediation, in which Mr O’Callaghan was closely involved. However, as Mr Bowdery observed, one must be careful not to look through the wrong end of the telescope. Driver Consult’s analysis did not inform Kier in 2004, whatever may be its merits.

159. In my judgment, the contemporary documentation produced by Kier indicates that there is no good reason to suppose that Kier would have considered it to be against its commercial advantage to execute the contract at any time before September 2004. Two categories of document are of particular importance. The reports of Kier’s site team’s monthly “production meetings” monitored progress and programming issues and were prepared by those involved in the project on site. The contract review meeting reports were also primarily the responsibility of the site management team and would contain the input of the contracts manager, the project manager and the managing quantity surveyor, but they were discussed at board level with the construction director, the commercial director and the managing director.

160. The reports of the production meetings record fairly clearly that until September the site team considered the project on track for completion by the proposed contractual completion date. Delays were recorded, in particular with regard to the housemasters’ block; but these delays had minimal reference to the critical path for completion, and in July the report engaged in some re-programming in order to bring the housemasters’ block back in line with the rest of the works. It was in September that
a delay to the completion date was identified. As for the contract review meeting reports, these remained relatively positive throughout the relevant period; although the report for September, when taken in conjunction with the delays forecast in that month’s report of the production meeting, was sufficient to indicate that the contract would no longer be commercially attractive to Kier.

161. Mr O’Callaghan was disinclined either to accept the reports of the production meetings at face value or to conclude that they provided a proper guide to the view that Kier’s board of directors would have taken when presented with a request to sign a contract. I did not find his evidence on this point convincing. In cross-examination he questioned whether the reports represented anything more than a “statement of intent” and said that he suspected that those responsible for the reports “knew they’d got a bigger problem on than they would commit to paper”. He suggested that the site team was sitting “on the fence” because it was unwilling “to be the bearer of bad news to [the] board of directors”. In fact, the reports do not “sit on the fence”, unless by that is meant that they do not identify delays to completion which Mr O’Callaghan, with his knowledge of the Driver Consult analysis, thinks they ought to have identified. Nor is it clear why the site team should have failed to acknowledge apparent programming problems, in circumstances where the worst possible outcome would be for Kier to assume unrealistic contractual obligations because the site team had ignored reality. The clear inference to be drawn from the reports is that until September 2004 those responsible for carrying out the works considered that the project could be completed on time.

162. I am also not persuaded by Mr O’Callaghan’s contention that the optimism shown in the production meeting reports would not have got past Kier’s board. The contract review meeting reports, which were considered at board level, do not betray any awareness that the project was heading for the rocks. One of the people instrumental in the production of the reports was Simon Phillips, the managing quantity surveyor. When it was put to Mr O’Callaghan that the reports were presumably a fair reflection of Mr Phillips’ perception of where the project was, month by month, Mr O’Callaghan answered:

“I’m afraid I would—I go back to what I said earlier. I think Simon—and I know Simon—is sitting on the fence. If I had been there, I would have looked at this and said, ‘This doesn’t stack up to me. You are not reflecting the true level of risk here,’ because the flags are already there before this report. They’re already saying we are getting into delays and he’s not factoring that. He’s just—he’s excluding that from his report to give himself probably—to enable himself to sit on the fence, is my view of this.”

In fact, delays had been identified; the complaint apparently is that they were not reflected in the projected completion dates. But that is to ignore the fact that the identified delays were not thought to impact on projected completion. Why Mr Phillips should wish to ignore the true level of risk is unexplained and remains unclear to me, particularly as Mr O’Callaghan’s apparent belief is that Kier was not responsible for the delays. And I view with scepticism Mr O’Callaghan’s claims as to what he would have done had he been present: as a matter of fact, the directors who were present did not do what he says he would have done; and his views on the
hypothetical situation are informed by Driver Concept’s analysis which, it appears, was obtained at a cost of up to £30,000 but was not available to Kier in 2004.

163. Dr Aldridge analysed Kier’s documentation and disagreed with Mr Hinchliffe’s conclusions. In his opinion, the documentation showed that as late as September 2004 Kier expected no more than a four-week delay, for which it believed it had a good case for an extension of time. It was accordingly unlikely that concern over delay would have prevented Kier from signing a contract until October, when indeed it became aware of more significant delays for which no extension of time was to be expected. He disagreed fundamentally with Mr Hinchliffe regarding the relevance of the reintroduction of steel into the design of the housemasters’ block. Although Kier later claimed that this design alteration was of critical importance, it was in fact not a cause of actual delay at all and—as Mr Hinchliffe himself acknowledged—was not identified as a cause of delay in any of Kier’s contemporaneous documents; the delays mentioned in Kier’s internal reports for June and July related to slippage in the programme but not to delay of the final completion of the works in their entirety.

164. On these matters, Dr Aldridge’s analysis of the position as it stood in 2004 appears to me to be more consistent with the evidence than does that of Mr Hinchliffe and Mr O’Callaghan. I find that even in September 2004 Kier would probably have been willing to sign a contract in September, because it believed that it could justify the modest predicted delay to completion. In October Kier’s perception of the likely delays had significantly altered and it would probably not have signed a contract without substantial renegotiation of its terms.

165. Mention may be made of other arguments that were adduced to show that Kier would have been unlikely to sign the contract.

166. First, recognising (I think) in the course of cross-examination that Kier’s internal records did not contain any expressions of awareness that delays made it unwise to sign the contract, Mr Hinchliffe suggested that there was a perceptible change of tone in the emails being sent to TTPM by Kier after May 2004. Although programming issues are properly within the scope of expert evidence, questions regarding the tone of emails and the recognition by Kier that a contract would be disadvantageous to it are matters of fact for the court. I do not consider that there is any relevant change of tone in Kier’s communications or that the terms in which it wrote to TTPM reasonably lead to the conclusion that it had decided not to sign the contract.

167. Second, Mr O’Callaghan raised the question of the additional costs referable to the reintroduction of steel into the design of the housemasters’ block. That is not a matter that prevented Kier from continuing with the works under the letters of intent, including the final letter of intent to the full value of the contract. It might also be thought somewhat remarkable that TTPM should now identify a supposed impediment to the execution of the contract which they had failed to identify during the period to which the Trust’s claim relates, in circumstances where it would have been to Kier’s advantage to mention the suggested problem and not to remain silent about it. Although it is possible that increased costs of construction of the housemasters’ block would have impeded the execution of a contract, I have not been persuaded on the evidence that it was likely to do so.
Third, some limited reliance was placed on Mr Bryan’s oral evidence that at the mediation in 2005 Kier had stated that it had taken a commercial decision not to execute the contract. Mr Bryan was uncertain and vague in that recollection and I have no hesitation in finding that Kier did not say any such thing, at least if it amounted to confirming that during 2004 it had only pretended to be desirous of executing the contract while in fact having decided not to do so. Mr Bryan’s evidence on the point was not given with confidence as to his recollection. There is no documentary evidence to support it. No other witness who attended the mediation had a similar recollection, although it is to be expected that they would have done so if Kier had said what is alleged, as it would have been a striking position to adopt at a mediation. And Kier itself would have had no obvious reason to make such a statement, which would have been irrelevant to any position it could have wished to advance at the mediation and would have served to confirm in the Trust and TTPM any suspicions of Kier’s bad faith.

Fourth, it was said that Kier’s failure to sign the contract promptly for more than two years after the mediation settlement is clear evidence that nothing TTPM could have done would have been at all likely to induce Kier to sign a contract during the currency of the H5 works. I am not persuaded by that argument. The situations were very different and are not properly comparable. In the events that happened, the parties had an adversarial dispute, there was no ongoing commercial relationship and the contract was ultimately signed pursuant to a compromise agreement. Kier’s delay in those circumstances is not a good guide to its willingness to sign a contract in an ongoing commercial relationship, particularly when I reject, as I do, the suggestion that Kier was in anything other than good faith with regard to the intention to sign a contract. Further, it is apparent from the evidence of Mr Marsh that there were some genuine issues to be resolved in the aftermath of the mediation and that what he saw as Kier’s “opportunism” was not the sole reason for continuing delay.

(ii) How would the Trust have benefited from a signed contract?

In assessing damages for TTPM’s breach of duty, it is necessary to consider what difference a signed contract would have made to the Trust. This involves both analysing the hand that the Trust would have been dealt and considering how the Trust and Kier would have played the matter out. The contingencies relating to Kier’s conduct are not, in my view, conveniently to be dealt with in terms of the loss of a chance in the strict sense—the endless permutations could not meaningfully be assessed. Rather it is necessary to look at the value in the round and attempt to value the improvement in the Trust’s position. This involves asking, in a rather broad way, what is likely to have happened if there had been a contract.

I shall address the question how a signed contract would have benefited the Trust by reference to four matters:

(a) The argument that there was anyway an implied contract containing the liquidated damages provision;

(b) The possibility that the liquidated damages provision was liable to challenge as being an unenforceable penalty;
(c) The fact that Kier had arguments that it was not guilty of culpable delay and that it was entitled to further payment from the Trust;

(d) The extent to which the Trust would have exploited any advantage.

(a) An implied contract, containing the liquidated damages provision

172. Any assessment of the benefit that a signed contract would have provided will have to take into account the fact that the Trust had the existing benefit of an argument that the liquidated damages provision applied despite the absence of a signed contract. Such an argument might have rested on either of two grounds, each of which was considered by those acting for the Trust before the mediation took place.

173. First, reliance might have been placed on the terms of the letters of intent, which say that “payment shall be in accordance with the payment conditions” in the JCT contract. But it is far-fetched to suppose that those words suffice to incorporate the liquidated damages provision. The relevant part of the letters of intent is the express statement that neither party would be bound by the intended contract unless and until the contract was signed.

174. Secondly, reliance might have been placed on the conduct of the parties after the letters of intent had expired, in particular, Kier’s request for an extension of time, as giving rise to an implied contract on the terms of the unsigned JCT contract. I make the following observations in respect of this line of argument.


“In *The Aramis* [1989] 1 Lloyd’s Law Reports 213 at page 224 Bingham LJ cited with approval the following passage from the judgment of May LJ in *The Elli* [1985] 1 Lloyd’s Law Reports 107 at 115 to the effect that:-

‘No such contract should be implied on the facts of any given case unless it is necessary to do so: necessary, that is to say, to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect [that] business reality and those enforceable obligations to exist.’

Those principles were also endorsed and applied by the Court of Appeal in *Baird Textile Holdings Limited v Marks & Spencer plc* [2001] EWCA Civ 274. Mance LJ observed at paragraph 62 that that the test of any such implication is necessity is clear both on authority and also as a matter of consistency. It could not, he observed, be right to adopt a test of necessity when implying terms into a contract and a more relaxed test when implying a contract, which must itself have terms.”
(2) The fact that parties have been dealing on a “subject to contract” basis—I refer again to the express statement in the letters of intent that neither party would be bound by the intended contract unless and until the contract was signed—does not of itself exclude the possibility that the time will come when the necessary implication of their conduct is that they have waived the requirement of a formal written contract. This has been put beyond doubt by the decision of the Supreme Court in RTS Flexible Systems Ltd v Molkerei Alois Müller Gmbh & Co KG (UK Production) [2010] UKSC 14, [2010] 1 W.L.R. 753. Although that was a decision on a case that raised issues close to that under consideration here, I do not think that counsel referred me to it in argument. In RTS Flexible Systems the Supreme Court was at pains to make clear that whether or not a contract had come into existence would depend on the particular facts of each case. The decision post-dates the dispute between the Trust and Kier; it does not, I think, make new law, but it does perhaps serve to shine a brighter light on the argument under consideration than did the previous authorities.

(3) The Trust’s argument that there was an implied contract incorporating the liquidated damages provision had some plausibility. In February 2005 BW had felt that it was more likely than not to succeed, and in October 2005 very experienced construction counsel, Mr Justin Fenwick QC, expressed the view that, although the contractual issues were tricky, the Trust’s was probably the better argument. (It should be emphasised that the view was expressed informally, after only a quick look at limited papers. The relevant point is simply that, having received such a reaction from such experienced counsel, the argument cannot be dismissed as unworthy of consideration.) However, by May 2005 BW had come to the view that, regarding incorporation of the liquidated damages provision, the Trust “[did] not have much of a case” (attendance note of 4th May 2005). Further, in a careful written Opinion given on 25 October 2005 experienced junior counsel, Mr Ben Patten, (now Ben Patten QC), advised that it was “clear beyond any real doubt that the parties contracted on the basis of the letters of intent only” and that an entitlement to recover liquidated damages under the letters of intent was “extremely improbable”. By the time the Trust went to mediation with Kier, it was not in a position to rely with any confidence on the argument from an implied contract.

(4) I am also, with respect, of the view that Mr Patten’s opinion was compelling and that Kier probably took the view that little weight should be attached to the argument. It is unnecessary for the purposes of this judgment to analyse the issue or Mr Patten’s reasoning in detail. Even the decision in RTS Flexible Systems makes it clear that it will be exceptional for an implied contract to arise through conduct where the parties have been in the equivalent of a “subject to contract” situation. At all times Kier and the Trust clearly distinguished between the position under the letters of intent and the requirement of a signed formal contract. There was never a time when either party indicated the belief that the requirement of a signed contract had been dispensed with or was no longer operative or that a contract had been formed. The strongest argument for the implication of a contract is that, after the expiry of the period to which the final letter of intent was expressed to relate,
the parties conducted themselves as though in accordance with the terms of the JCT contract. However, this is explicable by reference to the fact that the execution of a contract remained both the parties’ ostensible intention and a continuing possibility and that the contract, when executed, would have retrospective effect. The fact that the period mentioned in the final letter of intent had expired does not make it necessary to imply a full contract on the JCT terms, particularly when the final letter of intent was clearly intended to cover the works up to the stage of practical completion. The need to resolve contractual issues was specifically mentioned by Kier just four days before the expiry of the time period covered by the final letter of intent: see paragraph 58 above. Further, the factual circumstances from the time of the expiry of the final letter of intent involved issues of delay as between the parties; in the circumstances it is the more necessary to bear in mind that the implication of a contract in a situation like the present is exceptional and that “[t]he court should not impose binding contracts on the parties which they have not reached” (RTS Flexible Systems at paragraph 47).

175. In conclusion, the availability of the argument that despite the failure to execute a formal contract there was an implied contract containing the liquidated damages provision does not significantly derogate from the advantage that would have accrued to the Trust from the execution of the formal contract.

(b) The liquidated damages provision: an unenforceable penalty?

176. Counsel identified the relevant issue as follows:

8. Had there been an executed contract, were the liquidated damages of £50,000 per week liable to attack by Kier and at risk of being unenforceable?

177. For TTPM, Mr Fraser submitted that the value to the Trust of the inclusion of the liquidated damages provision would have been much reduced by the likelihood that the provision was unenforceable as being a penalty. He observed that the level of liquidated damages had not been subject to negotiation—when Kier questioned it, the Trust made clear that the liquidated damages were not negotiable—and were very high.

178. Mr Fraser also relied on the evidence of Mr Bryan regarding the manner in which the liquidated damages had been calculated. In short summary, that evidence was to the following effect. The figure of £50,000 was calculated by reference to the weekly cost of providing alternative accommodation for the students in hotels and guest-houses. It was possible that such alternative accommodation would have been provided, although the Trust’s intention had been instead to house the students in the older accommodation at the College. The Trust had adopted its method of calculation as a convenient, though artificial, way of taking into account the real risk that it would suffer significant damages under an altogether different head which was difficult to quantify, namely the deleterious impact on recruitment of girls as students at the College. The calculation of liquidated damages that was prepared by Mr Bryan and Mr Talabani was intended to make some realistic allowance for both these heads of
loss—alternative accommodation costs and loss of recruitment—but was presented solely in terms of the former head because of the difficulty both of calculating the latter head and of presenting it intelligibly to a contractor.

179. In *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79, Lord Dunedin said at 86-87:

“The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage. … The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged as at the time of the making of the contract, not as at the time of breach. … To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. … It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach.”

180. A more modern statement of the concept of penalty was given by Colman J in *Lordsvale Finance Plc v Bank of Zambia* [1996] QB 752 at 762H:

“… whether a provision is to be treated as a penalty is a matter of construction to be resolved by asking whether at the time the contract was entered into the predominant contractual function of the provision was to deter a party from breaking the contract or to compensate the innocent party for breach. That the contractual function is deterrent rather than compensatory can be deduced by comparing the amount that would be payable on breach with the loss that might be sustained if breach occurred.”

181. In *Murray v Leisureplay Plc* [2005] EWCA Civ 963 Buxton LJ, with whose approach Clarke LJ agreed, referred with approval to Colman J’s statement and continued at paragraph 108:

“It is important to note that the two alternatives, a deterrent penalty; or a genuine pre-estimate of loss; are indeed alternatives, with no middle ground between them. Accordingly, if the court cannot say with some confidence that the clause is indeed intended as a deterrent, it appears to be forced back upon finding it to be a genuine pre-estimate of loss. That choice illuminates the meaning of the latter phrase. ‘Genuine’ in this context does not mean ‘honest’; and much less, as the argument before us at one stage suggested, that the sum stipulated must be in fact an accurate statement of the loss. Rather, the expression merely underlines the requirement that the clause should be compensatory rather than deterrent.”

I would, with respect, observe that the language of intention and purpose must be understood objectively rather than subjectively, as is shown by the terms in which Lord Dunedin and Colman J expressed themselves. (Cf. also *Bridge v Campbell Discount Co Ltd* [1962] A.C. 600, *per* Lord Radcliffe at 621-2.)
182. In my judgment, the evidence before me does not establish either that the liquidated damages provision was in truth a penalty or that the argument that it was a penalty would have been strong. My reasons are as follows.

(1) The burden of showing that the provision was an unenforceable penalty would have lain squarely on Kier.

(2) The courts lean in favour of upholding liquidated damages clauses in contracts freely entered into: see, for example, *Robophone Facilities Ltd v Blank* [1966] 1 W.L.R. 1428, *per* Diplock LJ at 1447 B-F; *Philips Hong Kong Ltd v The Attorney General of Hong Kong* (1993) 61 B.L.R. 41 (Privy Council) at 58-9; *Murray v Leisureplay Plc*, *per* Clarke LJ in propositions (i) and (vii) at paragraph 106. It is not to be forgotten that, although the contractor with potential liability to pay liquidated damages will have an interest in restricting the level of such damages, that party too may stand to benefit from a clear knowledge of the extent of its potential liability.

(3) It might perhaps be thought that the artificial manner in which the calculation of liquidated damages was carried out, as described above, was an objection to supposing that the provision was a “genuine pre-estimate of loss”. In my judgment, that is not so; Buxton LJ’s explanation of the expression “genuine pre-estimate of loss” squarely addresses the point. The method of calculation might indicate that the specified figure for liquidated damages is not an accurate calculation of loss, but it does not show that the purpose of the provision is deterrence rather than compensation.

(4) A closely related point was made by Lord Dunedin in the *Dunlop Pneumatic Tyre* case, just after the passage set out above:

“It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.”

It is true that in the present case the nature of the loss anticipated by the Trust was not within the knowledge of both prospective parties to the building contract. But the point remains that the difficulty of assessing the likely loss—and in my view such difficulty existed in the present case—does not count against the validity of a liquidated damages provision.

(5) Colman J suggested that the deterrent, rather than compensatory, function of the provision might be deduced “by comparing the amount that would be payable on breach with the loss that might be sustained if breach occurred”. This consideration does not lead me to consider the provision in this case to be a penalty, for two reasons. In the first place, the fact of a difference between the liquidated and the contractual damages would not of itself justify the conclusion that the provision is a penalty, although it is a factor that might indicate such a conclusion. See *Murray v Leisureplay Plc*, *per* Buxton LJ at paragraphs 110 and 111, and *per* Clarke LJ in propositions (iv) at paragraph 106.
Further, the comparison mentioned by Colman J is not primarily with the actual loss in the given case but with the “worst case scenario”; see the concluding sentence of the dictum of Lord Dunedin set out above. In this case, there was a potential loss, difficult to predict and to quantify, in respect of damage to recruitment; there was also, as I accept, a real though modest risk that the students would have to be accommodated at substantial expense to the College. In some cases, it will be possible to take a confident view that the stipulated figure bears no relation to any possible loss; in that case, it can safely be concluded that the figure does not relate to any possible loss but has another (penal or deterrent) purpose. In my judgment, this is not such a case.

Although the figure for liquidated damages was high, it was not so high as to set alarm bells ringing. Kier was willing to accept it, in accordance with its own rulebook. The contractor on the H2 and H3 works had accepted a provision for liquidated damages in the same or a slightly higher figure. More importantly, TTPM had been privy to the calculation of the figure and its insertion into the draft contract and repeatedly expressed the view in the later stages of the project that no issue arose. In this regard I reject the evidence of Mr Bullen that he advised Mr Bryan that the level of liquidated damages was “ridiculously high”; that evidence is inconsistent with the documentation recording TTPM’s views on the liquidated damages, with the fact that neither Clugston nor Kier baulked at the level of liquidated damages, and with Mr Bryan’s evidence, which I generally found measured, consistent and persuasive.

The fact that the Trust told Kier that the proposed provision for liquidated damages was non-negotiable seems to me to be irrelevant. A contract between two commercial entities does not cease to be a freely negotiated contract just because each side has its sticking-points. It is open to TTPM to contend that Kier would never have agreed to a contract containing the liquidated damages provision, but it would be absurd to contend that, if Kier had agreed to such a contract, it would not have done so freely as an equal commercial party.

I do, however, consider that in a dispute with Kier regarding entitlements under the contract the Trust would probably have discounted its recovery, in the event of settlement, to take account of the litigation risk on this issue.

(c) Weighing Kier’s other arguments in the balance

For TTPM, Mr Fraser submitted that it was wrong to look only at the potential advantage of a signed contract (the liquidated damages provision) without also taking into account the factors on the other side of the scales. In particular, he submitted that a signed contract would have made available to Kier two important arguments: first, that it was entitled to an extension of time beyond the two-week extension that TTPM had agreed, with the result that the potential application of the liquidated damages provision was limited on the facts; second, that Kier was entitled to payment in a substantially greater sum than the bare contract price. I shall address these possible arguments in turn.
The claim for an extension of time

(1) Kier advanced this claim at the mediation, with the support of an analysis from Driver Consult.

(2) The claim was analysed by Mark Edge, TTPM’s Senior Project Manager, in a “Current Status Report” dated 27th January 2006. Mr Edge did not give evidence at the trial, and there is nothing before me to indicate that either he or any other relevant person at TTPM has ever resiled from the analysis in that document. This is what Mr Edge wrote:

“3. Claims for an Extension of Time

3.1 Weather

The majority of time claimed for the Extension of Time is due to inclement weather. This application was initially submitted by Kier in their letter of 17th September 2004. Turner & Townsend responded to this letter on 1st October 2004 requesting additional Information. Kier subsequently issued a second letter on 30th November 2004 which requested a nine week extension of time. The amount of time claimed did not appear realistic and of the seven week’s attributed to inclement weather a five week delay was rejected. An extension of time granting a two week extension was therefore issued on 2nd December 2004.

3.2 Value Engineering

KN have requested an extension of time (letter of 20th November 2004) due to the inclusion of works in the Value Engineering Register. The re-design of various elements due to VE opportunities brought about difficulties in construction on site which KN claim added to the programme. For example during value engineering it was proposed by Kier’s team that the Housemaster’s houses could be built without the need for a steel frame. However Kier’s implementation team which had not been party to their value engineered re-design did not feel this was feasible and therefore the programme and costs to Kier appeared to be increased. The roof voids had been proposed to be reduced in size however this appeared to create problems during the construction phase in the routing of the services which clashed with the steelwork. As these works were included in KN’s Contractor’s Proposals they are not a valid reason for an Extension of Time.

3.3 Variations

The total variations on the project generated a reduction in the contract sum of £97,463. The variations instructed are of a minor nature. Works such as the joinery fit-out of the Boot Room (£6k) and the provision and installation of furniture (£152k) have been omitted from the contract which should have reduced Kier’s
programme overall. As such an extension of time due to variation is not considered valid.

...  

5 Conclusion  
The issue of the contract being in place is central. Were the contract in place and the LAD sum not considered penal it appears that the Abbey have a strong case for pursuing their claim.”

(3) The logic of TTPM’s primary case on causation at the trial—that Kier’s alleged unwillingness to sign the contract was due to the risk of liability for liquidated damages for delay—was entirely consistent with Mr Edge’s opinion regarding extension of time. The point is made neatly by Mr Hinchliffe (paragraph 102 of his supplemental report):

“… from late May 2004, and probably earlier, I believe Kier was aware of programme slippage, for which it realised it would probably struggle to justify the award of an EOT [extension of time].”

(4) Dr Aldridge has considered the causes of delay and Kier’s claim for an extension of time. It is unnecessary for the purposes of this judgment to rehearse that analysis in detail; it is consistent with Mr Edge’s opinion and the implication of Mr Hinchliffe’s remark set out above. Dr Aldridge’s conclusion is as follows (supplemental report, paragraph 1.3.17):

“The only EOT claim that appears valid is the claim for exceptionally adverse weather. TTPM’s 2 week award for this Relevant Event appears generous …”

(5) The claim for an extension of time cannot be discounted entirely, in circumstances where, as Mr Edge had anticipated in his Report, Kier was ostensibly keen “to vigorously defend [its] position”. The Trust would reasonably have taken it into account when negotiating a settlement or pressing on with protracted litigation. However, on the basis of the evidence before me I do not consider that the claim for an extension of time would substantially have diminished the value of the liquidated damages provision.

186. The claim for additional payment

(1) At the mediation Kier argued that it was entitled to payment significantly in excess of the amount mentioned in the letters of intent: in round terms, £5.6m as opposed to £4.9m. At trial there was very little consideration of that claim or of how it might have been advanced if there had been a signed contract. However, on the basis of the information before me I do not consider that the possibility of exposure to such a claim weighs heavily against the Trust’s position.

(2) The difficulty with Kier’s argument in the circumstances that obtained at the mediation was identified by Mr Patten: “The terms of the letter could not have been clearer—‘you will not be entitled to any further payment whether by way
of quantum meruit or otherwise.’ There is no room in these words for Kier to import an obligation on the part of the Trust to extend that figure by such sum as may be deemed reasonable in the light of Kier’s claim for loss and expense.” (Mr Patten considered and dealt—in my view, with respect, correctly—with the possible counter-argument, namely that works had extended beyond the date mentioned in the final letter of intent.)

(3) Mr Fraser submitted that, if the contract had been signed, the Trust would have been deprived of this knockout blow, which was based on the wording of the letters of intent. Far from being in a better position, the Trust (he says) would have obtained the dubious benefit of a possibly invalid liquidated damages provision at the price of exposure to a claim by Kier in a sum that was approximately equal to the Trust’s maximum possible recovery of liquidated damages.

(4) However, the fact that, in the circumstances that obtained, the letters of intent provided a straightforward answer to Kier’s claim for further payment does nothing to indicate that such a claim would have had greater merit if the JCT contract had been executed.

(5) In fact, Kier’s position statement at the mediation shows that its claim was advanced precisely on the basis that, because the JCT Standard Form of Building Contract With Contractor’s Design (my italics) had never been executed, Kier was not responsible for additional costs incurred by it in consequence of the VE exercise. The nub of the Trust’s argument was that there was indeed a contract, namely an implied contract on the JCT terms, and that Kier was responsible for design, just as it would have been under a signed contract; the only entitlement to payment in excess of the contract price under the contract would have been on the usual basis reflected in approved variations and the final account; and only very minor variations had been notified and agreed, resulting in a minimal reduction in the total price. (It might be noted, in this connection, that part of the delay in executing the contract pursuant to the agreement reached at the mediation was due to Kier’s attempt to negotiate an exclusion of liability in respect of pre-contract design of the Works.)

(6) In conclusion, if a contract had been signed, Kier’s claim for substantial additional payment might never have been brought; if brought, it would not have been given much weight by the Trust.

(d) The extent to which the Trust would have exploited the advantage

187. I do not consider it plausible to contend that, if the Trust had considered itself to be in a reasonably strong position vis-à-vis Kier, it would not have sought to exploit its position. Whether because it is a charitable trust or for other reasons, the Trust
appears from this entire story as a body that does not willingly forego its rights or give concessions. One example of that is the argument with Shire about additional fees. Another example is this litigation itself, which appears to have been pursued for the vindication of a legal entitlement rather than because of any “out of pocket” losses. Mr Fraser pointed to the fact that, when a dispute did indeed arise with Kier, the Trust was keen to mediate rather than to litigate or go to arbitration. I cannot draw any conclusions from that fact, not least because the Trust was following the advice of BW, who had come to take a pessimistic view of the Trust’s case on liquidated damages. In declining to follow TTPM’s more bullish advice to go to arbitration, the Trust wisely decided not to proceed on the basis of an unduly optimistic assessment of the prospects of recovering liquidated damages. I cannot infer that the Trust was unwilling to fight to enforce its rights.

188. At the same time, I do not think that it would be right to characterise either Mr Bryan or the Trust as intransigent. The example of the eventual compromise with Shire illustrates the Trust’s capacity for pragmatism. I also consider that the circumstances of the dispute with Kier would have been likely to encourage the Trust not to become embroiled in extended litigation. First, Kier would probably have fought its corner hard (though that is not to say without pragmatism) and might have attempted to argue that it was entitled to additional payment. Second, as I have mentioned, there is no evidence to suggest that the Trust’s actual losses were believed to be anything like £750,000; this would have been likely to make the Trust more amenable to compromise at a lower figure, particularly when it otherwise faced the prospect of an extended arbitration or litigation. In support of the submission that the Trust would have sought to vindicate its legal rights against Kier, Mr Bowdery pointed to the manner in which it has pursued the claim in the present case. The argument is valid so far as it goes, but it does not greatly advance consideration of the present issue: the circumstances of the present litigation are different from those of the putative dispute with Kier; and, of course, I know nothing about the terms on which the Trust would have been willing to compromise the present litigation.

189. In short, the Trust would in my judgment have looked for a substantive recovery from Kier but would not have pressed for the greatest possible amount of recovery if a reasonable settlement were available. It is possible that the arguments would have had to be resolved by determination in arbitration or at court. It is more likely that some compromise would have been reached. Both parties would have had expert assistance and legal advice and it is probable that they would have been pragmatic, as most parties in such a situation are. I see no reason to suppose that Kier would not have been willing to reach a reasonable compromise in the light of the merits of the parties’ respective positions.

190. In addition to these matters, I have regard to the financial position relating to the H5 works. The state of account between the Trust and Kier is indicated by the eventual mediated settlement, which provided for further payments by the Trust to Kier in the total sum of approximately £423,000, including the retention. This is a circumstance that would have been in the parties’ minds in any negotiation.

191. Weighing all these matters, I am of the view that the likely level of settlement of the dispute between Kier and the Trust would have been £350,000 in respect of liquidated damages. I also consider it likely that the price to the Trust of achieving the contract with Kier would have been a payment of a further £10,000 to Shire, in addition to the
£10,000 that it did in fact pay. Accordingly the value of the benefit of the settlement would have been £340,000.

192. Subject to what follows, damages for TTPM’s breach of duty should accordingly be two-thirds of £340,000. (The payment to Shire is to be taken into account at this stage, because it would be made only in circumstances where the contract would follow.) That is £226,667.

(iii) Does TTPM have the benefit of an effective limitation clause?

193. The Terms of Appointment that TTPM sent to the Trust with its fee proposal on 27th November 2002 contained a limitation of liability provision in clause 11. The two issues that arise in respect of that clause are, first, whether it was incorporated into the contract between TTPM and the Trust and, second, if it was incorporated, whether it was deprived of effect by reason of section 3 of the Unfair Contract Terms Act 1977.

194. Mr Bowdery submits that the Terms of Appointment were not incorporated into the contract between the parties. The Trust did not return a signed copy of them, although page 4 contained a place for the parties to sign in acceptance of the terms. There was no other express agreement to the terms, and indeed the Trust’s approval was said to relate to “the fees”: see paragraph 16 above. There had been no discussion concerning the Terms of Appointment and TTPM did not draw Mr Bryan’s attention to the proposal to incorporate new terms that differed from those which had applied to the H2 works and the H3 works. Further, the purport of the Terms of Appointment was unclear, as the document set out only the services to be provided by TTPM itself (as distinct from other parts of the Group) but gave a costs breakdown only for TTCM.

195. I reject that submission and hold that the Terms of Appointment did form part of the contract between the parties. It is true that the Terms of Appointment had a place, on page 4, for signature on behalf of both parties and that the form was not signed. It is also true that Mr Bryan mentioned only approval of the fees; he said nothing about terms. However, the fact that the document was not signed does not mean that there was no acceptance of it on an objective basis. In my judgment, it is unreasonable to separate the fee proposal from the eleven-page document of which the Terms of Appointment formed the first four pages. That latter document purported to relate to the entirety of the works to which the fee proposal related. Page 6 contained a “Fee Schedule and Programme” for the entirety of the works and fees: project management, quantity surveying, and planning supervision. Pages 5 and 6 set out the project management services. Page 11 set out the planning supervision services. Page 8 set out the cost management services; it simply did so in the form of a breakdown of the costs payable for each state of those services. Although the Terms of Appointment document deals with the various services in rather different ways, therefore, it is incorrect to suggest that it lacks coherence or clear reference to the entirety of the works.

196. Accordingly I would not divide the proposal as to fees from the proposal as to terms. If one asks, “Fees for what?” the answer is, “Fees for doing such-and-such work on such-and-such terms.” It is unfortunate that Mr Bryan did not read the Terms of
Appointment and did not satisfy himself that they were acceptable. In my judgment, however, the acceptance of the fees proposed by TTPM is objectively to be understood as acceptance of the basis on which those fees were proposed. It follows that the limitation clause was incorporated into the contract between the parties.

197. Accordingly, it is necessary to consider whether the limitation clause was effective. The clause itself is in these terms; I have italicised the most relevant parts:

“Liability for any negligent failure by Us [TTPM] to carry out Our duties under these Terms shall be limited to such liability as is covered by Our Professional Indemnity Insurance Policy terms. Liability is also limited to such a sum as it would be equitable for Us to pay having regard to the extent of Our responsibility for any loss or damage suffered by You on the basis that all other consultants, contractors and subcontractors who also have a liability shall be deemed to have provided contractual undertakings to You on terms no less onerous than these Terms and shall be deemed to have paid to You such sums as it would be just and equitable for them to pay having regard to the extent of their responsibility for any such loss or damage and in no event shall Our liability exceed the fees paid to Us or £1 million whichever is the less.”

I should also mention clause 5 of the Terms of Appointment:

“We shall take out a policy of Professional Indemnity Insurance with a limit of indemnity of £10 million for any one occurrence or series of occurrences arising out of any one event … and maintain such insurance for a period of 6 years from the date of completion of the services providing such insurance remains available in the market on reasonable rates and terms.”

198. The material parts of sections 2, 3 and 11 of the Unfair Contract Terms Act 1977 provide as follows:

“2. Negligence Liability

(2) In the case of other loss or damage [i.e. other than personal injury or death], a person cannot [by reference to any contract term] exclude or restrict his liability for negligence except in so far as the term … satisfies the requirement of reasonableness.”

“3. Liability arising in contract

(1) This section applies as between contracting parties where one of them deals … on the other’s written standard terms of business.

(2) As against that party, the other cannot by reference to any contract term—
(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach …

except in so far as … the contract term satisfies the requirement of reasonableness.”

“11. The ‘reasonableness’ test

(1) In relation to a contract term, the requirement of reasonableness for the purposes of this Part of this Act … is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.

(4) Where by reference to a contract term … a person seeks to restrict liability to a specified sum of money, and the question arises … whether the term … satisfies the requirement of reasonableness, regard shall be had in particular … to—

(a) the resources which he could expect to be available to him for the purpose of meeting the liability should it arise; and

(b) how far it was open to him to cover himself by insurance.

(5) It is for those claiming that a contract term … satisfies the requirement of reasonableness to show that it does.”

199. Pursuant to section 11 (2) of the 1977 Act, Schedule 2 to the Act gives “guidelines” for the application of the reasonableness test in cases of the sale and supply of goods, in the form of a non-exhaustive list of matters to which the court shall have regard. Among those matters are: the strength of the parties’ respective bargaining positions; whether the customer received an inducement to agree to the term; and whether the customer knew or ought reasonably to have known of the existence and extent of the term, having regard among other things to any previous course of dealing between the parties. Those guidelines have no statutory force in the case of the present contract, but many decisions of he courts have recognised that they are nonetheless of general usefulness in considering the application of the reasonableness test.

200. Mr Fraser did not seek to argue that the reasonableness test was not engaged or that, if the Terms of Appointment applied, the contract was not made on TTPM’s written standard terms of business. But he submitted that the limitation clause satisfied the requirement of reasonableness: its terms were clear and unambiguous and would have been understood by Mr Bryan if he had taken the trouble to read the Terms of Appointment; there was no relevant inequality of bargaining power; the Trust did not receive an inducement to accept the Terms and Conditions; and the Trust had time, opportunity and freedom to turn to other project managers, if it did not care to contract on the terms proffered by TTPM. Generally, he drew attention to the importance of leaving commercial parties “free to apportion the risks as they think fit.
… and respecting their decisions” (per Lord Wilberforce in Photo Productions Ltd v Securicor Transport Ltd [1980] A.C. 827, 843).

201. Although there is some force in the particular points taken by Mr Fraser, I reject the conclusion he urged upon me and hold that the limitation clause was unreasonable. The central factor that leads me to that decision is that the contract imposed on TTPM an obligation to take out professional indemnity insurance to a level of £10 million. The cost of such insurance would, as a matter of commercial reality, be passed on to the Trust within the fees payable. Yet the limitation clause would result in a limit of liability equal to the fees paid to TTPM, which is £111,321 (together with whatever might be awarded on the counterclaim). In the absence of any explanation as to why in this case TTPM should have stipulated insurance cover of £10 million despite a limitation of liability to less than £200,000, I consider it unreasonable that the contract purported to limit liability in that manner. The effect of upholding the limitation clause would be that, although the parties had contracted for the insurance of the risks and (implicitly) for the Trust to pay for that insurance, far the greater part of that insurance would be rendered illusory. I accept that the contract between the Trust and TTPM was freely made and that the limitation clause was plain to be read and easy to understand. Those facts are not determinative, however, either singly or together, and in my judgment they do not outweigh the considerations in respect of the interrelationship of the contractual provisions. Further, while Mr Bryan should of course have read the documentation more closely, it is not altogether surprising that he did not do so and that, in circumstances where he had asked simply for a fee proposal and where TTPM had not pointed out to him that they were seeking to include new terms in the contract for the H5 works, he assumed that the terms that had applied to the H2 works and the H3 works would simply “roll over”. In my judgment, in respect of the requirement of reasonableness, there is force in Mr Bowdery’s submission that it was “wrong that, after building up a relationship of trust from two previous projects, and knowing that the third project was not going out to competitive tender, TTPM should seek to introduce this Draconian term which was wholly inconsistent with the requirement for substantial professional indemnity insurance without specific notice and any discussion.”

202. In his written opening submissions, Mr Fraser also relied on the words in the central part of clause 11 (shown without italics in the quotation above) and contended that any liability on the part of TTPM must be limited by applying the assumption that Kier had paid the Trust “for those matters for which Kier was responsible”. Insofar as I can understand that submission, it is as much as to argue that, where TTPM is sued for negligent failure to ensure that Kier had a liability (viz. for liquidated damages), TTPM’s liability is to be reduced by the amount of the liquidated damages. That is clearly not what the words in question mean; in broad terms, what they are seeking to do is to limit TTPM’s exposure by taking into account the contribution that would justly be required of other wrongdoers liable for the same damage. Mr Fraser did not raise this point in his closing submissions and I need say no more about it.

Summary and conclusion on the claim
203. Accordingly the Trust is entitled to recover £226,667 on the claim.

The Counterclaim

204. TTPM’s counterclaim is for additional fees in respect of its extended involvement with the H5 works and the assistance it provided to the Trust, at the request of the Trust and its solicitors, in its dispute with Kier at the conclusion of the H5 works. There are four relevant invoices, in the total sum of £53,435 net of VAT (£62,730 inclusive of VAT).

205. When the claim for additional fees was first intimated to the Trust in February 2005, Mr Bryan accepted the principle of the claim but not the amount and he suggested that payment be contingent on the recovery of liquidated damages from Kier, a suggestion that TTPM rejected (paragraph 63 above). The correspondence shows that during 2005 the principle that TTPM was entitled to additional fees was not in question.

206. The Trust does not dispute that TTPM carried out the work to which the counterclaim relates. However, for the Trust, Mr Bowdery submitted that TTPM was not entitled to further payment, because the work to which the additional fees relate only became necessary because of TTPM’s negligence. I rejected that submission. Insofar as the counterclaim relates to TTPM’s extended involvement with the H5 works, I see no good reason to suppose that the failure to procure a contract is relevant. Insofar as the counterclaim relates to work done in connection with the dispute with Kier and the mediation, I consider that the existence of a contract would have affected the relative merits of the arguments in the dispute with Kier and at the mediation but would not have prevented either the dispute or the need for a mediation.

207. Mr Hinchliffe considered the counterclaim in his first report and concluded that the proper amount of additional fees was £37,167—some £25,000 less than the amount claimed by TTPM. The reason for that conclusion was, in essence, that the original fee proposal was properly to be understood as including fees for services provided during an overrun period at the conclusion of the works; therefore the additional fees have been claimed for a longer period than is appropriate. I accept Mr Hinchliffe’s opinion and the reason he gives for it.

208. Accordingly there will be judgment for TTPM on the counterclaim for £37,167.