Neutral Citation Number: [2003] EWHC 3124 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN’S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Before:
His Honour Judge Humphrey Lloyd QC

B E T W E E N

MASTONS (a firm)
Claimant/Part 20 Defendant

and

(1) WD KING LIMITED
(2) PROSPECT GARDENS (BATH) LIMITED
Defendant/Part 20 Claimants

Richard Wilmot-Smith QC and Sean Wilken appeared for the defendant and Part 20 claimants, instructed by Fenwick Elliott.
Derek Sweeting QC appeared for the claimant and Part 20 defendant, instructed by Masons.

JUDGMENT
Introduction

1. This action was commenced by the claimant, Masons, a well-known firm of solicitors, to recover £37,093.35 as the balance of its fees for professional services. The fees so far paid come to more than £250,000 as the work was extensive. The first defendant, W D King (WDK), is a property company, as is, nominally, the second Part 20 claimant (PGBL). The latter are the effective claimants. I shall use the term WDK to cover both (unless the context indicates that it is only the first defendant). This Introduction provides a summary of the case. I shall then set out certain extracts from the pleadings and the issues, before considering the facts relevant to the issues and providing answers to those issues.

2. In 1999 Masons was retained to advise and to prepare documents for the purposes of a development at Prospect Gardens, off Wells Road, Beechen Cliff, Bath. The project was to build new accommodation for about 220 students at the University of Bath. It was joint venture of which WDK and another company City and County Ltd were the leading members. WDK was to provide the money. PGBL was a SPV (Special Purpose Vehicle) formed by the joint venture and was to be the employer of the contractor. On completion the University would take a lease of the development from PGBL, but the latter's interest would at the same time be assigned to an investment fund so that the University would become its tenant. The partner at Masons who was first contacted was Frances Alderson, but the partner principally responsible was Mr Mark Collingwood who is based at the firm's Bristol offices. He had then over twenty years' experience as solicitor specialising in construction (in which field Masons' reputation is largely founded). He became a partner in 1985. He was assisted by Mrs Alyson Houghton (then Alyson Howells as I shall call her in this judgment) who is a Senior Associate. She qualified in 1989 and worked at Cameron Markby Hewitt, Simmons and Simmons and Eversheds, throughout specialising in non-contentious construction work, before joining Masons. Ms Beverley Pike also worked on the matter but was not really involved with the drafting of the building contract.

3. The University wanted to have the buildings (there were three sections or phases) completed in good time for the start of the academic year in 2000. If Section 2 (the main accommodation) was not ready by then the University would not pay rent until the following year. It was therefore important to WDK that the building work was finished on time. Ideally the building contract should have rendered the building contractor liable to pay damages equivalent to the loss of a year's rent if the works were finished late. That was of course commercially unrealistic (if only because any contractor would simply add to its tender price an amount to offset the risk of such liability) but the building contract did contain some special provisions which were intended to provide protection to WDK. The contract was to incorporate the GC/Works/1 Standard Form, Single Stage Design and Build Version (1998) as it was favoured by WDK. It had to be adapted for use on this project by a private developer. One of the special provisions originally drafted by Masons was a replacement for condition 38. In its final form (after the inclusion of wording proposed by the contractor's solicitors, Eversheds) the relevant part read:

“In the event the PM is of the opinion that the Contractor’s rate of progress in carrying out the works is likely to prejudice completion of the works or any section by its date for completion, and to the extent that in the opinion of the PM this is due to a cause which is not listed in Condition 36(1), the PM, acting reasonably, and taking account of the Contractor’s representations may instruct the Contractor as to the measures he requires the Contractor to take to retrieve the position and the Contractor shall comply with the same at no cost to the Employer. Without prejudice to the generality of the foregoing, such instructions may include the requirement to re-sequence works, to accelerate completion of the works and/or require the Contractor to increase his on and off site resources”.

In essence therefore the Project Manager had a new power to issue an instruction to re-programme or re-sequence or deploy additional resources if delay to completion looked as if it might occur. The contractor would have to bear the cost of compliance. Accordingly all the contractor could jib at was whether the instruction was reasonable (the amendment added by Eversheds).
The building contract was made on 19 October 1999 between PGBL and Jarvis Construction (UK) Ltd (Jarvis). The contract sum was £5,750,000. The Project Manager was Paul Whitley Architects ("PWA"). The contract also contained Condition 55 which as amended (the new wording is in italics) read:

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55 Liquidated damages

(1) This Condition applies where a rate of liquidated damages for any delay in the completion of the Works or a Section has been specified in the Abstract of Particulars.

(2) If the Works or a Section are or is not completed by the relevant Date for Completion, the Contractor shall immediately become liable to pay to the Employer liquidated damages in accordance with the Abstract of Particulars. Nothing herein shall prevent the Employer being entitled to such damages prior to certification of completion of the Works or any Section under Condition 39.

(3) Subject to Condition 50A (Withholding payment), the Employer may deduct any amount of liquidated damages to which he may be entitled under this Condition from any advances to which the Contractor may otherwise be entitled under Condition 48 (Advances on account).

(4) If the sum due as liquidated damages exceeds any advance payable to the Contractor under Condition 48 (Advances on account), the Contractor shall pay to the Employer the difference. That sum shall be recoverable in accordance with Condition 51 (Recovery of sums).

(5) No payment or concession to the Contractor, or Instruction or VI at any time given to the Contractor (whether before or after the Date or Dates for Completion), or other act or omission by or on behalf of the Employer, shall in any way affect the rights of the Employer to deduct or recover liquidated damages, or shall be deemed to be a waiver of the right of the Employer to recover such damages. The rights of the Employer to deduct or recover liquidated damages may be waived only by notice from the Employer to the Contractor.

(6) The Contractor hereby irrevocably accepts and agrees:

   (a) that having regard to the purpose for which the Works are required and the Employer's obligations and liabilities under the Agreement for Lease and the Development Finance Agreement, liquidated damages calculated in accordance with paragraph (2) represent reasonable pre-estimates of the loss and damage likely to be sustained by the Employer in the event the Works or Sections 1, 2 and 3 are not completed by the Date or Dates for Completion and in particular if the Works (except Section 3) are not completed by 30th August 2000.

   (b) that no challenge shall be made or sought to be made to the liquidated damages by the Employer, or by the Contractor on the basis that they are a penalty or that they do not represent a genuine pre-estimate of the Employer's losses arising from delay.

   (c) That pursuant to paragraph (2) of the Abstract of Particulars, the Contractor's liability to pay or allow up to the sum of £300,000 by way of liquidated damages accrues irrespective of the extent of delay beyond the Date or Dates for Completion where completion occurs after 30th August 2000.
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The Abstract of Particulars provided that Section 2 was to be completed by 28 August 2000; Section 1 was due to be finished by 23 December 2000 and Section 3 by 7 January 2001. It also provided that £1500 per week was payable as liquidated damages for delay in the completion of sections 1 and 2 up to 30 August 2000 and £3000 per week for delay to section 3 in respect of any delay after the Date for Completion. It then said: "Thereafter in respect of Sections 1 and 2 and.... subject always to Condition 55(2), a single lump sum... “ and then four graduated amounts, starting with £300,000 and decreasing to £200,000 were provided as payable, depending on how many blocks were incomplete between 1 September and 31 December 2000. Thus the contractor would pay no more than these maxima should the relevant work be finished later.

5. There was also a Development Finance Agreement dated 19 October 1999 (DFA) between (1) WDK, (2) PGBL, (3) Unilease Jersey No 3 Ltd (UJ3) the nominal developer (and funder) and (4) Unilease Jersey No 4 Ltd (UJ4) the funder, as well as an agreement for a lease (also dated 19 October 1999) between UJ3 and the University. The arrangements are conventional (at least superficially). The agreement with the University enabled it to take possession up to August 2003. The lease was for 30 years. If the accommodation was not ready for the University, WDK would have to fund the project for an extra year. That would cost about £680,000, i.e. more than the maximum that it might recover from the contractor.

6. For reasons which will appear, the work was delayed. The Project Manager endeavoured to operate condition 38 (by issuing an instruction PMI 003) but any steps that Jarvis may have taken did not achieve the end desired by WDK. The work finished late. Practical completion was not certified until 21 August 2001. By that time WDK/PGBL, having taken advice from other solicitors and from leading counsel, had claimed the lost rent from Jarvis as damages for failure to comply with Condition 38. On 25 May 2001 PGBL referred the ensuing dispute to adjudication. On 7 August 2001 the adjudicator, Mr Keith Pickavance, issued his decision. In it he decided that Jarvis “did not make any bona fide effort to comply with PMI 003 by accelerating progress in order to achieve the completion dates specified, they did not comply with PMI 003, which was properly issued, and hence were in breach of contract”. He accepted WDK’s case that it could recover unliquidated damages for breach of Condition 38 but not if they were damages for delay in completion as that liability was exclusively governed by the provisions of Condition 55. WDK although dissatisfied with the decision did not refer its claim to arbitration as Mr Pickavance was named in the contract as both adjudicator and arbitrator.

7. WDK has therefore brought these proceedings to recover what it maintains that it should have recovered from Jarvis had the contract been drawn up properly by Masons, primarily the losses of “opportunity” suffered as a result of not receiving the right advice from Masons about the risks of not recovering unliquidated damages. (The claim also extends to other allegations of professional negligence by Masons in relation to other aspects of the transactions and to other parts of the suite of contracts.)

The Basic Claims as Pledged

8. The amended particulars of claim say, amongst other things:

"14 The following were express and/or implied terms of Masons’ said retainer and/or retainers:

(a) Masons would draft and/or advise King upon the drafting of the agreements necessary to secure

(i) the development of the Site by the construction of four accommodation blocks and associated external works;

(ii) the letting of the said development to the University; and

(iii) ......
(b) when requested to do so by King, PGBL or PWA on their behalf, Masons would provide legal advice and/or services in connection with other aspects of the development;

(c) whether or not requested to do by King, PGBL or PWA on their behalf, Masons would advise King and PGBL on all matters relevant to their retainers(s), insofar as such advice was and/or appeared to be reasonably necessary;

(d) in so drafting, advising or acting, Mason would:
   (i) take all reasonable steps to further King's objective of avoiding risk where possible and otherwise minimising risk where it was unavoidable; and
   (ii) take due account of King's lack of experience of and expertise in a development of this size and nature;
   (iii) warn King and/or PGBL of any significant or material risk to them in the contracts they would be entering into.

15. Further, it was an implied term of Masons' said retainer(s) (either implied by operation of law and/or in order to ensure business efficacy) that Masons would exercise the care and skill reasonably to be expected of solicitors with specialist experience and expertise in the areas of commercial property (including development finance) law and construction law in performing the said retainer(s).

16. Further, or alternatively, Masons owned to King and to PGBL (and to each of them) a duty of care at common law in the tort of negligence, which was both co-extensive and concurrent with the said implied contractual duty of care.

17. In purported performance of their said retainer(s):

   (a) Masons drafted and/or advised King and PGBL upon the draft terms of:
      (i) the Development Finance Agreement ("the DFA");
      (ii) the Agreement for Lease ("the AFL") and
      (iii) the Building Contract ("the Building Contract"),
      which said agreements are further particularised below (and to which King and PGBL will refer for their full terms and true effect); and

   (b) Masons advised PWA, on behalf of PGBL, upon the terms of Project Manager's Instruction No 003, which PWA issued under the Building Contract on 17 May 2000.

67 (i) Masons failed to draft the building contract and/or to advise [WDK] that the building contract should be drafted as expressly to permit PGBL to recover unliquidated damages in the event that Jarvis was in breach of an acceleration instruction issued by the Project Manager under Condition 38. For the avoidance of doubt, as pleaded in the Reply, King's and PGBL's case is that Masons ought properly to have drafted the building contract so as to expressly provide for unliquidated damages to be recovered by the employer in respect of the failure to mitigate and/or to eliminate delay by acceleration as instructed by the Project Manager.

67 (ii) At the least, Masons ought properly to have warned of the risk of the irrecoverability of the principal (delay) loss which [WDK] were likely to incur as a result of any breach of Condition 38. ...“

67A. In the alternative, PGBL would not have entered into the Building Contract with Jarvis if it had been advised that there was a significant risk and/or a material possibility that a breach by Jarvis of its obligation in respect of acceleration under clause 38 would not give PGBL the right or might not enable PGBL to recover unliquidated damages for failure to
mitigate and/or to eliminate any delay by accelerating, where so instructed by the project manager, in addition to any right to recover liquidated and ascertained damages.

67B. Further and in the further alternative PGBL lost the opportunity to decide whether or not to proceed with Jarvis as contractor, whether on alternative terms, or at all.

68. Masons’ failure (either in breach of contract and/or negligently) so to act or advise caused PGBL to lose the opportunity to contract with Jarvis on the basis that Jarvis would be liable to pay unliquidated damages in respect of loss caused to PGBL by Jarvis’ breach of condition 38. King and PGBL contend that Jarvis would have contracted on that basis had PGBL required it to do so, since:

(a) under condition 38, Jarvis would be required to comply with an acceleration instruction only if the same were issued reasonably and taking into account Jarvis’ representations in respect thereof;

(b) liability for unliquidated damages for breach of an acceleration instruction would not have undermined the liquidated and ascertained damages provisions of the Building Contract. On the contrary, unliquidated damages would have been recoverable only in the event that Jarvis failed to take the measures expressly specified in an acceleration instruction. Unlike Jarvis’ liability to pay liquidated and ascertained damages under condition 55, its liability to pay unliquidated damages would not necessarily arise in the event that the contractual completion dates were missed as a result of delay for which Jarvis was responsible. Rather, provided that Jarvis took the measures specified in an acceleration instruction, no liability whatsoever for unliquidated damages would arise, even if such measures were wholly and/or partly ineffective to retrieve delay. In the premises, the risk that Jarvis would be in breach of an acceleration instruction would have been a risk wholly within Jarvis’ own control and Jarvis would have accepted the same if invited to do so.

PGBL’s loss and damage

69. By reason of Masons’ said breaches of contract and/or duty, PGBL has suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE

Masons’ said breaches of contract and/or duty in relation to the terms of the Building Contract caused PGBL to lose:

(a) the opportunity to recover unliquidated damages for delay from Jarvis for Jarvis’ breaches of condition 38 of the Building Contract. The value of such opportunity was equal to PGBL’s losses as set out at paragraphs 49 to 58 inclusive above and as more fully particularised in Substitute Appendix D herewith and Appendices F to G hereto; and

(b) the legal and associated costs of PGBL’s reasonable attempts to mitigate its said loss by its claims against Jarvis in the adjudication and in the arbitration. Such costs amount to £309,580.52 (excluding VAT), as more fully particularised at Appendix H.”

The Issues

9. On 12 March 2003 I ordered that the following issues should be tried:
1. Did Masons enter into a contract of retain er with PGBL as alleged in paragraph 4(a) of the Amended Defence? (Amended Defence paragraph 4(a); Amended Counterclaim paragraphs 9-12 inclusive; Amended Defence to Counterclaim paragraphs 8-11 inclusive.)

2. Did Masons owe PGBL a duty of care as alleged in paragraph 16 of the Amended Counterclaim? (Amended Counterclaim paragraph 16; Amended Defence to Counterclaim paragraph 18.)

3. Did the building contract permit PGBL to recover unliquidated damages for delay in the event that Jarvis was in breach of an acceleration instruction issued by the Project Manager under Condition 38? (Amended Counterclaim paragraph 67(i); Amended Defence to Counterclaim, paragraphs 42.2, 51 and 52.)

4. Were Masons under any of the duties alleged in paragraphs 14(a)(iii) and (b)-(d) of the Amended Defence and Counterclaim and, if so, which of them?

5. Subject to the answers to issue 4, were Masons in breach of contract and/or in breach of their duty of care at common law as alleged at paragraph 67(i) and (ii) of the Amended Counterclaim? (Amended Counterclaim paragraph 67(i) and (ii); Amended Defence to Counterclaim paragraphs 42.1, 42.4.1, 43-50 inclusive and 54.)

6. If the answer to question 5 is “yes” did such breach cause PGBL to lose the opportunity to:
   (i) contract with Jarvis on the basis that Jarvis would be liable to pay unliquidated damages for delay in respect of loss caused by PGBL by Jarvis’ breach of Condition 38 (Amended Counterclaim paragraphs 68, 69(a); Amended Defence to Counterclaim paragraphs 54.1 and 55; and/or
   (ii) decide whether or not to proceed with Jarvis as contractor whether on alternative terms or at all (Amended Counterclaim paragraph 67(b).)

7. If the answer to either or both of the questions at issue 6 is “yes”, would PGBL have taken advantage of this opportunity or those opportunities if it or they had been available? (Amended Defence to Counterclaim paragraphs 54.2 and 56.)

8. Did the Adjudicator decide that:
   (a) had Jarvis taken accelerative measures which it was within Jarvis’ power to take, it would have achieved Completion of the Works by the dates referred to in PMI 003;
   (b) the Building Contract did not permit PGBL to recover unliquidated damages in respect of losses caused by Jarvis’ breaches of PMI 003;
   (c) on the true construction of the Building Contract PGBL’s recovery was limited to liquidated damages under Condition 55 (Amended Counterclaim paragraph 60.)?

9. If the answer to issue 5 is “yes”, and assuming without deciding, that Jarvis were in breach of PMI 003 to the extent held by the adjudicator, did Masons’ breaches of duty cause PGBL to lose the opportunity to recover unliquidated damages for delay from Jarvis’ breaches of Condition 38 of the Building Contract? (Amended Counterclaim 69(a).).

**Facts**

10. WDK is a family company in that Jeffrey Rosenbaum owns 75% of it and since 1991 has, through another company, Jeffrey Management Limited, been its sole director. Jeffrey Management Ltd is also a director of PGBL. Mr Rosenbaum (who was called) explained that this type of development was completely new to him. He had not before been involved in building new property. From 1957 when he joined the family business, he had only dealt with residential property, mostly renovating a house or converting it and renovating it, letting it or selling it. He said that it was only after this litigation had begun, that he had “begun to understand what on earth [condition] 38
means, but in those days I had never heard of it, I had never heard words such as an acceleration clause. When you are renovating a house you do not come across that sort of jargon”. Equally, when dealing with a later period in 1999, he said that he had never come across terms such as liquidated and ascertained damages before “in dealing with Mr Joe Bloggs, the builder, so it was a little bit foreign to me but I knew enough for it to be something between the difference between what you could actually lose and something which you would receive from the builder towards the loss”. He also said that, when his father died in 1990, Jayant Sanghvi, who was then his accountant, advised him that it would be wise not to spend too much time on property matters. He regarded Mr Sanghvi as “a very good accountant... a genius”. In 1991 he and his brother split the business, leaving him as the only one in the family to run the day-to-day affairs of meetings with bank managers and trusts “and all this complicated stuff, which my brother who was an accountant used to deal with”. It was therefore suggested that he ought to have a partner to assist him with property matters so that is how he came to know Michael Taylor, “an entrepreneur”, who was recommended to him by his brother’s best friend. Mr Taylor’s company was City and County Ltd. Mr Rosenbaum therefore needed people with expertise to advise him, such as Paul Whitley, who was an architect, and left the day to day direction of the project to others, led by his joint venture partner, Mr Taylor. He agreed that he thus relied on Mr Whitley, Masons, Mr Taylor and Mr Sanghvi. Mr Rosenbaum was asked about what Mr Whitley had said in his first statement:

"Q: ‘… I believe that Jeffrey Rosenbaum generally had no real understanding of the risks and calculations and was strongly relying upon Jayant Sanghvi and Michael Taylor to tell him that things were all right or not, what was the current financial projection of his likely profits and what were their recommendations.’

Is that right?

A. I am not ashamed to admit, that is absolutely true.”

Mr Rosenbaum said that the land in Bath had been bought either to sell on, once planning consent had been obtained first, or to develop but not by him but by Mr Taylor. At the end of his statement Mr Rosenbaum said that he “was, and always have been highly risk averse.” He made this clear in his evidence to me. For example, he said that he asked one of his advisers, Mr Max Bloch (see below), “to write to Masons to point out that we are real scaredy cats, nervous and wet behind the ears, and can you please protect us and highlight any dangers, protect us as much as you can, but if you cannot, do your best and warn us”. All this is undoubtedly true, but, as will appear, Mr Rosenbaum’s interests were not always safeguarded as they ought to have been. By all accounts, and from his evidence to me, he was clearly very nice and trusting, seemingly to the point of naivety.

11. The site had been found in 1995 by Mr Alan Meek, a business partner of Mr Charles Isaac, a property consultant and developer. Mr Isaac (who was called) said that, since he could not buy it, he brought in Mr Taylor and Mr Taylor suggested it to WDK as a joint development. In exchange for the introduction and “in lieu of acquisition and disposal fees” Mr Rosenbaum agreed with Mr Meek and Mr Isaac and the latter two would have a 16% share in the profits. However in late 1999 Mr Isaac sold his interest to Mr Rosenbaum. The site was bought for £485,000 in late 1995. There were three plots. The development for the University was on one of them and was known as Phase 1. After Mr Isaac sold out he was re-employed to work on the development of the other plots, Phases 1 and 2.

12. One of Mr Rosenbaum’s advisers was Mr Max Bloch. He gave evidence. He had been a solicitor in private practice as a commercial property lawyer. In 1991 he joined WDK as Group Estates Manager. He is also a company secretary of PGBL. PGBL was formed in 1998. Mr Bloch’s role is and was to look after the property side of WDK’s business. However once planning consent for the site had been obtained Mr Sanghvi took over its management since according to Mr Bloch, it became a financial matter. Mr Bloch’s role included managing external lawyers. He thus attended a number of the meetings with Masons.

13. Mr Whitley is the principal of PWA. He was WDK’s principal witness. He has been an architect for about 16 years. Until 1984 he practised as an architectural designer. He is also a director and
the principal beneficial shareholder in two property companies, Urban Dialectics Ltd and European
Developments Ltd. He had not previously been involved developments comparable to that at Bath.
He had helped in the acquisition of the site and became a participant in the venture, with a share in
the profits of 8% as an incentive. PWA was engaged as architect by WDK in 1997 to develop a
scheme and to obtain planning permission. It became the Project Manager under the contract
between PGBL and Jarvis. (Mr Alan Smith Oliver was the project architect). Mr Whitley said that
meetings were usually attended by Mr Isaac, Mr Meek, Mr Taylor and himself, plus Mr Sanghvi and Mr
Bloch for WDK. Mr Rosenbaum would come for the conclusion when Mr Taylor would tell him what
had happened and make a recommendation (which Mr Rosenbaum generally followed, even though
his money was being spent). He also said that Mr Taylor (who, like Mr Sanghvi, was not called)
“made all the day to day decisions and would make the main initiatives. He was the principal point of
contact and client representative for the whole professional team”. In November 2000 he agreed
with WDK to buy himself out. Thus at all material times the financial interests, expressed as shares
of any profit, were:

- Mr Rosenbaum on behalf of WDK with 38%, providing the funding;
- Mr Taylor on behalf of his company with 38%, handling the development;
- Mr Isaac, Mr Meek and Mr Whitley with 8% each.

14. Losses were to be shared between Mr Rosenbaum and Mr Taylor. Mr Collingwood and Ms
Howells in their evidence provided excellent descriptions of Mr Whitley, with which I agree. Mr
Collingwood said that Mr Whitley appeared to have
“had considerable expertise in matters of construction procurement, was knowledgeable in
matters of construction law and had firm opinions on various issues related both to
construction procurement and construction law. For example, he had decided the GC/Works
standard form of contract was to be used and I believe this was based upon his perception
that it was a form favourable to employers. He appeared to know the standard forms of
construction contract well and to know the various merits and demerits of standard
adjudication procedures. … Mr Whitley … had a prodigious eye for detail and never stinted
in either the spoken or written word to ensure whatever he wanted to say was got across.
He was interventionist in the drafting process we undertook. Every indication was that he
read and considered everything we produced in the greatest detail.

Mr Whitley had firm views on certain things, for example, use of the GC/Works standard
form, that arbitration was preferable to litigation, about how completion should be dealt with
under the various contracts related to the development and that the Adjudicator should be the
same individual as the Adjudicator to make it less likely that any arbitration would ever take
place.”

Ms Howells said of Mr Whitley:
“My overall impression of Mr Whittley was that he was an extremely intelligent man, with a
good deal of knowledge not only about the construction industry as a whole but also about
the meaning and significance of contract conditions. He was in this respect someone who I
would class as having knowledge and understanding which went beyond that of many
architects. My view of him in this respect was supported by the extent to which he involved
himself in the drafting process, commenting upon detailed provisions and requiring
amendments to them.”

Since Mr Whitley was the person from whom Masons received all or virtually all their material
instructions, Masons were in my judgment entitled to assume that WDK and any other person whose
interests Mr Whitley had in mind would be as well informed as he was. I do not consider that Mr
Whitley had any relevant conflict of interest, at least at the stage when the contracts were being
drawn up as his financial and other interests were synonymous with those of WDK and the other
departicipants in the joint venture. Mr Wilmot-Smith QC correctly and candidly said that Mr Whitley was
“certainly a strong character” and “certainly an opinionated character”. I agree.
In early January 1999 following a conversation with Frances Alderson of Masons, Ms Howells got in touch with Mr Whitley. She wrote on 12 January to confirm her conversations:

“Further to our conversations on Friday and yesterday, I am pleased to enclose details of the services that WD King are likely to need from us in relation to preparation of the tender documents and building contract conditions for this project. I have set a fixed fee against each individual part of the services which I hope will give you the information you want. I have also specifically set out what is excluded from the fixed fee on the basis that at this particular moment it is difficult for me to gauge the extent of work that might be required to deal with the excluded matters, and I would therefore have difficulty calculating a price for them.

I have included details of our hourly rates for matters falling outside the fixed fee, although this is not to say that all further work would necessarily be charged at the hourly rates. If further work became necessary, and provided we were able to make a reasonable assessment of the extent of work required, we would be happy at that stage to discuss with you a fixed fee for that further work.

If you have any queries on the enclosed note, please do not hesitate to telephone me to discuss them. If the fee is acceptable to WD King then I hope that your commitments permit our provisional meeting in Bath next Monday to go ahead. We can then put together a timetable for the process of drafting and revision of amendments and fix a date for a further meeting to go through the first draft of any amendments to the contract and Supplementary Conditions.”

She said that she thought that from the information given to her the project was not particularly complex, even though it later became far more complicated. On 14 January Mr Whitley replied. I set out the letter in full not only because of its content but because it provides both a good early illustration of the precision and care that Mr Whitley brought to the project and which was fully apparent during the course of his evidence and because it shows, even at this stage, how much work had been done, the decisions that had been taken and the arrangements that had been made.

“Further to our conversation, I should like to confirm the following.

1. The procurement process will be a 2 stage process, the first being a tender to select the contractor with whom we shall be negotiating in the second stage. We are intending to go out to tender sometime during the last week in January, and this contract documentation will need to be completed in good time prior to that to allow its incorporation in the tender documents. We need to conclude the negotiation and be ready to enter into a contract around the first week in April.

2. Your approach to the amendments to the standard form of the contract will be to amend that as little as possible, consistent with your opinion of what is clearly necessary to protect your client’s interest.

3. You will assume that the standard BPF form of warranty is acceptable to all parties, and shall incorporate provision for that in the contract.

4. The contract will include for a bond or parent company guarantee, of a type that is acceptable to W.D. King. They will send to you a form of bond that they have used in the past that they would like incorporated, with whatever amendments you would recommend. You have expressed your reservation that certain types of bond may be unacceptable to some contractors. Consequently, I understand that you will be setting out, in an enquiry, the principles of the bond that would be proposed, for us to send off to the contractors in the first of the two stage tender. Dependent upon the nature of the response to this enquiry, you will draft whatever bond or parent company guarantee may be necessary.

5. You will need to take on board the views of the funders. There will be an investment fund, which will buy the completed project upon practical completion, with the University
becoming their tenant. There will also be a construction finance funder. The final decision, as to which will be these funders, will be decided in about 3 weeks, and we expect their respective solicitors to be appointed in about 6 weeks. It appears likely that the investment funder will be the Sanwa Bank with Clifford Chance acting for them, and that the construction funder to be either the Royal Bank of Scotland or Barclays Bank. As therefore, you will not be able to agree anything with them until later the tender issue, we want you to take a view as to what is likely to be acceptable to the funders, with the intention of being as tough as possible with them subsequently. We want to have the minimum amount of changes to incorporate in the construction contract negotiation.

6. I shall be bringing with me, at the first briefing meeting, the following.

   a) The draft Agreement for Lease. This is hopefully in a form that we are happy with by the time that we meet, which I am expecting to be faxed to me tomorrow. Dibb Lupton, who are acting for W D King have yet to have that finally agreed with the University’s solicitor. We have set the 25th January as the deadline for this to happen.

   b) A set of the scheme tender drawings.

   c) A set of the draft preliminaries, together with the employer’s answers to the query sheets arising out of that.

7. I have asked you to estimate for me your maximum fee on the basis of this brief. You have advised me that you have allowed for two revisions to the draft amendments to take on board the client’s additional information or changes of detailed instructions. Any other revisions that are required, as a result or your mistaking or omitting a matter, will be included in your fee.

8. You told me today that you thought that your maximum fee for this service would be capped at a figure in the region of £8,000.00 + disbursements / VAT. If the work came in at less than that, you would charge us the lesser amount. Your hourly charge rates are as in your letter of the 12th January to me. You were hoping to consider the exact amount of this cap and revert to me by fax today, but you have not been able to do that. Would you please fax me tomorrow, Friday, with that cap, together with any other comments that you wish to make, either to confirm our conversation or in response to this letter? Please also send a copy of that by fax to W D King and also to City & County Ltd, as set out below.

9. The client, to whom Masons shall be contracted is:

   W D King Ltd
   120 High Street
   Edgware
   Middx. HA8 7EL
   Tel: 0181 9511 1616
   Fax: 0181 951 1427

   Attn: Mr Jayant Sanghvi

A company I control, Urban Dialectics Ltd, is a joint venture partner on this project. This practice of architects has a separate engagement with W D King. City & County Ltd is one of the other joint venture partners, and is to be copied on all correspondence.

They are:

   City & County Ltd
   Kinetic Centre
   Theobald Street
10 I shall be out of the office all day tomorrow, but will be in sometime over the weekend, and shall pick up the fax.

11 I have arranged to meet you in Bath on Monday. I wish to slightly change the arrangements for meeting. I propose that we meet in the lounge of the Frances Hotel in Queens Square at 8.45 am. I shall be travelling by train arriving at 8.40. I shall have my mobile telephone with me, the number being 0468 221 869. If you have a mobile, please include the number on the fax, in case there is a delay or other change. One of the Quantity Surveyors on the project, Andy Platts from Bucknall Austin will be joining us.

I look forward to meeting you”.

The letter was copied to Mr Taylor and Mr Sanghvi.

16 The next day Alyson Howells fell ill and so Mr Collingwood took over. (She did not return to the matter until May 1999; she went away on holiday at the end of August 1999 just before Mr Collingwood had returned from his.) On 18 January a meeting was held between him and Mr Whitley together with Mr Andy Platts of Bucknall Austin, the quantity surveyors. Mr Collingwood’s typed note read:

1. Attending out Paul Whitley and Andy Platts, the latter from Bucknall Austin at the Frances Hotel, Bath.

Andy Platt was there around 8.45 am and Paul came in about 9.30 am. We finished around 12.45 pm.

Andy told me a bit about the project before Paul’s arrival. Bucknall Austin are the quantity surveyors advising WD King on the tender documentation. I am not sure what their role will be, if any, under the Building Contract, but suspect they will be QSs. Andy said that there were a couple of major risk items in connection with the project, the first being ground conditions, the second archaeology. Certain archaeological discoveries have been made on the site and there has been talk of a full open dig.

It is hoped that there will be a small enabling contract, let on the advice of Bucknall Austin only and very straightforward, under which a reduced level excavation will take place. These enabling works will be done before the main contract is let so that there is an opportunity to see the extent to which there is risk in relation to archaeological finds but even if nothing were to be revealed by the reduced level excavations, there is still a prospect of something being found later, for example when the foundations are piled (at this stage of the meeting it was thought they would be piled).

It is believed that the Employer will want the Contractor to take the risk of any archaeological finds and that an Archaeologist will still have a supervisory/monitoring role whilst the works are being carried out. Presumably he would advise the PM under the contract and the PM then act – so he may not need a mention in the conditions.

Consequently, there will need to be provisions in the contract to cover this, at least to the extent of requiring the Contractor to provide estimates of delay and additional cost where there is a stoppage caused by a particular find and also estimates of acceleration costs to try to reduce whatever delay and disruption might be caused.
The works are being carried out on a sloping site that will need stabilising. It was for this reason that piles were thought to be required (but later in the meeting Paul Whitley said that the foundations will be raft or strip and that a mistake had been made previously by the structural engineers they had advised the need for piling).

The idea is that the Contractor is to be responsible for the ground conditions, the adequacy of the reports that have been done on behalf of the Employer by a structural engineer in Bath, for any extras or any inadequacies, etc.

It was thought that a Contractor would be more likely to take the risk of archaeological finds if, as its anticipated to be the case, certain enabling works are undertaken before the main contract is let, those enabling works being to reduce levels (see above).

2. Andy said that the Employer's Requirements were 95% there, and the first stage tender would be on the basis of prelims, overheads and profit and design costs. The Contractor's will also be asked to suggest their project management method, staff and submit outline design proposals for that 10 or 20% of the project (largely structural apparently) that has not yet been designed.

Paul Whitley Architects (who is also associated with the developer, W D King) is the project Architect. He will be the PM under the building contract. He has prepared the 80% of the design that has thus far been undertaken although there is also a structural engineer. The Contractor is to take responsibility for all of the design work undertaken by Paul Whitley Architects and to have no rights back against Paul Whitley in the event the work the latter has done was to prove to be inadequate or defective in any way. MAC questioned this (the absence of a novation) but the idea apparently is that the Contractor's will have adequate time and opportunity to look at all work undertaken by Paul Whitley Architects, check it is ok, so that they will be happy to take responsibility for it. Hmmm. The position is not the same in relation to the structural engineer. Here the Contractor is indeed responsible for work undertaken by the structural engineer but is to stand in the shoes of W D King in relation to the engineer's appointment.

3. It was said that the planning permission contains some constraints that will be relevant to the construction contract. This will be sent to MAC.

4. The agreement for lease was looked at on Paul Whitley's arrival but it is not yet agreed. Paul was apparently expecting to see LADs in the agreement for lease but there are none. The works are to be completed by July 2000, specifically by 28 July 2000 with hand over to the University under the agreement for lease occurring on 23 August. This would then leave about a week or so before the start of the autumn term Osborne Clarke are acting for the University of Bath on property matters. There are about 220 rooms within the student buildings which are 4 in number. All of them are different. The construction works are likely to cost around £5½m to £6m. the Employer is to be Prospect Gardens (Bath) Limited, MAC raising the question of the potential need for comfort in relation to payment on the part of the Contractor. There will be a 10% default bond and a Parent Company Guarantee. Design liability will be based on reasonable skill and care.

5. Paul then joined the meeting and he handed over to MAC a copy of the intended tender drawings, draft preliminaries and the agreement for lease, the latter a draft. The first thing Paul did was to ask for confirmation of acceptability of his letter of 14 January which confirmation MAC gave although he could not help wondering whether we are going to be doing rather more work for £8,500 than might at the outset have been imagined!

The agreement for lease is not completed and I was given certain other correspondence that results from the latest draft of the agreement which includes certain comments from a Michael Taylor (the other joint venture partner) and some correspondence from Dibbs. Paul
is obviously thoroughly frustrated with Dibbs and has decided that he will sack them. He wondered whether Masons had quoted for the property work, with MAC being uncertain. He said he wanted to instruct Masons on the property work and I am to go back to him today on this.

6. As to design, the Contractor is to be responsible for all of the design without ovation of rights against the Architect (Paul Whitley Architects). Paul said that he would be giving (as Architect) a warranty to the University. This appeared to be superfluous, or very likely to be superfluous but in any event Paul is happy to give it and wishes to give it and my instructions are that he will give it. However, I am not to draft it.

7. As to completion and liquidated damages, there was quite a discussion. There will be one completion date but damages are a little difficult and uncertain where the University does not wish to be obliged to take possession if practical completion occurs after the start of the autumn 1990 term. The position is that there are 4 blocks. Block 4 could be taken and used by the University at Christmas 2000/2001 but the other 3 blocks do not want to be taken by the University until the following academic year if they cannot be taken at the beginning of the previous one. There is some agreement whereby the University will use its best endeavours to get students into the completed blocks during the academic Year 2000 and it might be the liquidated damages (levied on the basis of some £150,000 per year each block) would be repaid to the extent rent was incoming from the students during academic year 2000.

MAC wondered what commitment was made by the University to its students. He anticipated that the University would be committing take students well before it might be known the accommodation would not be ready for the academic year 2000 and he speculated that the students would go into temporary accommodation for the period of delay and this would be the basis of the calculation of liquidated damages.

MAC is to hold fire drafting anything in relation to this on the basis of the difficulties inherent with it. No Contractor is going to be able to assess the risk of having levied against him some £600,000 worth of LDs is he is more than about 4 weeks late. No Contractor will know how likely or otherwise it is that the University will be able to fill the accommodation during the academic year 2000. The size of the penalty, whilst it might be a reasonable pre-estimate, would invite disputes. The Employer (W D King's) loss in the event of delay would not only relate to liability to the University in the agreement for lease (in respect of which Paul said there was no provision for liquidated damages; no aspect of the agreement Paul was describing that he had reached with the University concerning delay seemed to be reflected in the agreement for lease) but would also constitute funding costs. See also clause 5.2 of the agreement for lease.

8. As regards dispute resolution, Paul wishes adjudication to take place as per the CIC draft procedure with appointment by the RIBA. See his letters of 14 and 18 January. He does not like the Courts as the final forum for the resolution of disputes. He wants an Arbitrator who is legally and technically qualified (query what this means), appointed by the RIBA and he would prefer the same person to sit as both Adjudicator and Arbitrator. MAC explained the potential absence of wisdom of this and in any event said that he thought the CIC rules precluded the Adjudicator acting also as Arbitrator subsequently. This has go to be researched. His thinking is that if you have the same person you would not have to go to arbitration! MAC explained that he did not think this was a very good idea where we were here advising an Employer. No doubt this point needs to be made in correspondence.

As to disputes concerning the achievement of practical completion or completion, Paul wanted some joinder provision that would mean that any dispute under any contract in respect of whether completion had taken place would be heard by one person whose decision would be binding on all. Paul, as project manager, is to decide the issue using his professional opinion, deal with it impartially and allowing matters that are de minimis
(whether they relate to the preparation of manuals, as built drawings, etc or defects or outstanding works) and any dispute about practical completion has to be fast tracked, something along the lines of the CIAMAR rule 7. Paul anticipates deciding the question of practical completion under every contract including the agreement for lease.

9. MAC briefly mentioned the conflict that Paul might feel he had in relation to acting as both developer and project manager.

10. As to warranties, the Contractor is to give one, as are sub-contractors with design responsibilities and the professional team, that is designing professionals. This will include the structural engineer but I am not sure who else is involved. Warranties will be given to the two funders and the University. We discussed when the warranties would be given, the conclusion being that it would be a pre-emption either to the achievement of practical completion or possibly condition precedent to first payment under the construction contract (in the case of the Contractor) and something similar in respect of sub-contractors.

As to the definition of completion, we wanted to include the provision of as built drawings, manuals, the health and safety plan, etc and the de minimis points referred to above would apply to this also.

In the agreement for lease, there are certain obligations post practical completion, first the completion of defects that are outstanding as at practical completion, these to be identified in a list and carried out as soon as possible but in any event within a month if possible. Second there are those defects that arise in a defects liability period where defects will be made good by way of listed items at the end of 12 months save formatters that are said to be of an emergency kind. Defects that are made good during the defects liability period are not to involve any excessive or undue disruption.

As to insurance, we talked about PI cover and Bucknall Austin will come up with the amounts that might be necessary to be included by sub-contractors and we thought that £10m would be the most the Contractor would be asked to come up with. Apparently it is £1m vis a vis the University under the agreement for lease.

11. We are going to have a meeting next Wednesday morning at 9.30am in London if I can make it. MAC to confirm.

12. Two other points. There is to be no early hand over, that is not obligation on the Employer to take the building prior to July or may be we might consider doing so if there were suitable provisions in relation to security and provide we did not suffer any loss up the line. The intention is the hand over will be back, to back with the agreement for lease. There would need to be a hand over procedure drafted that would include the giving of necessary notices to all parties to inspect, etc. As regards insurances under the construction contract, the client is taking out insurance for all of the work.

13. Some other things were discussed. See my manuscript notes.”

As the end of paragraph 7 shows, Masons were made aware of the possibility that there might be a shortfall that have to be borne by the developers should the building not be ready by the start of the University’s term as a contractor would be unwilling to pay £600,000 damages a delay of more than four weeks. A similar note was made by Mr Platts:

“Damages currently not quantified in Agreement for Lease, but loss of rental income likely to be a total of approximately £600,000, assuming all rooms remain empty for whole year awaiting the new intake of students. University cannot give commitment to fill rooms if buildings handed over late.”
17. If it was not previously clear then Masons were informed by Mr Sanghvi on 19 January that
WDK would be the "interim funder" and would bear not only the cost of the site (set at £2.1 million)
but the cost of the development until practical completion when it would be sold to the SPV and the
lease taken up.

18. Mr Collingwood returned first drafts very promptly. On 21 January 1999 he wrote to Mr
Whitley:
   "I attach:
   1. A copy of the GC/Works/1 Contract Conditions marked up with certain suggested
      amendments.
   2. A commentary giving some explanation of certain of the amendments I have
      suggested to the conditions. I also identify one or two areas where instructions are needed
      and/or further discussions.
   3. Draft parent company guarantee (to follow by fax tomorrow).
   4. Draft warranties (to follow as above).
   5. Draft default bond (to follow as above).

   Please treat all of the enclosures as first drafts; there remains much to be done - in particular
   dependent upon the final terms of the Agreement for Lease.
   ......
   I am sending you all the attached as I promised that you would have something by Friday. I
   hope to be able to take things further over the next few days before our meeting on
   Wednesday."

This draft did not include any changes to condition 38. In his commentary on GC/Works/1 Mr
Collingwood noted against condition 55:
   "I have made no amendments to the liquidated damages provision as yet because I am
   waiting to hear from you once you have spoken on this topic to the University."

19. Another feature of the scheme was that Mr Whitley wanted to place as much of the risks on
the contractor. He said that he chose this version of GC/Works/1 as it was the standard form that he
believed was the most likely to be risk averse from an employer's perspective. As I have shown, his
general instructions were to use that form, subject only to amendments necessary to protect the
interests of WDK/PGBL and to amend as little as possible and not to do drafting for its own sake.
However as Mr Collingwood rightly pointed out, this became inconsistent with Mr Whitley's intention
to shift as much risk as possible to the Contractor. As appears from Mr Collingwood's note of 18
January, Mr Whitley wanted the contractor to bear the risk of archaeological finds and the risk of site
instability. Mr Collingwood was, so far as possible, to eliminate those risks in the draft of the
contract conditions.

20. Mr Collingwood thought that he had met Mr Rosenbaum at a meeting at the end of January
although from his description of the meeting I think that it was later, probably in March, as he
recalled that it took place at WD King, that there were a number of other people present, including
Mr Bloch, and that Mr Rosenbaum did not play a large part. Mr Collingwood accepted that W D King
(i.e. Mr Rosenbaum) was the client but that if an error was made in preparing the building contract,
the SPV, i.e. PGBL, could suffer a loss. Given the nature and purpose of the SPV any losses that could not be absorbed by PGBL would have to be met by WDK as funder.

21. On 8 February 1999 Mr Taylor wrote to Mr Whitley:

“I have today spoken to Mark Collingwood at Masons regarding the “no risk” policy, i.e. a guaranteed maximum price no matter what, that we are adopting with the contractors.

It was his view that we may find that several of the contractors may not wish to tender on the basis that they are taking all the risks on everything. We do need, in my view, to carry out some more in depth contamination studies and possibly further ground tests as this will be required, not only by the contractors, but particularly by the funders and eventual purchasers.

We will, at the end of the day, have to make a commercial decision once we have found out the sort of premium that the contractors are loading onto their tender price because of this “no risk” policy and weigh it against us bearing the risk, having carried out all necessary tests.

Please phone me to discuss this as a matter of urgency.”

Although the letter was said to have been copied to Mr Collingwood (and to Mr Rosenbaum) Mr Collingwood said that there was no record that it was received by Masons. It must be accepted that it did not reach Mr Collingwood. It does not perhaps matter since the validity of Mr Taylor’s views are self-evident and would certainly have been acknowledged by Mr Collingwood. They record that Masons advised that a completely “no-risk” contract was not feasible and that WDK had to do more to minimise its exposure to the risks that it would have to bear.

22. Mr Collingwood sent a second set of draft amendments to Mr Whitley on 5 February 1999 together with an amended version of the earlier commentary. These versions contained amendments to conditions 38 and 55. Those relating to the latter were intended to make it more difficult for the contractor to challenge of liquidated damages. The terms were used when inviting tenders. Condition 38(3) was proposed by Mr Collingwood:

“Delete 38(3) and insert new 38(3):-

38(3) In the event the PM is of the opinion that the Contractor’s rate of progress in carrying out the Works is likely to prejudice completion of the Works or any Section by its Date for Completion, and to the extent that in the opinion of the PM this is due to a cause which is not listed in Condition 36(10), the PM may instruct the Contractor as to the measures he requires the Contractor to take to retrieve the position and the Contractor shall comply with the same at no cost to the Employer. Without prejudice to the generality of the foregoing, such instructions may include the requirement to re-sequence works, to accelerate completion of the works and/or require the Contractor to increase his on and off site resources”.

Mr Collingwood said that at that stage he did not specifically consider what damages would be recoverable by the employer if the contractor were to be in breach of the acceleration provision in condition 38 as re-drafted by him. As he made clear when cross-examined, based on what had been told by Mr Whitley at the meeting on 19 January (and as recorded in his typed and manuscript notes), he saw that condition 38 (the acceleration provision) in GC/Works1 applied only where the employer wanted completion before the completion date so he thought it would be useful that the project manager’s powers should be “beefed up”. This was his own initiative. It was, in my view, a sensible and constructive change, entirely consistent with his instructions in order to meet the objective of minimising risk. He rightly then understood that the whole of the delay-related losses that might potentially be incurred on the employer’s side would be passed down to the contractor under the building contract. (He also accepted the self-evident propositions that the contract policy
was that if the delay were the contractor’s fault, then the cost of acceleration was to be met by the contractor; if the delay was the employer’s fault, then the cost of acceleration had to be met by the employer.)

23. A decision was then taken by WDK as to the amount of liquidated damages recoverable. On 12 February Mr Whitley wrote to Mr Sanghvi:

“Dear Jayant

Re: PROSPECT GARDENS, BATH

Further to our telephone conversation today, may I write to request that you URGENTLY turn your attention to the following tasks. Some of these I raised in the reminder I recently sent you in relation to the queries on the preliminaries. I have not received anything on that yet. I now in particular need your response on the following.

Liquidated and Ascertained Damages

We need your and Michael’s commercial decision on what LAD to insert in the building contract. At the meeting that Michael and I had with the bursar of the University, we agreed with them a provision that they will not charge damages until after the 7th September, although the date due for completion of the works is 23rd August. Brian Thomas has expressed that he did not wish to accept the accommodation after the 7th September. However, we did not definitively define with him whether he would nonetheless be obligated to accept it during the middle of the academic year, save for his willingness to receive one of the buildings at the 31st December.

I have a different interpretation of the situation from Michael in this lack of definition on this point. I infer the situation as follows. If BT says that he will not accept an obligation to pay the full rent if it is handed over late, but will simply carry out his best endeavours to fill the rooms and pay us accordingly, then this means that – if those “best endeavours” comes to nothing – then that means that we would lose a year’s rent (less the rent received on the one building handed over at Christmas). The result of this inference is that we would lose somewhere about £750,000 in lost income, interest, additional fees etc, if the contractor was 1 week late beyond the 7th September date.

Michael has a different interpretation of the agreement, and – as this interpretation of the agreement is in our favour – this is what our lawyers have been instructed to provide for in the Agreement for Lease. The hope is that the University either may just go along with it, or else may not notice that this Agreement does not prevent handover of the premises in the middle of the academic year. You may remember that the Dibb Lupton Agreement for Lease (which we were advised had been agreed by Osborne Clarke) neither prevented handover in the middle of the academic year, nor did it provide for LAD should we had over late. I think I understand Michael’s interpretation as follows. If we are late, then the University will have to accept it whenever we hand it over, and pay the full rent thereafter, but that they would impose LAD on us, at the rate of £40.00 per week per student. On this interpretation, if we handed the premises over one week later than the 7th September, then we would suffer just 3 weeks loss of rent on the whole premises (pro-rata to a year that would be around £40,000), together with 1 week of damages, (around £9,000), totalling £49,000.

Beverley Pike of Masons tells me that she will be completing her second draft of the Agreement for Lease on Tuesday next week (16th) and will put that to Osborne Clark at that time, with the covering letter that she is still awaiting her client’s final instructions on the matter, in order to give herself some room for manoeuvre thereafter. I therefore guess that we will not get the University’s response for perhaps a fortnight. In the meanwhile the tenders are going out on Monday, and I need to tell the contractors the fundamental issue of what the LAD will be.
We have agreed with the University that we can tell them as late as the 31st May that we will be late, and if we do that then we can hand over the premises a year later. This will give the contractor the knowledge when he is tendering, and assessing his risk of what LAD he may have to pay if he runs late, that he can make a final judgement on his likely completion date 2 months before he is due to finish and with most of the risks behind him. At this stage, he could accelerate 3 of the 4 buildings, to finish by the 7th September and complete the 4th by Christmas. Under these circumstances, I estimate that we would lose – on both Michael and my interpretation – about £60-70,000 loss of rent only.

You should check all these figures for yourself to satisfy yourself on them, and I am only raising them to you to give context to my question.

I now need to turn to the amount of LAD that a contractor would possibly accept in the contract, if he were not to simply add it on as an additional premium of the same amount on to the contractor sum. Bucknall Austin tell me that if the total likely LAD that he suffers is more than about £200,000 then the surplus will just be added to the tender price.

The usual arrangement for the LAD in a building contract is £X per week. I need not to remind you that the legal definition of LAD is that it is genuine pre-estimate of the damages you are likely to suffer, whether you actually suffer them or not. Would you and Michael please urgently address this question and advise your decision to us and to Any Platts at Bucknall Austin.

... your urgent attention is appreciated.”

The letter was copied to Mr Collingwood. Mr. Sanghvi was of the same opinion: “JS is ok with the principle of total LAD not exceeding £200k. JS suggests that the contractors should be persuaded to hand over the building early to reduce the risk of late delivery.”

24. In February 1999 tenders were sought from six contractors. Those from Jarvis and Ernest Ireland were the lowest. After meetings with both during which Jarvis price remained the lower it was decided on 23 April to continue to negotiate only with Jarvis. However the funding available was not much greater than £5.5 million. The final offer from Ernest Ireland was £6.8 million so as Mr Whitley later recorded:

“Given that the [Ernest Ireland] proposal for GMP is £6.8 million, [Jeffrey Rosenbaum] really cannot see how we are going to proceed any further.”

Mr Whitley also accepted that, at least at that stage there was no other contractor who was prepared to tender at the price which WDK was prepared to pay.

25. In March 1999 the possibility arose of selling the development to Manhattan Loft Corporation Ltd. Mr Isaac and Mr Whitley had worked with it on other projects. Mr Isaac was in favour of the sale as he doubted if WDK’s team would be able to execute the project satisfactorily. On 1 March 1999 he wrote at some length. In his letter he said, amongst other things:

“As part of the decision making process I would like you to consider the following points.

1) Cost Control

Throughout the four years this project has been underway actual costs have always massively exceeded original predictions, revisions and re-revisions and estimates of important factors such as building costs have varied wildly.
Good examples are the fees for architects and other professionals. The original quote from PWA was £120,000 and current expenditure is over £500,000 and still rising. This is an overspend of £380,000 plus. At our meeting of 23/9/98 Paul Whitley announced the then latest QS estimates of building costs had risen from circa £5.5 million to circa £6.5 million. At the time you pointed out that early estimates were circa £4 million. This is a fluctuation of £2.5 million.

Are we really expected to believe that it is an acceptable developers risk to jeopardise a profit of £1.5 million on costs of £2.5 million (a profit of 60% on cost) in an attempt to make an additional £0.5 million knowing our poor record on cost control and prediction?

2) Time Control

Discounting the ill-advised attempts to win consent for a cinema complex on the site, it has taken well over two years to reach the position that we now find ourselves in. As with cost control, the project’s record on meeting targets is appalling, although I do recognise that some of this can be attributed to BANES and the complex multiparty negotiations that are necessary to proceed on a project of this nature. Again I refer to firm predictions made in last September’s meeting. Paul Whitley advised the meeting that it was indeed possible to construct the entire complex in time for an August 1999 delivery and yet we are now only at the tender stage in March 1999. Michael Taylor advised the same meeting that the lease to the University would be signed up well before Christmas (1998) and negotiations still continue today.

I do not think therefore that the project has demonstrated the ability to deliver the finished complex on time. I therefore perceive a high risk of financial penalties being incurred. In addition to the obvious additional cost, such as late payment penalties due to lenders and extra interest costs, I am particularly concerned that a whole year’s rent may be lost by failing to meet the August 2000 deadline. Bath University have already made it clear that if the project is not complete on time they will not be obliged to commence paying rent part way through their academic year. This will mean that WD King or the interim funder will have to stump up the first years rent in order to complete the sale to Sanwa. This will result in a reduction in profitability of about £700,000.

Once again the risks in this area are far greater than the possible future rewards.”

At a meeting on 4 or 5 March Mr Isaac’s views were not accepted by the others. It was decided to go ahead:

“Such contract to be a fixed price and to place all the risks of construction on the contractor and none on our shoulders.”

26. Mr Isaacs who had voiced very serious concerns at the meeting was asked about the meeting and his letter:

“Q. At this stage, do you recollect whether there was any understanding on your part as to what the position was going to be in relation to recovering those sorts of losses from the contractors?
A. Well, at the meeting where all this was discussed I was shouted down, if you like, or I was persuaded that the contract with the preferred contractor, Jarvis, was going to be written in such a way that it would tightly control them and there was every chance that the building would be delivered on time.
JUDGE LLOYD: The problem would be avoided but in a different way?
A. Yes.”

Mr Isaacs said that the meeting went the way because it was Mr Whitley’s view that “the building could be delivered on time and that the risks in his view were manageable”. Having heard from
many of those present at the meeting, and especially Mr Whitley and Mr Rosenbaum, I have no doubt that Mr Isaac was right in that conclusion. Mr Rosenbaum said in his evidence:

"Paul Whitley was very confident that there would not be a problem completing the works on time. This was discussed at the meeting held in the first week of March 1999."

"Paul Whitley said he felt confident that there were adequate mechanisms and controls in the construction contract over the contractor to enable us to complete on time. He was very confident in the contract Masons had put together for us."

Mr Isaacs subsequently recorded his views in a further letter in March 1999. He said: "I went away from the meeting and I felt so strongly about it that I decided I would have one last stab at putting my points more clearly in writing, because, as you know, in some meetings things get quite heated and figures were being bandied around and I felt it was fair to all concerned to set things out in a more logical fashion."

27. Evidently one of consequences of the meeting was that Mr Bloch got in touch with Mr Collingwood on 15 March 1999. Mr Collingwood's attendance note records the conversation:

"Telephone in Mr Block who is at WD King. He wondered whether I needed a structure of WD King and in particular whether I knew that Geoffrey Rosenbowne [sic] was the sole proprietary [sic]of all of the companies associated with WD King and that he was concerned to preserve his capital.

Basically, Mr Bloch was asking me whether it could be said that the risk in relation to this job was limited to the contract sum which was fixed price. I said that it was not, that I thought however that contract documents had been prepared but transferred as much risk as it was probably viable (and maybe beyond) that which it is possible to pass to the Contractor. Nevertheless, I said that whilst the contract was fixed price it was fixed price subject to adjustments and obviously everything depending upon whether the Contractor was prepared to take the risks that we have suggested be transferred to them. I mentioned changes being an area of risk, insolvency of the Contractor, and basically that whilst 80 or 90% of risk had been transferred over to the Contractor in the draft documents, there was still 10 or 20% risk at least that remained with the Employer.

He was going to speak to Paul Whitley to find out when tenderers were to be returned, then to see whether the Contractors were prepared to take the sort of risks that we were asking them to take."

Mr Bloch then wrote to Mr Collingwood on 17 March 1999:

"Dear Mark

PROSPECT GARDENS, BATH

I refer to the above and to our telephone conversation of 15 March.

As I explained to you it has always been Jeffrey's desire to minimise the risk element in the event of our carrying out the building works. We discussed the extent to which we could rely on the existence of a fixed price contract but I understood you to say that, even where the chosen contractor accepts the form of contract as drafted by you, there is still a 10% to 20% risk that the price will rise.

You mentioned that, predominantly, this could arise from variations which may be required e.g. because of the archaeology or for some other reason, and that these variations could then have a knock-on effect, possibly increasing the time required for carrying out the works. You also mentioned that the greater the risk the contractor is required to take on board, the higher the price that he is likely to quote. In effect, I understood you to say that there is no
such thing as a risk-free, fixed price, contract. I appreciate that we have to make a
corporate decision as to whether we take that risk on board and, in so doing, it would be
helpful if you would confirm my understanding of the position and amplify on it in any way
that you consider necessary, so that we can have the full benefit of your views in reaching
any decision.

Yours sincerely

Max Bloch
THE W D KING GROUP"

Mr Collingwood accepted that the letter was a request to Masons to minimise risk as far as possible
and to bear in mind the inexperience of WDK of this type of development. He replied on 19 March
1999:

"Many thanks for your letter.

As you appreciate, no construction contract is without risk to the employer under it, no
matter what its terms might be. However, the contract which Paul and I have prepared
minimises the risk of out turn cost significantly exceeding whatever will be the fixed price
tender sum.

Save that the percentages I referred to on the phone (your first paragraph) were not meant
by me to be writ in stone and that (your second paragraph) the present draft contract places
risks relating to archaeology on the Contractor, I would agree that your letter is a fair
summary of the points I made on the telephone.

As I say, a good deal of risk has been passed to the Contractor. He is responsible for all
aspects of design (whether actually undertaken by him or not). Risks relating to archaeology
and ground conditions are the Contractor’s and if the Employer’s Requirements prove to be
inadequate - in so far as discrepancies within the Requirements are concerned - the
Contractor is responsible for them; even though the Employer’s Requirements is an
employer’s document. Again, if there are changes to statutory requirements during the
project, the Contractor carries the risks of these. Matters entitling the Contractor to further
time are very limited and likewise his potential entitlement to addition by way of disruption
costs (please see conditions 36 and 46)

On the other hand, losses could be suffered if there were to be Contractor insolvency or the
Contractor to grossly fail to perform and fail to remedy the position such that determination
might be necessary. (There again, however, you will have a bond and parent company
guarantee to provide recourse). Changes could lead to additional liability, mismanagement of
the contract likewise. Nor do I believe we have yet achieved a position where the employer’s
potential liability to the University in respect of delay is covered under the construction
contract. (I may be wrong about this. In any event, I do not know how damages for delay
were ultimately dealt with in the invitation documents).

The agreement for Lease with the University does little to affect the position outlined above.
The Landlord undertakes to obtain all necessary consents for the development and then to
procure that the works are carried out in accordance with the Building Contract. The
University has the right to suggest “minor” variations to the works, and consent to these
variations cannot be reasonably withheld if the Project Manager considers that the variations
would not delay the issue of the Certificate of Completion of Works. The University are
obliged to reimburse you any consequent increase in the overall costs of such variations
(including any increase in professional fees, loss of profits and interest etc). Accordingly,
there should be no risk to the employer, provided the University do not default on their
obligations.
The Agreement for Lease contains provisions permitting substitution of material which are not procurable within a reasonable time or at a reasonable cost, but this is subject to obtaining the University’s prior consent to any substantial substitutions, and in addition, there will be a list of particular materials and products which will not be capable of variation. This could lead to delay in the event of any of the specified projects not being available within the requisite timescale.

As you will be aware, the University require the completed premises to be available before commencement of the Autumn term (one building may be handed over during the Christmas vacation). The Agreement for Lease contains provisions for notice to be served on the University in May specifying which parts of the premises are anticipated to be completed by August of that year. In the event of the premises specified in the notice not being available, liquidated and ascertained damages will be payable at the rate of £40 for each student bed space, but, of course, it is intended to pass the risk of payment of liquidated and ascertained damages on to the Contractor.

One final risk which arises from the Agreement for Lease is the possibility of the University failing to complete the Lease, whether because of delay in the works beyond the ultimate long stop date of 23 August 2003, or the University effectively becoming insolvent or ceasing to exist. In these circumstances, the fund will not make payment to you for the development, and the property will remain unlet, with no income being received. However, as one hopes with most of the other potential risks identified in this letter, all of this is somewhat unlikely to come to pass.”

In my view that letter sets out the risks very clearly and satisfactorily. On the same day however Mr Collingwood’s lack of knowledge of WDK’s actual intentions about liquidated damages was resolved. He was instructed as to the level of liquidated damages in a telephone call from Mr Whitley. Mr Collingwood’s attendance note reads:

“Telephone in Paul Whitley who said that the deal in relation to liquidated damages was £200,000 flat after 31st August, £10,000 per week for any delay between the completion date (28th July and 31st August). This is what I am meant to be drafting. He also thought there were one or two other points that Beverley might have come up with at the last meeting relating to the agreement for lease that might impact upon the construction contract. I need to speak to Beverley.

Subsequently speaking to Paul Whitley again when he said he would send me a fax of various things that he thought were outstanding and in respect of which Jayant was to come back to him. He is asking me to chase Jayant on these matters and I said I would. He says that the losses in respect of delay to the University if buildings are completed late will be some £3 quarters of a million, rather more than £200,000 liquidated damages included in the contract. I told him about Max Bloch’s letter and my letter back and promised to send him a copy. It is obvious that there is a big exposure to risk in relation to damages up the line under the agreement for lease that will not be covered under the construction contract.”

28. Whilst the discussions between Mr Bloch and Mr Collingwood were about ordinary matters such as the need for proper pre-planning to avoid variations it is clear that WDK’s principal advisers, notably Mr Whitley, appreciated that in setting and capping liquidated damages at the figures given to Masons, there could be a shortfall between the maximum amount recoverable and the losses which might possibly be incurred were the delay in completion such that the University could decline to take the buildings until the following year. As Mr Collingwood said in his witness statement (and in cross-examination):

“As can be seen, when I wrote my letter of 19th, it was not clear whether delay related damages potentially to be suffered by the Employer would be compensated by liquidated damages under the building contract. It became clear that the anticipation was that they would not in a telephone conversation that I had with Mr Whitley later on that same day. I refer to my attendance note….. . During this call, Mr Whitley told me that liquidated
damages were likely to be considerably less than the actual damages likely to be suffered by PGBL if the Works were delayed. I do not think Mr Whitley knew what actual damages might be for matters were not sufficiently advanced in the negotiation with either University or funders and no doubt there would have been various calculations dependent, for example, on how late the project might be. He told me however that it was likely that actual losses for delay would exceed what would be included in the building contract for liquidated damages. The only explanation I have as to why I did not write again to Max Bloch immediately following Mr Whitley's telephone call to me was that I did not think to do so because I regarded Mr Whitley as my client so that if he was telling me that there was the likelihood of this substantial shortfall, then I did not need to tell him. I anticipated that knowledge which Mr Whitley had was either knowledge that the Employer had or would be knowledge that would be passed on by Mr Whitley to W D King."

In the light of Mr Bloch's concern about ensuring the Mr Rosenbaum's position was understood and safeguarded, I have no doubt that WDK's advisers must have realised that there was a risk that completion of the works might be so delayed that the amount of liquidated damages recoverable would be insufficient to meet the actual losses. If it was obvious to Mr Collingwood that there was "a big exposure to risk in relation to damages up the line under the agreement for lease that will not be covered under the construction contract" then it was equally obvious to WDK and the joint venturers who throughout were acutely alert to all financial implications that might affect the out turn. Although Mr Bloch maintained that he unaware of it and of this interchange, Mr Isaac's evidence makes it clear that this was central to the discussion at the March meeting. (Mr Bloch's role was at times no more than a messenger.). It was the starting point for Mr Isaac's worries. Others who had confidence in Mr Whitley did not share them. In addition I have already recorded that Mr Rosenbaum relied on the trio of Mr Sanghvi, Mr Taylor and Mr Whitley. Mr Rosenbaum said of the decisions of March 1999:

"Q. There was a commercial decision taken after this, which again is covered in the evidence and the court has seen, which resulted in assent being given to the liquidated and ascertained damages provision by Mr Sanghvi and Mr Taylor?
A. Yes.
Q. Were you involved in the commercial decision which Mr Bloch is referring to here?
A. Because I did not understand the project that well, I did not think I was the best man to throw my weight around even if it was my money at stake. I was surrounded by experts who understand this project far better than I do, I will go by their advice, Mr Sanghvi being a very good accountant, as I understood. I regard him as a genius. And Michael Taylor being a very successful entrepreneur with me, in the years we had done business together, the preceding six years or so.
Q. Again, it would really be Mr Taylor and Mr Sanghvi who were primarily involved in that side of things?
A. Yes, although unfortunately I was the one to lose the money, if there was any money to be lost. Perhaps I should have tried to understand it better, but then it is hard when you do not have the experience behind you."

Mr Rosenbaum said also:

"I regard Paul Whitley as a man of integrity and intelligence, and he has dealt with Masons, who are also a firm of great repute, and if they say this is a strong contract and Paul Whitley says he can see this contract executed on time, then I relax. I think I am not at risk. Without any further knowledge on the subject, any further warning on the subject, or any warning, I would be happy with that contract, to proceed and take my chance."

In my judgment it is clear that from the evidence (such as these passages) that Mr Rosenbaum relied ultimately on his close circle of advisers to assess the advice given to them from Masons and others. In addition WDK's case pleaded in paragraph 14(b) of the defence that Masons were to provide advice "when requested to do so... by PWA on their behalf" so on that basis WDK expected Masons to rely on Mr Whitley as the principal intermediary and as fully authorised to obtain and to transmit whatever advice Mr Whitley thought he needed. The evidence has however two consequences: first, that there was no reliance on Masons in the ordinary sense that a client relies directly and solely on a
solicitor for legal advice and, secondly, as I have said, that Masons were entitled to assume that WDK’s advisers were themselves well able to ask for and to assess advice given by the firm.

29. The subject of liquidated damages continued to be discussed during the negotiations with Jarvis. On 23 March 1999 Mr Whitley had written to Mr Sanghvi:

“The most appropriate penalty/damages regime is a bit complex, given all the handover permutations, and I set out the following for your consideration.

1. Handover all between 28 July – 30 August (4½ weeks).

Proposal is £20,000 pw penalty.
(WDK to be advised that there will be continuous professional fees during this period to be charged on a quantum merit or pro-rata basis, but no damages from the University, they will make a significant “profit” on this penalty.

2. Handover of all buildings after 30 August.
Proposal is £250,000 LAD (note loss will be more like £700,000-£750,00).

3. Handover of 2 buildings between 30 August - 31 December (17½ weeks).
Handover of 1 building between 30 August – 31 December (17½ weeks).

Proposal not formulated. There needs to be an incentive on the contractor to try to get as many done by 30 August, therefore penalty of damages should be between £90K (4½ weeks of £20,000) + £250,000.

Loss of rent to WD King is at £3000/pa/student (i.e. £57.50 per week) assuming that the University fills none of the accommodation on best ........Basis in a period before 31 December if, therefore, say we had Building 4 with approximately 60 students then loss approx. £60,000.

The University will not accept more than 1 booking of approximately 60 students at Christmas, therefore if 2 buildings not finished, each of say 60 rooms, then loss is therefore (3000 x 60) + £60,000 = £240,000.

We need to make a big initiative for the contractor not to incur the £250,000 LAD (as the effect is so disastrous for WD King, and so suggestion is that:

If 1 building is handed over between 30 August - 31 December, penalty is £120K.
If 1 building is handed over between 30 August - 31 December, LAD is £160K.

Please phone me to discuss any thoughts or queries you have urgently. If I am not here, please speak to John Munro. I am in the midst of negotiations with 2 contractors and I need your instructions on this as soon as possible.

The letter may not have reached Masons. In any event it was not regarded by Mr Whitley as an instruction since on 18 May he sent by fax a long note on the issues that he wished to discuss with Mr Collingwood that day, which included the following:

“Abstract of Particulars of the Building Contract

A draft of this, prepared by Bucknall Austin is attached. Masons are requested to comment on it, for consistency with the rest of the contract, and for conformity with any relevant University Requirements, and to include any relevant protection to the employer so as to minimise his risk.

....
A payment regime for compensable late completion, incorporating both LAD and “penalty” elements has been agreed – in principle – with the contractor and by WDK. This is set out in PW’s letter of the 23rd March to Jayant Sanghvi, a copy of which is attached. Masons are requested to consider this in principle proposal, and to prepare a draft contract condition to cover this matter, incorporating other ramifications as necessary.”

The discussions led to a letter from Mr Collingwood to Mr Whitley on 1 June:

“I attach draft amendments to Conditions 37 (Partial Possession) and 55 (Liquidated Damages).

The purpose of the amendments is to seek to incorporate what I believe you are seeking to achieve in respect of liquidated damages.

In order to make things a little easier for you, I also attach the GC Works 1 Edition 3 Conditions 37 and 55 as previously amended by me so that you can see how the new suggested amendments fit it.

It will also be necessary to amend the Abstract of Particulars but this is only a matter of mechanics. I have not yet been through the other Conditions to check whether further consequential amendments need to be made. I will do this as soon as possible.

Having a fixed sum for liquidated damages regardless of the extent of the Contractor’s culpable delay, is, of course, no incentive on the Contractor to complete once he is in a period of delay. The Contractor might conclude that if his maximum liability for delay is £270,000, he may just as well not complete the work but you are protected in this eventuality by the determination provision. In other words, the Employer could employ others to complete the work and seek to recover the cost of so doing from the Contractor.

New Condition 37(4) needs to be completed. I have yet to conclude how best to go about describing the four buildings that are referred to.

I should be grateful if you would please go through the suggested amendments very carefully and let me know if you think they work and achieve what you wish them to achieve.”

30. These proposals were evidently approved. On 16 June WDK sent a letter of intent to Jarvis (for the attention of Mr Duncan Clark). It read:

“Dear Sirs

PROSPECT GARDENS, BATH

1. We confirm that it is the intention of W.D. King or its nominee company, Prospect Gardens (Bath) Ltd, (“W.D. King”) to enter into a capital fee contract (the “Contract”) with you in due course to carry out certain works as described in the tender enquiry documents and subsequent amendments to those tender documents in Appendix III to this letter (the “Contract Documents”). It is intended that the conditions of the contract (the “Conditions”) will be substantially in the form of GC/Works, Edition 3 Single Stage Design and Build but incorporating the amendments set out in the Contract Documents and further amendments.

2. We further confirm that it is anticipated the Contract will incorporate provisions, which provide for a Guaranteed Maximum Price in the sum of £5.65 million.

3. As to liquidated damages in the event of delayed completion, we confirm that, under the Contract, if you are in culpable delay beyond the dates specified in Appendix II, then you
will be liable for the damages as set out therein, in the circumstances of your being in delay beyond 30th August, that liability being in the same sum, regardless of whether the period of delay is 1 day or more.

4. We further confirm that it is intended that W.D. King will enter into an agreement, supplemental to the Contract with you, as set out in Appendix 1 (the “Supplemental Agreement”). This provides for the payment of further sums to you in relation to a target savings fund arrangement (the “Target Savings Fund”) together with costs or cost liability, should they be incurred, associated with the failure to achieve certain planning consents (the “Planning Risk Cost”).

5. It is anticipated that the programme of works, currently being carried out by the archaeological contractor, BAT, will be completed during week commencing Monday 14th June 1999. You have advised us that you wish to take possession of the site on Monday 21st June, and we confirm that this is acceptable to us.

6. In the meantime, with a view to ensuring that construction activities can proceed in accordance with your intended programme to completion of three buildings on 18 August 2000 and the fourth building on 28th August 2000. Please accept this letter as authority for you to proceed with the works as set out in the Contract Documents.

7. The authority contained in this letter extends to 19th July 1999. In any event W.D. King's total liability to you in respect of the matters authorised by this letter is limited to reasonable costs or cost liability incurred, including preliminaries and the due proportion of main office overheads + VAT but excluding any profit. These main office overheads will be calculated and the whole liability capped at the weekly cost levels as set out in Appendix IV. Any work carried out or other costs, expenses or liabilities incurred by you after that date or in excess of the financial limit will be entirely at your own risk.

8. In carrying out work pursuant to the authority contained in this letter you will in all respects comply with the requirements of the Contract Documents save to the extent the same are inconsistent with the terms of this letter. Moreover and without prejudice to the generality of the foregoing you are to comply in every respect with any technical, qualitative, time and/or performance requirements of the Contract Documents.

9. In the event the Contract and Supplemental Agreement is entered into, it shall have retrospective effect so that all their terms and conditions shall apply to all work carried out pursuant to the authority contained in this letter. You will credit us under the Contract to the value of any payments made hereunder.

10. In the event no Contract and Supplemental Agreement is entered into, W D King will reimburse you all expenditure or cost liability reasonably and properly incurred as a direct result of your complying with this authority. The level of this is to be ascertained by Paul Whitley Architects on an ‘open book’ basis (and for that purpose you shall make available to Paul Whitley Architects all and any documents and/or information as they may in their absolute discretion deem necessary in order to carry out that ascertainment) but subject always to the limitations as to time and money set out above.

11. In the event that for whatever reasons the Contract and the Supplement Agreement is not entered into you will have no entitlement or claim against us save for the reimbursement of expenditure reasonably and properly incurred as aforementioned.

12. This letter of intent may be terminated upon 24 hours simple written notice by ourselves to you and in the event such notice is served you will immediately upon the expiry of the 24 hours cease work and deliver to us the product of all work undertaken pursuant to this letter (including copies of design documentation).
13. Please note that notwithstanding what is said in the Conditions it has now been agreed between us that if the Contract is entered into you will be responsible for taking out and maintaining all insurances of the type envisaged in the conditions. You are to ensure that all such insurances are in place to cover all work carried out pursuant to the authority contained in this letter.

14. The payment/guarantee provisions of the Contract, Supplemental Agreement and under this letter are as follows:
   i) W D King themselves will pay the sums due under this letter and any sums in excess of £150,000 due under the Supplemental Agreement, and they or their nominee company will pay any sums due under the Contract.
   ii) Capital Bank plc will provide a letter of comfort sufficiently guaranteeing the payment obligations of W D King under the Contract.
   iii) W D King will provide a solicitor's letter prior to the signing of the Contract, confirming that £150,000 will be held from the receipts from the investment bank at completion, in an interest bearing Escrow account, to be released to you upon the terms of the Supplemental Agreement.

15. We confirm that it is anticipated you will be appointed the “Principal Contractor” pursuant to the Construction (Design & Management) Regulations 1996, and that you will perform such duties of Principal Contractor as are necessary in respect of the work authorised by this letter.

16. Finally, if any dispute arises between us under this letter it shall be dealt with in accordance with the dispute resolution provisions set out in the Conditions.

Would you please acknowledge receipt of this letter and acceptance of its terms by signing and returning the enclosed duplicate copy.

Yours faithfully

18 June 1999

J ROSENBAUM
Signed on behalf of W D King Ltd"

(Jarvis was subsequently to confirm its acceptance of these terms.)

31. On 21 June Mr Whitley sent a very long fax to Masons about outstanding legal issues. In paragraph 8.14 under the heading “Developer to pay cost over-runs” he said:
   “I understand that the Building Contract provides that every risk is with the Contractor, and that should the Employer not impose any variations, then there is no provision for increased costs to the contract whatsoever. Perhaps MC might confirm this to [Mr Taylor]”.

In his reply of 22 June Mr Collingwood said:
   “8.14. The first paragraph is not accurate. Perhaps the best place to go for the risks that are involved in this construction contract is my letter to Max Bloch of 19th March”.

32. On 2 July Mr Collingwood met Mr Bloch. Both recalled that the meeting was about the proliferation and complexity of the documentation that was now required. It was followed by a letter from Mr Bloch which, according to him, was written at the request of Mr Rosenbaum. Mr Bloch could not really remember why the letter had to be written but he thought that what he was trying to do
was to emphasise concern that things be made clear, to say, in as simple a way as possible, what the
risks were, and to highlight that they were very concerned that they would be safely covered, that
they had as risk free a contract as possible, and that to the extent there were risks to which WDK
would exposed they were to be highlighted. The letter read:

“I refer to our meeting on 2 July which was, of course, with regard to a totally separate issue.

I did, however, at the time raise with you the fact that the above project is of a type which is
beyond our previous experience both as to its very nature and also its complexity. As I explained to you we are, therefore, very dependent on our legal advisers and on the team generally to ensure that everything possible is done to cover any exposure that may be
to us and absolutely minimise any risk insofar as this is practically possible.

You confirmed that you are all too well aware of the mass of documentation which exists, at
present, but that before anything is finally signed you and your team will double check that
our position has been safeguarded. I would ask that where you feel there may be an
element of exposure, which could prejudice our position, any such situation be brought
specifically to our attention. ….”

Mr Collingwood said in his reply of 8 July that he appreciated your concerns and said that at
appropriate time the mass of documentation would be examined in its entirety “to seek to ensure
everything is as it should be”. Mr Collingwood accepted that he did not say that liquidated damages
under the contract would not compensate for losses likely or potentially to be incurred by W D King if
the project was completed later than the cap. In my judgment this was both understandable and
not in any way culpable, not only as it was clear that W D King already knew this to be the case, but
also because Masons did not know the precise extent of the actual losses that WDK might incur as
did they not have any calculations.

33. Jarvis meanwhile was continuing to discuss and negotiate the terms of the contract. In my
view it must have done so from a position of strength that grew increasingly stronger as work
proceeded under the letter of intent. An employer is rarely able to bring to an end the relationship
created by such a letter and still keep within its budget, whereas a contractor generally loses little
even if payment is confined to what is due under the letter. Masons called two witnesses from
Jarvis, Mr Duncan Clark, who was at the time the Commercial Director of the Southern Region and Mr
Robert Terry, a Managing Quantity Surveyor and now Jarvis’ Commercial Development Director. The
evidence of both was unbiased, factual, informed and, in my judgment, entirely credible. No doubt
they are also, as Mr Whitley said, “astute and sharp businessmen .... used to this kind of rough and
tumble. To them it is just business.” However Mr Whitley was more than capable of safeguarding
the interests of WDK and the other participants. As he himself said of one event: “I was playing tough
with them back because they were playing hardball with me.” Mr Terry said Jarvis had noted that in
March both the proposed liquidated damages and the suggested acceleration clause (condition 38)
were potentially unacceptable. Within Jarvis Mr Tony Ward had also been involved in examining
WDK’s proposed terms. Mr Clark became responsible for the project before the time of the letter of
intent as it was addressed to him. In addition to the figures being too high and not, to Jarvis, an
genuine estimate of WDK’s losses, Jarvis could not get insurance for the “lump sum” aspect of the
damages and it found it hard to work out a practical way of passing them on to relevant
subcontractors. WDK’s case here (and elsewhere) was unrealistic. Condition 38, unless operated
skillfully, already was close to crossing the borderline in terms of the basic principles of the allocation
of risk and its management.

34. Jarvis’ position on condition 38 was unchanged. In evidence Mr Clark explained, a little
tartly, that had Jarvis considered the question it would have objected to a clause which made it clear
that it would be liable to pay the employer the full amount of the damage suffered for late completion
if Jarvis did not comply with an instruction issued under condition 38, on the grounds that it would
put it at a greater risk than that which Jarvis would be in terms of the level of liquidated damages
under the contract. Thus PGBL would be better off if Jarvis did not comply with an instruction than if
no instruction at all had been issued, where, in each case, the works were completed late on the same date. (That self-evident point may not have been fully appreciated by WDK and its advisers.) Mr Clark said. Mr Clark agreed that, if a crisis occurred, a decision had to be made whether to take measures to make up lost time or not, then an assessment had to be made of the consequences if the measures were not taken (or, I would add, were not effective) and if there were liquidated damages, then the contractor would know exactly what the consequences would be, so that its management could take an informed decision, but if there were no provision for liquidated damages the decision is that much more difficult to take. Mr Clark thought it would have been very difficult to price it, i.e. to include in the margin for risk something for the risk of liability for unliquidated damages for non-compliance under condition 38. It could however deal with the capped level of the risk in financial terms. Strictly, therefore, the evidence left open the possibility that Jarvis might have been able to price for the risk of having to pay unliquidated damages beyond the ceiling of the liquidated damages. In my judgment, taking account of the rest of the evidence and commercial reality, the chance that Jarvis would in the event have been able to do so and have done so was so slim as to be non-existent. As Mr Clark made it clear, and I am entirely satisfied, that Jarvis would not have entered into a contract for this project on the basis of a possible liability for unliquidated damages arising for non-compliance with an instruction given under condition 38. In summary, its position was made plain by Mr Clark:

“Q: In the context of this contract, would Jarvis have been prepared to have entered into it on the basis of a liability for unliquidated damages for delay?

A: No.”

35. In letters of 10 and 11 August 1999 Mr Clark took up with Mr Whitley the question of the liquidated damages. In reply Mr Whitley said:

“Further to your letter of today’s date, our subsequent conversation and my conversation with Rob Terry I would confirm as follows the response of W.D. King.

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<td>Regarding liquidated damages, these are not negotiable, and indeed do [not] represent the genuine pre-estimate of the losses. If we do not complete by 30 August, then we lose a year’s rent at approx £0.75m. The University has agreed only to reasonable endeavours to fill those rooms, and the Bursar has told us that it is likely that he will fill hardly any at all. We are therefore expecting our losses to be in this order. Jarvis actually are lucky in that we have agreed to carry around £450k of losses even if we do get your £300k. You told me that Michael Taylor has advised you that there was room for flexibility on this point. I have since spoken to Michael Taylor, and have to report to you that there isn’t.</td>
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In any event, this sum was discussed and agreed in the negotiations with your contracts manager and with your operations director, and we have accepted the additional price of the contract resulting from those negotiations. This is therefore an agreed sum and is not negotiable.

9       | Regarding the extension of time claim, I am not aware that we have a dispute. A claim has been made, and in my capacity as the PM, acting impartially on the basis of the contract we have between us, I have refused it. I have advised Jarvis that if they have any further evidence or legal argument to put to me then I will consider that. |
10. Regarding the “acceleration at no cost” concern. I have discussed this in detail with Tony Ward and have written to him to confirm that the intention of the contract is not as may be interpreted in the schedule amendments to the contract issued with the tender. This was mistaken in omitting the wrong clause, which gave the possible interpretation that the PM had the power to impose acceleration at the contractor’s cost when the contract was in delay for reasons of the employer’s responsibility. The intention is that if the contractor is in delay, for whatever reason, the contractor should propose measures to accelerate to complete on time, and if he doesn’t, or doesn’t do so to the PM’s satisfaction, then the PM may require him to carry out acceleration measures. The costs of that entirely depend upon the reasons for the delay. If they are for reasons for which the contractor is responsible, then he pays, and if it is for reasons for which the employer is responsible then the employer pays. That would depend upon any relevant extension of time claim. If the contractor disagreed with the PM’s extension of time decision then he should go to the adjudicator to decide that issue. In any event, any dispute regarding who may be responsible for the delay should have no bearing on the duty to accelerate to make up for any delay. Neither the employer nor contractor can afford to argue about the point when the cost of delay is so huge. Let the adjudicator resolve that while we work together to finish the building on time.

Masons (MC)

11. Regarding adjudication, it is proposed only that the adjudicator’s decision on completion of the Works would be binding without the ability to appeal to arbitration or litigation. You may like to remember that there was not even this tier of appeal in the documents upon which we agreed the negotiation leading to the letter of intent. Originally it was the PM’s decision which was binding without any further appeal.

The University would be similarly bound. This is a chain of contracts. If there was a dispute between the Landlord and University, or between the employer and contractor on this issue it is important that all parties are rapidly bound by the decision of that independent third party, as otherwise everyone will suffer. If any pair of parties were in dispute we have to have the University to be bound to accept the decision, so that the funder will pay, so that the employer has the money to pay the contractor.

Masons (BP)

12. Regarding insurances, if the provisions in the contract are genuinely uninsurable, then that is in nobody’s interest. I have sent the previous correspondence from your broker, Bishop’s to W.D. King’s broker, Risk Advice Management, and have asked him to liaise with your broker. Masons may have to amend the contract wording accordingly. I have given these details to Rob Terry, and would confirm the details as:

Danny Bailey
Risk Advice Management
53 Worcester Crescent
Mill Hill
London NW4 4LP

Tel: 0181 201 1573
e-mail: riskadvice@aol.com

Masons (MC)

JCUK
That deals with all the matters in your letter. May I emphasise that there is a great pressure now to conclude these agreements rapidly, as otherwise they will not happen at all, which would be disastrous for all the parties concerned. May I therefore request that you ensure that Jarvis handle the action matters that I have set out with the utmost urgency, and I will try to do the same for the parties for whom the employer is responsible.”

The letter was copied to Mr Collingwood. Mr Whitley agreed (at least at this stage) that it was recognised the contract did not pass to the contractor the risk of a shortfall between the possible actual loss in the event of delay and the amount of liquidated damages recoverable.

36. Whilst Mr Collingwood was on holiday in August 1999 Ms Howells advised WDK. She said that at that time the level of liquidated damages as a genuine pre-estimate of loss was still a thorny issue. The draft then envisaged that if Jarvis missed the August 2000 completion date for all four buildings but thereafter completed one or more of the buildings before 31 December 2000, it would get a refund of some damages for each building that was completed. However, according to Mr Whitley, it was apparently impossible for Jarvis to hand over building 4 without building 3 being completed first because the former had no lift and access to its upper floors (by lift) could only be through a link with building 3. She thought that the refund arrangement should be adjusted to reflect this but Mr Whitley was adamant that there should be no changes because changing the liquidated damages provisions in any way would “blow the whole deal”. He also confirmed that the liquidated damages did not even begin to reflect PGBL’s real loss should completion be delayed – restated in a letter of 17 August 1999:

“... I also confirm the instruction that it is not intended to change the LAD arrangements in respect of refunds following the 30th August date. The whole LAD issue has been long and hard negotiated and any change to that with Jarvis at this stage would create a further crisis of confidence. In any event, the amount payable for LAD is only a fraction of the overall losses suffered and therefore whether we provided a £20,000 or £40,000 refund when buildings 3 and 4 are handed over at Christmas is irrelevant to the overall equation.

Mark had previously structured the LAD so that the £2,250 per day was payable in respect of late completion of section one up until 30th August and £750 per day in respect of section two. In practice this will now be £1,500 each (£750 per building per day)”

The acceleration clause was discussed with Ms Howells at a meeting on 19 August between Mr Whitley, Mr Taylor, Mr Platts, and Mr Terry. The first part of the meeting was a negotiation with Mr Taylor about the price and financial terms. Mr Whitley and Mr Platts arrived later and dealt with the terms of the proposed contract. Mr Terry then agreed some changes to it. During the meeting Mr Terry asked her the purpose of the clause as he could not see what the remedy was if Jarvis failed to comply with it. She said that it had none. She said that it “was not in truth, a question that I had given any thought to up to that point and did feel ‘put on the spot’ by it. After a moment’s thought, my initial reaction was that the clause had no ‘teeth’ – that is no specific remedy attached to the breach of it, and I believe that this is what I told Rob Terry”. Ms Howells also commented that she thought that “all the people representing WDK/PGBL (i.e. Mr Whitley and Mr Taylor) would have been in the room when I made this response. If their intention had been to give the acceleration clause ‘teeth’ by attaching an express remedy to it, I would have expected an instruction to that effect to have been given at or after that meeting”. Mr Whitley certainly agreed that he had never suggested to Jarvis that in relation to condition 38 and acceleration it might be exposed to general damages for delay, from which I conclude that no one corrected Ms Howells’ view of the effect of condition 38. Moreover her intervention smoothed the negotiations. When cross-examined she was asked about the absence of any written record to support her recollection. She pointed out that before the meeting Jarvis wanted to get rid of condition 38 altogether, on the basis that condition 40 already contained quite wide powers, and so condition 38 was unnecessary, but that as the discussions went on, it accepted that the clause could remain in the contract. The point about remedies and teeth made further discussion of it irrelevant. (It was later agreed that the project manager would be
required to act reasonably when acting under condition 38.) In my view that account (which I accept) explains the absence of any note.

37. On 25 August 1999 Mr Whitley wrote to Ms Howells:

“Dear Alyson

Re: Prospect Gardens, Bath

I am writing further to our extended telephone conversation yesterday. I was raising a number of issues with you that Masons had not previously addressed in the building contract, and you were getting quite exasperated with my requests. However, my comments have all flowed from the original overriding brief to Masons.

You appear not to have understood the overriding brief that Masons have in relation to this process, and in which respect all my comments over the past few months have followed. This brief, which overrides everything else is that of risk elimination – where possible – and risk minimisation where not. This is the brief given to us by Jeffrey Rosenbaum and which Michael, Jayant, Max and myself are working to. In this context, I have been charged with the briefing of the detailed contractual matters with Masons to achieve this end.

W.D. King do not want to be placed in a situation where the stakes are high, and the contractor can justifiably argue for more time or money, or just does not finish on time thus causing W.D. King potentially huge further losses. This risk management may be characterised in a number of ways, which include:

i] Making sure that the Employer / Developer / Landlord remains transparent in any obligations or decisions that pass through the chain of contracts.

ii] Putting every risk upon the contractor, including neutral and statutory ones, and following that principle, fill potential gaps in the contract. We want to put the full responsibility on the contractor to fulfil the product that the University want, so that should there be a problem we have 1 point of reference at which to point the responsibility and we are holding the performance bond to defray costs. We do not want to be in a situation of looking to see who else may or may not be responsible, and how many professional indemnity insurers we want to end up in a legal battle with. We have been clear from the outset with the contractor that this was the intended objective, given him the tools to assess and cost his own risk, and accepted the higher price resulting from that.

iii] Giving the PM the tools to effectively monitor the contractor’s compliance with his obligations, particularly in respect to time and quality. In respect of the tools necessary in respect of time, I would draw your attention to John Barker Construction Ltd v London Portman Hotel (1996) CILL 1152 to illustrate the absolute necessity of carrying out a proper logical delay analysis.

iv] Making the building contract easily understandable and clear in its intent, so as to avoid potential arguments as to how it may be interpreted later. This includes being as specific as possible within each clause, rather than simply relying upon the catch all clause 20, and also adding “avoidance of doubt! Riders where you believe the clause may not cover the intended result.

I have had to write hundreds of comments to Masons over the past few months, much or most of which has been to achieve the aim of the overriding brief. It should not be up to me:

i) to continually draw Masons attention to the lack of transparency
ii) to point out the gaps where the contractor could construe the contract as entitling him more time or money in a particular situation.

iii) to teach you what those effective monitoring tools are

iv) to guess where the clauses may not be sufficiently clear to have the intended result.

You commented several times during our conversation yesterday, that you would make some specific change to the contract only if I really required it, but that is missing the point. I should be relying on your advice and proposals to get to the end result of satisfying the overriding brief, not trying to persuade you to make the change.

Please take this on board. I am trying to work with your lead as how to achieve the brief, and not to feel I am having to remind and persuade."

She replied on the same day:

"Thank you for your fax of 25th August.

I apologise if I appeared exasperated during our conversation yesterday. As you know, I am feeling rather below par at the minute and was struggling with the telephone conversation in the context of having virtually no voice: I have to confess that it did rather take the energy out of me!

I understand perfectly the overriding brief (as does Mark). Your intention is risk elimination where possible and risk minimisation where not. That is what we have been working to achieve in the contract amendments. My reservation about presenting Jarvis with new amendments comes from the fact that on a number of occasions that matters which we have been instructed by you have been agreed with the contractor (and which we have consequently spent considerable amounts of time documenting) have not been so agreed. An example of this was the Supplementary Agreement. It therefore seems to me, (and I made this point during our conversation) that it is unproductive at this stage in the process, when the intention is that the documentation is to be finalised this week, to insert amendments into the contract which have not been agreed in principle with Jarvis and which are not vital in terms of the “big issue” of risk transfer.

Neither Mark, nor I, thought that some of the amendments that were raised in your correspondence were necessary ones and we had not therefore incorporated them into the draft previously. Examples of this were inserting into the requirements for the performance bond and guarantee the requirement that they be executed at the time of entry into the contract. Since this as a matter of practicality will be done any way, it is not a vital amendment.

Other amendments you required – such as the insertion of the obligation to comply with statutory requirements – are, I think, justifiably made in that they do improve the clarity of the existing contract wording. I have to say, however, that of the 8 amendments resulting from our conversation of over an hour yesterday, 3 were not significant to the meaning of the contract as a whole (the amendments to Clauses 46, 66 and 67), and one was the reinstatement of the programming clause which was deleted by agreement at the meeting with Jarvis. There were, therefore, 4 amendments which arose from your original fax to Mark which have clarified the existing wording or the extent of the contractor’s obligations. In that context, your comments in your fax seem rather harsh.

So far as the programming issues are concerned, and your point about carrying out proper logical delay analysis, you will recall that it was agreed at the meeting with Jarvis that Clause 33(4) should be deleted since it was already covered in the preliminaries. You told me on the telephone yesterday that in fact this was wrong and we would need to renege on that
agreement and reinstate the clause or similar obligation. I have done this, and have amended the clause in accordance with your requirements as explained on the telephone yesterday; I cannot therefore understand why Masons are under fire in respect of the conditions regarding programming issues.

I appreciate that you are concerned that the Contractor should not be given any opportunity to raise any claim for additional time or money other than in very limited circumstances. That is the object of the amendments that we have drafted so far. The contract quite clearly sets out those circumstances in which the Contractor is entitled to additional time or money in Conditions 36, 41, 42, 43 and 46. I do not think that any of the comments that you raised affected this position. Sadly, that is rather different from the issue of the Contractor being able to construe the Contract as entitling him to more time or money in a particular situation. I think it is fair to say that no amount of drafting can prevent a Contractor “trying it on” with a claim. The point is that the Contract has been amended with the aim of preventing the Contractor successfully pursuing a claim through adjudication and/or arbitration other than for those matters specifically set out in the Conditions referred to above. I do not see how we can do more.

You refer to “lack of transparency” and I am not clear what you mean by this, although I think that it forms part of a larger general point concerning the back to back relationship between the Contract and other project documents. I believe that Beverley has already addressed this point with you and with Michael Taylor.

I am sorry that you feel that you are having to teach us what the “effective monitoring tools” are. I had believed from our conversation yesterday that I had made quite clear that I understood why you wanted from the Contractor the information on programming that you were seeking, and empathised with why you would want it. My only point was and remains that Jarvis is clearly very resistant to producing this information and that as a matter of general practice within the industry it is quite common for Contractors not to produce satisfactory programmes as a matter of course throughout a job, but rather to produce these programmes retrospectively at the end of a job when they actually begin to litigate or arbitrate over extension of time claims. I accept completely why you would want to change this position, and for this reason we agreed that we would adapt the existing Clause 33(4) (which is the one that was deleted during the meeting with Jarvis) in order to try and achieve the result that you want. However, I return to the point that since Jarvis were so resistant to this clause in the meeting, it might be more productive to try and get to the bottom of this resistance, rather than to continue producing this clause to them only to have them refuse to accept it. To the extent that you think that there are other “monitoring tools” that you specifically want to employ, then it is for you to tell us what those tools are. Neither I, nor Mark, can second-guess the way that you want to run this job.

Finally, as a general point, I believe that the “catch all” Clause 20 is effective to protect the Employer in relation to the obligations that it assumes under the Agreement for Lease and the Development Finance Agreement. Whilst I agree that in an ideal world you would specifically step down from these agreements every single obligation which is relevant to the building contract, in this project (as in many, many others) this is simply not practical because of the continual amendments that have been made throughout the period of negotiation to both the Agreement for Lease and the Development Finance Agreement. This method of using a “catch all” clause is adopted on very many projects, and is an effective way of ensuring that the contractor is bound by obligations in those other agreements insofar as they apply to the Works. I suppose the point that I am trying to make is that one can carry on amending and re-amending a contract ad infinitum. There is always another specific obligation that could be inserted or a specific limitation to which the contractor’s attention could be drawn on a “for the avoidance of doubt” basis. Realistically, however, a line must be drawn under the amendments at some point for the sake of achieving the deal.
I hope that after our discussion yesterday you feel that the draft has now taken account of all
of the points that were of importance to you I terms of your services as a Project Manager.
For my part, I believe that the Contractor’s entitlement to claim additional time and money
under the Contract has been limited.

I am now away from the office for a few days. Mark will be back from his holiday at the end
of this week (I believe he may be in the office on Friday afternoon) and will certainly be in
the office Tuesday next. I hope by that time that Jarvis will have responded to this revised
draft and to the side letter and that we will at that point be able to tie things up.

With kind regards

Yours sincerely

Alyson Howells”

This interchange provides another good illustration of the detailed care being given to WDK’s
requirements. By this time, to adopt what Mr Collingwood said repeatedly throughout his evidence,
Masons’ task was to see that the building contract matched the commercial deal that had been done
between Jarvis and WDK/PGBL.

38. It is also instructive to note Ms Howells’ letter of 1 September 1999 to Mr Bailey of Risk
Advice Management as it shows that the question of the shortfall was being considered in another
context. Contact with Mr Bailey was prompted by Mr Whitley to whom the letter was copied.

“Further to our earlier telephone conversation, and to your fax of 26 August, I attach: -

1) The definition of “Accepted Risks”.
2) The original GC/Works/1 insurance clause 8 (with the parts that you can ignore
   struck through).
3) Our amended Condition 36.

You will see that, as I said in my previous letter, clause 3(b) is very similar to our
clause 8(2)(b), in that it also requires the public liability insurance of the Contractor to include
a provision for indemnity to the Employer in respect of the Contractor’s liability under
Condition 19. We agreed during our telephone conversation that this cannot be right, and
that Jarvis’s brokers do have a point when they say that public liability insurance will not
cover loss or damage to the Works or Things on Site (clause (6)(c) of Condition 19) and that
the requirement for that insurance also to cover loss of profits and/or loss of use resulting
from any loss or damage does potentially overlap with the recovery of liquidated damages for
delay and may even be interpreted as requiring the Contractor to ensure for amounts beyond
those recoverable by way of liquidated damages.

The only way in which loss of profits and/or loss of use could arise is if the works are not
completed by the completion date (subject only to the Contractors entitlement to extension
of time, in the limited circumstances set out in our amended Condition 36 - see below).
Failure to complete by the completion date will give rise to the right to deduct liquidated
damages, and in this scenario, it does seem that Condition 19(6)(d) is unnecessary except
insofar as it is seeking to impose on the Contractor a liability beyond the amount of liquidated
damages. We know in this contract that the Employer’s loss is potentially going to be greater
than the amount of liquidated damages that will be included in the Contract. As we
discussed, to the extent that there is potential to insure this loss then this should be dealt
with in the contract but, as you suggested, it may be suffered where delay to the Works gives
rise to a greater loss to the Employer then is recoverable by way of liquidated damages from
the Contractor. A separate issue is the insurance of loss of liquidated damages where the completion date is extended under Condition 36.

It is important that everyone is quite clear on which risks are insurable, and by whom, before we make any further changes to the Contract wording. Could you perhaps come back to me to confirm whether you think that it is sensible for Prospect Gardens (Bath) Limited to take its own delay cover to deal with the type of loss envisaged in Condition 19(6)(d), and whether loss of liquidated damages cover is appropriate. As soon as I have heard from you I will then be able to go back to Jarvis’s brokers with proposals for amendments to the wordings to Conditions 8 and 19 so that we can tie up the insurance provisions.”

39. On 1 September Mr Whitley wrote to Mr Terry of Jarvis:

“Dear Rob

Re: Prospect Gardens, Bath

Thank you for your letter of 25 August, to which I reply.

I first deal with the question of how the LAD have been calculated. In this case, the LAD is not an estimate of the whole of the damages that appear likely to be suffered by the Employer should the contractor be in culpable delay. The Agreement for Lease with the University provides that the University merely has a “reasonable endeavours” obligation under a license arrangement to seek to fill the student rooms should the project be handed over late. This license arrangement would continue for the whole of the academic year and the agreed lease provisions which provides for the payment of the full rent would only come into force at the beginning of the following academic year. The University will however, accept one building and pay the full rent for that at 31 December. The annual rent is a sum in the region of £680,000 and consequently if one credits the rent for the one building from 31 December onwards against the loss of that annual rent one is left with a loss in the region of £600,000. We are not assuming that we would receive any substantial credit in respect of the license fees, given advice from the Bursar, that despite the “reasonable endeavours” obligation, he does not expect to fill hardly any such rooms at short notice. In addition to the foregoing losses, the Agreement for Lease also provides that the University will charge us a penalty of £40 per student per week, which would equate to losses in the region of a further £400,000. The overall expected loss therefore, is in the region of £1,000,000.

We made a commercial decision that a contractor faced with £1,000,000 of LAD for even a very short period of delay, would not quote for this project on a competitive basis and that we would pay an undue premium within the contract price should we seek to impose this as an LAD. We therefore judged that £300,000 was the maximum a contractor would be comfortable to face. This is what was proposed to the selected contractors with whom we were negotiating and accepted by both in their final GMP submissions to us.

I then calculated the losses arising from the “best case situation” when the contractor is in culpable delay, this being (when only one building is handed over late but which is available to the University prior to 31 December) and proposed an LAD in respect of these circumstances to approximately balance those losses. As you can see, the loss of rent for one term of Building 3 is a sum in the region of £70,000 and if one adds the University’s £40,000 Per week penalty on top of that, this adds another approximately £45,000 of loss. The total losses therefore in these circumstances approximately £115,000.

Regarding the various scenarios in between these two conditions of culpable delay, I have simply set out figures between the two extremes which provides for a gradually increasing incentive on the contractor to provide as many buildings as early as possible. These figures have no calculated basis.
As offered to Jarvis previously, the Employer would be very happy to dispense with the LAD if the contractor wishes instead to pay the whole of whatever losses are suffered by the Employer should the contractor be in culpable delay.

I now reply to the rest of your letter using your alphabetical references.

(a) Agreed

(b) (i) Agreed

(ii) I will deal with the discrepancies in response to the penultimate paragraph of your letter.

(iii) I believe the only insurance provision upon which Jarvis had difficulty was the proposal that Jarvis should take out insurance to cover any LADs they may suffer. I confirm that this is not to be a requirement of the project. Please advise me if there are any further insurance questions yet to be resolved.

(iv) Regarding concurrency of delaying issues, we are now proposing to amend the original provisions in the tender documentation, such that a delaying event by the Employer is to be taken into account within the overall calculation of any further Extension of Time. It was also agreed at our last meeting that – whatever were the merits of the claim by Jarvis for an Extension of Time at the beginning of this project – that they agreed to formally withdraw that claim.

You should now be in possession of the revised amendment of the conditions and side letter following our meeting. I would be pleased to receive any comments you have to make urgently.

Regarding the arbitration provisions, I explained at our meeting the benefit for all parties including the Contractor for there to be a fast-track mechanism to resolve any dispute should it occur regarding the completion certificate. It is in everybody’s interests that the University will be bound by such a decision which would therefore allow the Funder to provide the finance for the Employer to pay the Contractor at that stage. I believe you and Duncan understood the point but wished also to think further about the question in case there may be other disadvantages for the Contractor. I trust you now agree with the proposal. We are therefore maintaining our proposal for fast-track arbitration at this stage only. This would not take away the right of either party to seek an adjudicated award although that may be redundant and unnecessary.

(d) Agreed. My colleague, Peter Ashby, is also responding under separate cover on this matter.

(e) Given the great difficulty of creating a definition of what “Completion” means, if one has got a potentially open-ended snagging list, we believe this would be a receipt for dispute, as the Contractor and the University are likely to take different positions. We have to have a clear definition of what “Completion” means, in order that the PM has a basis for certifying that. Our agreement made with you and Gareth at this office to consider your proposal of how we may give more time to the Contractor at Completion was on the basis that you would be bringing forward a clear definition. Peter Roberts’ subsequent letter on this issue accepted the difficulties of making that clear definition.

We have therefore decided to simply exclude external works from the work to be completed by 28 August and for that to be in a separate section to be handed over two weeks later; this being 1 September 2000. You have referred to 14 September in your letter; I think this must be a mistake as the discussion previously has been only about a two-week extension to the previously set completion date of 28 August.
(f) Regarding handover of Block 4, it has always been a requirement that any block handed over must have access to a lift. My proposal that Jarvis are allowed to hand it over on 28 August instead of 18 August takes nothing away from the previously agreed deal, but instead gives the Contractor ten days more leeway to complete Block 4. You seem to be interpreting that I have added the risk to Jarvis by this proposal when in fact I am reducing it.

However, we are mindful of your pressures and are seeking to accommodate those where we can. I have therefore just agreed with the University that Block 4 may be handed over without the lift, provided that the lift is available to access that block by 11 September 2000. Effectively, I am now proposing that Jarvis would have 24 more days to hand over Block 4, together with lift access, than had been the deal at the time of entering the Letter of Intent.

(g) Certain sub-contractors who have a design responsibility are being required to take out warranties and we have proposed P.I. levels in respect of each. Andy Platts is sending you another copy of this under separate cover. Regarding consultant P.I. levels, it has always been a requirement that they have a cover of £1,000,000 for each and every claim. I trust that this is now agreed. It is agreed that Capital Bank may pay Jarvis directly. Regarding the other comfort that Jarvis require from Capital Bank, the ball for this is in Jarvis’ court as your Paul Milner was talking directly to Capital Bank.

I now turn to your penultimate paragraph dealing with the question of discrepancies within the documents.

Your description regarding some requirements superseding others throughout the negotiation period is not a fair description of the Employer’s Requirements at any stage. The University’s Standard Requirements document has always been, right from tender onwards, a part of the Employer’s Requirements. It has also been one of the contract conditions, right from tender period onwards, that any discrepancy within the Employer’s Requirements shall be decided by the Project Manager in his own discretion without adjustment to the Contract Sum. At no stage, until our meeting two weeks ago, has anyone from Jarvis raised these agreed matters as being a problem to them. By raising it now, Jarvis is seeking to change the deal agreed between us.

This is an all-risks deal. It was precisely in order to give the Contractor the ability to check the thoroughness of the documentation in order that he could bind himself to taking on all risks including the risk of discrepancies within the documentation, that the Employer agreed to pay for the Contractor’s design team fees whether a contract was successfully negotiated with that firm or not. You and your designers have now trawled through the documentation in great detail and have come up with a relatively limited list of discrepancies which we are presently discussing with you. I therefore submit to you that the risk of any further discrepancies arising is a particularly limited one.

I would also note that we are allowing Jarvis to raise discrepancies at this stage and to seek to resolve them in a mutually agreed manner rather than simply imposing on them a decision which, under the contractual terms implied into the Letter of Intent, we would otherwise have the right to do. I trust you will see that we are therefore being accommodating to your concerns in seeking to bring these questions to resolution rather than simply insisting upon the deal as made.

This is not an inequitable situation as you have stated it to be. It is simply allocating and pricing a risk and that is the agreed basis of the Letter of Intent. It is clearly essential that the University accepts, without reservation, the Employer’s Requirements, in order that they will accept the building that Jarvis builds for their occupation. They will only do so should this contractual provision allowing the PM to resolve discrepancies remain, and we therefore cannot negotiate this matter.
My colleague, Peter Ashby, is responding to you under separate cover regarding your appendix to this letter dealing with discrepancies and your letter of 26 August making proposals for amendments to the Employer’s Requirements.

In mid September 1999 Ms Howells completed the drafts of the principal documents. (By this time Jarvis had been working for about three months.) During this period Eversheds on behalf of Jarvis had negotiated some changes so that in their final form condition 38(1) and (2) read:

“38(1) In the event the PM is of the opinion that the Contractor’s rate of progress in carrying out the Works is likely to prejudice completion of the Works or any Section by its Data for Completion, and to the extent that in the opinion of the PM this is due to a cause which is not listed in Condition 36(1), the PM, acting reasonably, and taking account of the Contractor’s representations, may instruct the Contractor as to the measures he requires the Contractor to take to retrieve the position and the Contractor shall comply with the same at no cost to the Employer. Without prejudice to the generality of the foregoing, such instructions may include the requirement to re-sequence work, to accelerate completion of a part of the Works and/or require the Contractor to increase his on and off site resources.

38(2) The PM shall give the Contractor notice in writing of an intention to issue an acceleration instruction no later than 5 working days before such instruction is intended to be issued, and the Contractor may submit to the PM representation in relation to the proposed instruction no later than 4 working days thereafter. In taking account of the Contractor’s representation, and in making a decision to issue an acceleration instruction the PM shall have regard to the progress of the Works against the completion date for the Works and each Section thereof current at the relevant time”.

The new Condition 55(6) read:

“55(6) The Contractor hereby irrevocably accepts and agrees:-

55(6)(a) that having regard to the purpose for which the Works are required and the Employer’s obligations and liabilities under the Agreement for Lease and the Development Finance Agreement, liquidated damages calculated in accordance with paragraph (2) represent reasonable pre-estimates of the loss and damage likely to be sustained by the Employer in the event the Works or Sections 1, 2 and 3 are not completed by the Date or Dates for Completion and in particular if the Works (except Section 3) are not completed by 30th August 2000.

55(6)(b) that no challenge shall be made or sought to be made to the liquidated damages by the Employer, or by the Contractor on the basis that they are a penalty or that they do not represent a genuine pre-estimate of the Employer’s losses arising from delay.

55(6)(c) that pursuant to paragraph (2) of the Abstract of Particulars, the Contractor’s liability to pay or allow up to the sum of £300,000 by way of liquidated damages accrues irrespective of the extent of delay beyond the Date or Dates for Completion where completion occurs after 30th August 2000”.

The words at the end of sub-para (b) were added by Eversheds at Jarvis’ request. In addition there was a restriction of the indemnity in condition 20 insofar as it might relate to delay losses. Jarvis were similarly concerned about condition 19 in relation to an expression of liability for unliquidated damages for non-compliance with condition 38. That read (as amended):

“(1) This Condition applies to any loss or damage which arises out of, or is in any way connected with, the execution or purported execution of the Contract.

(2) The Contractor shall without delay and at his own cost reinstate, replace or make good to the satisfaction of the Employer or, if the Employer agrees, compensate the Employer for, any loss or damage.
When a claim is made, or proceedings are brought against the Employer in respect of any loss or damage, the Contractor shall reimburse the Employer any costs or expenses which the Employer may reasonably incur in dealing with, or in settling, that claim or those proceedings.

The Employer shall notify the Contractor as soon as possible of any claim made, or proceedings brought against the Employer in respect of any loss or damage.

The Employer shall reimburse the Contractor for any costs or expenses which the Contractor incurs in accordance with paragraphs (2) and (3) to the extent that the loss or damage is caused by:

(a) the neglect or default of the Employer or of any other contractor or agent of the Employer;

(b) any Accepted Risk. …”.

41. Other relevant conditions include:

(1) Condition 20:

“Compliance with agreements associated with the Works

20(1) The Contractor acknowledges receipt of a copy of those extracts from the Agreement for Lease and the Development Finance Agreement which are annexed to the Abstract of Particulars with the Employer to so design, carry out, complete and maintain the Works as not to put the Employer in breach of the obligations contained in the said extracts of the said agreements (including, without limitation, the Construction Requirements and the provision of evidence of compliance with the Construction Industry Scheme as set out in clause 24 of the Development Finance Agreement) and to do everything reasonably necessary to facilitate the Employer” compliance with its obligations under the said agreements. For the avoidance of doubt the Contractor shall however owe no obligation in connection with paragraph 8 of Schedule 1 to the Agreement for Lease.

20(2) The Contractor shall indemnify the Employer against any costs, loss, expense or damages arising from any breach by the Contractor of any of its obligations under this Condition 20, save in respect of costs, losses, expenses or damages arising from delay, which shall be dealt with in accordance with Condition 55 (Liquidated Damages)”

Condition 20 was new and replaced the GC/Works/1 version. It is significant that the last limb of condition 20(2) was inserted as the request of Jarvis to ensure that there was no possibility that its liability for damages for delay would other than the liquidated damages provided in and under Condition 55. Mr Collingwood said in cross-examination that it was inserted by Jarvis “to confirm, as I understand it, the commercial deal that was between the parties…..to ensure that there was not, as it were, a back-door route to recovery of unliquidated delay damages by reason of breach of this clause”.

(2) Condition 33:

“Programme

(1) The Contractor warrants that the Programme shows the sequence in which the Contractor proposes to execute the Works, details of any temporary work, method of work, labour and plant proposed to be employed, and events, which, in his opinion, are critical to the satisfactory completion of the Works; that the Programme is achievable, conforms with the requirements of the Contract, permits effective monitoring of progress, and allows reasonable periods of time for the provision of information required from the Employer; and that the Programme is based on a period for the execution of the Works to the Date or Dates for Completion.

(2) Subject to Conditions 35 (Progress meetings), 37 (Early possession) and 38 (Acceleration), the Contractor may at any time submit for the PM’s agreement proposals for
the amendment of the Programme. The agreement of the PM to any proposal for the amendment of the Programme shall not relieve the Contractor of any liability which he has under the Contract. In particular, without limitation, the submission by the Contractor of any proposal for the amendment of the Programme showing a period for the execution of the Works extending beyond the Date or any of the Dates for Completion shall not constitute a notice from the Contractor requesting an extension of time for the completion of the Works or of any Section; and the agreement of the PM to any such amendment shall not constitute, or be evidence of, or in support of, any extension of time for the completion of the Works or of any Section.”

(3) Condition 40

PM’s Instructions

(1) The PM may from time to time issue further drawings, details, instructions, directions and explanations, all or any of which shall be treated for the purposes of the Contract as Instructions, including Variation Instructions. The Contractor shall comply forthwith with any Instruction.

(2) Instructions may be given in relation to all or any of the following matters -

(a) a change in the Employer’s Requirements;
(b) the resolution of such discrepancies as are referred to in Condition 2 (Contract documents);
(c) the removal from the Site of any Things for incorporation and their substitution with any other Things;
(d) the removal and/or re-execution of any work executed by the Contractor;
(e) the order of execution of the Works or any part of them;
(f) the hours of working and the extent of overtime or night work to be adopted;
(g) the suspension of the execution of the Works or any part of them;
(h) the replacement of any person employed in connection with the Contract;
(i) the opening up for inspection of any work covered up;
(j) the amending and making good of any defects under Condition 21 (Defects in Maintenance Periods);
(k) (not used);
(l) the execution of any emergency work as mentioned in Condition 54 (Emergency work);
(m) the use or disposal of material obtained from excavations, demolition or dismantling on the Site;
(n) the actions to be taken following discovery of fossils, antiquities or objects of interest or value;
(o) measures to avoid nuisance or pollution;
(p) quality control accreditation of the Contractor as mentioned in Condition 31 (Quality); and
(q) any other matter which the PM considers necessary or expedient.

(3) All Instructions shall be in writing except those under sub-paragraphs (b), (d), (g) and (l) of paragraph (2), which may be given orally. Oral Instructions shall be immediately effective in accordance with their terms, but shall be confirmed in writing by the PM within 7 Days. Written Instructions shall be given to the Contractor’s agent. Oral Instructions may be given to such employee or agent of the Contractor as the PM thinks fit, but shall be confirmed in writing to the Contractor’s agent. The Contractor’s agent shall immediately acknowledge receipt of any written Instruction, and of every written confirmation of an oral Instruction.

(4) (Not used)
(5) The PM may include in a VI a requirement for the Contractor to submit to the QS not later than 21 Days from the receipt of that Instruction a written quotation of the lump sum total price of complying with it. The PM may make any VI conditional upon agreement of such a lump sum price, pending which agreement the Contractor is not to begin complying with the VI."

42. Another good indication of Mr Whitley's approach, of his care and attention, and of how he made up his own mind on Masons' advice, is seen from his letter of September 1999 to Mr Sanghvi: "Dear Jayant

Re: Prospect Gardens, Bath

I write to draw to WD King's attention, for the avoidance of doubt, that the Developer's obligations in the Development finance Agreement (DFA) and Agreement for Lease (AFL) are not fully mirrored in the Contractor's obligations in the Building contract or the consultant's obligations in the Consultancy Agreements. As such, the Developer will be in breach of certain of his DFA/AFL obligations, as the Project Manager/Architect will be administering the Building Contract according to their present terms and managing the Consultants according to their present terms.

WD King's brief in respect of these Agreements has been to eliminate all risk where possible, and where not, to minimise that. As you know, I have written dozens of letters to Masons, on WD King's behalf, with hundreds of representations to various drafts of these Agreements, in order to seek to achieve this end. I am disappointed that the end result of these three contracts does not go as far down that line of risk minimisation as I would have considered possible and desirable. Although many of my representations have been reflected in the latest drafts, some have not.

There are many issues in this category which do not allow the developer to be legally "transparent" in the chain of contracts. At this late stage I could not list them all as I understand that the other parties involved have pretty well agreed the respective contracts and we are about to have them all signed. WD King have been copied with all my letters to Masons over the past six months, which is where I make these points. Although the following by no means deals with all of these issues, you could get an idea of the current situation by reference to my letters of 21 September and 27 September to Beverly Pike regarding the AFL and the DFA respectively. In addition, I have also recently highlighted particular issues in the DFA in which I am in agreement with Gleeds (the funder's Monitoring Surveyors) as to what ought to constitute the Developer's obligations in the DFA in a letter to Kay Williams of 30 September, but which are not reflected in the latest draft.

There are also other issues which I have previously raised but are not reported in those recent letter, for example the lack of Dispute Resolution procedures that bind the relevant parties. Let me give an example of what hypothetically could go wrong. The definition of Building Work Defects in the Building contract is different from that in the DFA. The Project Manager/Architect will be certifying completion according to the obligations in the Building contract although the Monitoring Surveyor will approve the application for funds from the funder arising out of that Certificate only according to the terms of the DFA. If there is a dispute as to whether a matter is a Defect or not and consequently whether completion has been achieved or not, then to compound the above problem, there is no single arbitration procedure binding on all parties. The Developer is therefore left in a no-win situation in the middle.

In addition, although I have made many representations to Masons you should not assume that I have pointed out all the issues where the risk has not been minimised. My responsibility has been to brief Masons and to make representations to them "with due skill and care" to try to point out to them where I believe the latest draft may not have fulfilled
that brief, but in the end it is Masons’ responsibility to draft those Agreements according to that overall risk minimisation brief and to point out to WD King what are any remaining risks.

I have had conversations with you, Michael, William and Mark Collingwood over the past couple of weeks regarding a particular term of the proposed Project Manager/Architect Appointment (clause 5.1) which provides some responsibility on the consultant to facilitate the Client’s compliance with his obligations in the various Agreements. I have now agreed with Mark, the inclusion of a new Clause 6.2 which is intended to recognise the problems I have outlined in this matter and which qualifies my obligations under Clause 5.1. I enclose a copy of the latest draft of clause 5.1 and 5.2.

You will note that 5.2 requires me to alert you of the likelihood of any failure of the client to comply with its obligations in these Agreements. I am here confirming to you not simply that there is such a likelihood but the certainty that in many respects the Client will be unable to comply with its obligations.

I cannot foretell whether any of these failures will turn out in the implementation of the Project to be either a fundamental catastrophic problem or to be totally inconsequential. It all depends upon the actual circumstances that arise upon which that failure of the client to comply with an obligation is relevant and also depends upon the attitude of the Funder or Tenant as to whether they may wish to make an issue out of what otherwise may be considered merely to be a “technical” breach with no consequential loss to those parties.

If you want me to trawl through all the past correspondence to Masons and summarise any issues which I have raised and which may still be outstanding, I will be happy to. However I understand the intention is to get the various Agreements signed within the next few days and consequently such an exercise would delay that. It is up to WD King to decide whether to take a commercial view, given an overall sense of the level of risks involved in their position, or alternatively to consider all the matters in details to determine if they are satisfied that each individual risk is worth taking.

Whilst writing, may I also draw your attention certain risks associated with the Building contract not arising from the above “inconsistencies” issue which however have not been minimised or eliminated as much as I would like. Overall it is important to note that I am pleased with the general trust of this particular form of contract that Masons have prepared it is particularly unusual as to the extent it throws all the risks on the contractor. However I have not been able to convince Jarvis to accept all the provisions I would have liked for instance I wanted to more explicitly spell out the programming information that Jarvis must provide so that the project Manager/Architect could monitor the Contractor’s progress more effectively. I have a particular concern at present that Jarvis are behind programme and although they are formally reporting to me that they expect to complete on time, I do not have the relevant evidence form them as to why I could agree with that. If the Completion Date would otherwise be delayed, I do have the power to require the acceleration of the works and I can only effectively do this with that proper programming information provided by them.”

By October WDK’s cash reserves were running low so there was pressure to conclude the arrangements in order to get the finance. Mr Whitley said: “We discussed this long and hard and we wanted it finished.” On 7 October 1999 Ms Howells had a telephone call with Mr Whitley. Her attendance note includes the following:

“Liquidated damages – I asked him to explain the £1,500 for each of section 1 and 2 up to 30th August. He confirmed that they are indeed a complete penalty and that the only loss WD King might suffer up to that point is the £1 payable to the University or perhaps additional professional fees. I said that notwithstanding clause 55(6) in which Jarvis confirm their agreement that the liquidated damages do represent a genuine pre-estimate of loss, I could not guarantee that this provision would not be open to challenge. Paul said that he
worked on the basis that there was nothing wrong with having a penalty in English law and I stopped him at that point and explained that there was and that was precisely the reason why liquidated damages do have to represent a genuine pre-estimate of loss. I said that my view was that because clause 55(6) in which Jarvis had specifically agreed the figures, they would find it quite difficult to raise a challenge to the liquidated damages at a later date. However, it was not impossible that they might do this, and might do it successfully. In short I could not guarantee that the liquidated damages provisions would work.”

Mr Whitley acknowledged that he understood the advice. In my view this is another instance where Mr Whitley fully understood that the mechanisms proposed by Masons were the best that could be devised but could not be guaranteed.

44. The project contracts were signed on 14 October 1999 (and the contract with Jarvis on 19 October 1999). The completion dates were 28 August 2000 for Section 2; 23 December 2000 for Section 1; and 7 January 2001 for Section 3. Prior to the signing of the financing and other transactions Ms Howells had to take Mr Rosenbaum, Mr Taylor, Mr Sanghvi and Mr Bloch through a fax which had been sent to Mr Sanghvi by Mr Whitley on 4 October 1999 in which Mr Whitley (who did attend the meeting) had been very critical of the documentation prepared by Masons. He said the documents did not minimise the risks to be borne by WDK and PGBL and they could lead to “a fundamental catastrophic problem”. The fax did not say that there was any failure in relation to the differential between the potential losses on the project should there be late completion and the amount of liquidated damages that would be recoverable. I agree with Ms Howells that if Mr Whitley had thought that this was an issue at the time he would surely have raised it. Subsequently, on 11 November 1999, Ms Howells wrote to Mr Rosenbaum about her advice. The letter was mainly about Mr Whitley’s complaints about the other agreements but she also dealt fully with the building contract with Jarvis, (including condition 20) and such risks as she perceived there to be. She said, in part:

“9. Paragraph 8 and 9: no comment, other than to say that on two long letters that Paul sent through to us, requesting various amendments to the Building Contract, I went through these with him by telephone point by point and dealt with each one, either by incorporating it where relevant and/or necessary, or by rejecting it as unnecessary. To our knowledge there are no outstanding points that he has raised.”

45. On Christmas Eve 1999 a landslip occurred on the site. Initially Jarvis considered that it was not responsible under the contract for overcoming the effects of that event. Advice was sought from Masons. Ms Howells wrote on 17 February 2000 in which she said amongst other things:

“It is arguable in theory that this last category means that Jarvis would have liability for amounts over and above liquidated damages. However, Jarvis were awake to this possibility during the negotiations and an amendment was made to clause 55 to prevent the employer challenging the liquidated and ascertained damages figure in order to offset the possibility that monies over and above the LADs figure may be claimed by the employer under clause 19 in respect of losses for delay.

..."It is arguable whether this amendment does actually have effect. Assuming that it does, it would not preclude claims for loss of profits which stem from third parties."

"The position is therefore that Jarvis have a liability in respect of loss of profits/loss of use. They will argue that clause 55.6 precludes the employer challenging the liquidated and ascertained damages figure, therefore prevents a loss of profits/loss of use claim being raised by the employer insofar as it is based on its own loss of profits/loss of use arising out of the works, and cannot raise that argument in relation to third parties."

46. Further advice was given by her on 22 February 2000, as recorded in her attendance note:
"I pointed out that it had never been an option in the course of the negotiations that we
would recover from Jarvis more than the LADs amount in respect of delay. That is just a
quirk in this particular contract form that gives the potential to argue otherwise. He agreed
that this was the case and it was of course the norm for LADs to represent the entirety of the
amount that the employer could expect to recover from the contractor in the event of a delay
in practical completion."

This note is of particular significance as it shows clearly that Mr Whitley accepted that he had never
considered that Jarvis would be liable to pay unliquidated damages.

47. On 1 March 2000 Mr Whitley sent out a report that he had prepared on the reasons for the
landslip and on the steps open. It contained the following passages:

“[10] (iv) Since the ground movement event occurred, Jarvis have shown little
evidence that they are progressing with dealing with the problem in accordance with their
obligations in a diligent manner, and have – for much of the period – not accepted those
obligations. In order to protect the Employer’s position in the evolving situation over the past
2 months, I have been regularly seeking Mason’s opinion on their interpretation of the
respective parties’ rights and obligations, and keeping the Employer informed accordingly. I
am now asking Masons for further opinions on the legal aspect of this document, and it is
likely that their advice will be needed for the immediate foreseeable future, until the present
problems are resolved. Arising out of this, there will be fees payable to Masons.

11. Insurance position: Contractor and Developer

11.1 Masons have confirmed to me that all the insurance obligations in the Building
Contract are with the Contractor, rather than the Employer. These include the obligation to
take out Construction all-risks Insurance against loss or damage to the works and public
liability insurance for injury to any persons or damage to other property arising from or in
connection with the works.

11.2 I understand from Danny Bailey that the Employer’s insurances include that against
damage to third party property caused by certain groundworks, e.g. underpinning, lowering
of ground levels, etc. We have sought confirmation from Danny Bailey that these are in
place. It appears however that he has not got a copy of the policy and is having difficulty
getting one from the insurers themselves. We are chasing him on this matter.

12. Losses arising out of Delay to Completion

12.1 The L.A.D’s only cover a proportion of the overall losses that would be suffered in the
event of Delay to Completion. The level of L.A.D’s was set at being the maximum level it was
judged that a Contractor would sign up to without adding a corresponding premium to the
cost of the Contract and thus is an arbitrary commercial judgment rather than any reflection
of the significantly greater losses. It is to be noted however, that Clause 19(d) of the
Contract requires the Contractor to Indemnify the Employer for “any loss of profits or loss of
use suffered because of any loss or damage”. This theoretically would make Jarvis liable for
any consequential losses suffered by the Employer over and above that payable by way of
L.A.D’s. Masons have however advised me that they believe Jarvis may challenge this
interpretation of the Contract should the matter become a dispute and that the chance of
success on this point would be evenly balanced.

12.2 For the sake of hazard ing a broad-brush estimate of the likely level of losses, should
Jarvis successfully argue they are not responsible for consequential losses, I have estimated
the following figures. Please do not rely upon my interpretations of these losses and
liabilities and take your own legal and accounting advice on the matter, if you are uncertain
of the meaning from your own reading of the relevant documents. I am setting them out
purely to give an idea of the financial loss context in order to assist the consideration of the matter at this stage.

12.3 The Contractor is aiming to complete two buildings by the due date (18th) in August and two buildings (by 23rd) in December. The University is obligated to pay the full rent for one of those blocks but not both. Upon the second, they only have to carry out reasonable endeavours to fill rooms, and pay the rent accordingly. Let us assume that for the second block, say Block 1, they only partly fill the rooms so they could only pay half the rent for the rest of the year, following the handover by 23rd December. On this basis then we will lose 17 weeks of rent in respect of Block 2, and 17 weeks loss of full rent together with 35 weeks loss of half rent in respect of Block 1. If the loss of rent for 17 weeks delay were calculated on a pro rata basis to the whole year, then the total loss of rent would amount to £153,215. If we add a notional figure of, say, £100,000 for further consultancy costs as set out in 10 above, then the total loss would amount to approximately £250,000 against which one would receive £195,000 i.e. a loss of say, £55,000-£60,000.

12.4 Should the Contractor achieve the August date for Blocks 3 and 4, but fail to meet the Christmas date for Blocks 1 and 2, and complete say, in January instead, then I would not expect the University would be able to fill much, if any, rooms under their reasonable endeavours obligation. It would be prudent to assume a nil rental for the rest of the year. On this basis the total loss of rent amounts to £330,000 plus say the notional £100,000 of professional fees, less LAD recovered of £225,000 giving a total loss suffered of £205,000.

12.5 Should the contractor fail to meet the August date for Blocks 3 and 4 and the Christmas date for Blocks 1 and 2, then the loss would increase by the loss of rent in respect of Blocks 3 and 4, i.e. by £352,440. The recoverable LAD will increase by £75,000 thereby giving a total loss of approximately £500,000.

12.6 Note that the above “order of costs” relative comparison, excludes any consideration of LAD that may become payable to the University, and thus become an additional liability to the above figures. Should the developer not give notice to the University by 31st May that any building will not be completed by the due date in August, or by 31st October if the due date is in December, then the developer will have to pay the University LAD, amounting to £40/week/room. We have given this notice to the University with respect to Buildings 3+4, that they will not be completed by August, but are expected to be so by December. Consequently, at present, LAD’s are not an issue. However, should the contractor be confident (and show reason to be confident) that these completion dates will be met up to the latest date of giving notice, and then fall behind thereafter, then the LAD’s will become applicable. Therefore, further losses, additional to those set out above, would be suffered, should any buildings be delivered later than the revised completion dates of August and December.

13. Jarvis’ Proposals to complete the Works

13.1 At the meeting on 24 February 2000, Jarvis tabled the attached “Without Prejudice” offer. I will not expand here my thoughts regarding the correctness of the statements that Jarvis make throughout this document, although I did comment to Jarvis at the meeting upon certain matters with which I disagreed.

Upon further discussion of what this document meant at that meeting, Jarvis clarified what they meant by their proposals as follows:

i) Jarvis would be prepared to carry out the work to stabilise the wall and then to proceed with the rest of the building works to complete Blocks 3 and 4 by the 23rd December, on the “strict condition” that “other parties” would carry the cost of all the wall stabilisation works.
ii) This stabilisation for the wall would include the construction of buttresses against the wall and the erection of such buttresses, which would allow Jarvis to provide a long-term guarantee for the stability of the wall.

iii) The additional costs arising out of these works would be in a sum of not more than £1000,000, which Jarvis would wish to be paid, as an additional cost to the contract. Jarvis will carry all other additional costs, for example the preliminaries for the extended period of works.

iv) Jarvis make the point that by virtue of providing a guarantee for the long-term stability of the wall, they are providing an additional benefit not included within their building contract obligations and which would benefit those who had an interest in the land subsequent to the completion of the Works, and those who had an obligation to maintain the wall.

13.2 Jarvis have the obligation in the contract to maintain that wall’s stability in the short-term during the period of the contract, which the engineering advice states is best fulfilled by the placing of the piled foundations in front of the wall. These same piles then form the foundations for the buttresses which when cast against that wall, would provide the long-term stability. Most of the cost of this operation is in the foundations.

13.3 The parties who would receive an additional benefit should the wall be guaranteed stable for the long-term would be UJ3 and the University (as owners/tenants of land which would be affected should it collapse) and the neighbours who it is presumed have the legal maintenance obligation (owners of the Wells road properties and the Highway Authority). In strict legal terms, the Developer would appear not to receive any benefit in addition to the other parties (contractor, university, Fudner) fulfilling their parts of the bargain which has been struck. It is advised, however, that the Developer should consider pragmatic benefits of participating in any “contribution” by the affected parties, rather than morally in the light of legal rights and benefits.

13.4 We explored at the meeting with Jarvis what they meant by the phrase “in order for such a solution to be acceptable the respective costs of the various parties would need to be set at an acceptable level…” Jarvis’ response was that they needed to protect their commercial interest, and – in this light – if they did not get agreement to this offer, then they had only two other options:

i) the first being to take the risk of letting the retaining wall collapse (upon which they considered they had no obligation to support even during the period of the contract) and simply proceeding with the works.

ii) or else stopping work altogether on Buildings 1 & 2.

As they have scheduled the piling necessary for this wall stabilisation to commence upon 13th March, they require confirmation of acceptable of this offer in good time prior to that date.

13.5 It is to be noted that if the Employer were to knowingly allow the contractor to take the risk that the wall collapse, it does collapse, and injury or damage is caused to a third party, and the Employer had the power to prevent that happening, then the employer may be found to be partly liable for that injury or damage, along with the contractor. I request Masons’ comment on this matter.

It is also to be noted, that should the wall collapse, then the cost of rebuilding it would be likely to be far in excess of the £100k under consideration here. There would also be the likelihood of significant legal costs, should a party – who had that maintenance obligation – be unwilling or unable to pay for that.
13.6 If the contractor were to stop work altogether on Buildings 1 & 2, then they would have, in effect, repudiated the Building contract. I would also request Masons’ comment on this matter.

14. **Recommendation in respect of the current situation.**

14.1 It is recommended that the Developer should, either itself or through the Architect/Project Manager, immediately enter into discussions with the potential beneficiaries of Jarvis’ proposals (Funders, University, Highways Authorities and neighbours) to assess whether any of them were to avail themselves of the offer of benefit. Masons should also advise on whether any kind of notice, threatening injunction, can be served on the parties who apparently have the wall maintenance obligation, in order to encourage them into agreement.

14.2 I have interpreted that the Developer/Employer is not a “beneficiary”, but that the Funder is. My reading of the DFA is that if Funder decided to pay, then they could not contractually reduce the Balancing Payment accordingly, and would therefore have to bear the cost of that contribution themselves. I would also request Masons’ comment on this matter.

14.2 I have spoken to the University of Bath Bursar on 25th February to briefly outline the situation to him. He had previously been advised of this from his Clerk of Works, who attended the 24th February meeting. He told me that the university’s present position must be that it would not contribute to any fund, though he recognised the undesirability of having a potentially unstable wall bordering the land they would be occupying and the potential additional cost of dealing with the problem at that time.

14.3 We have spoken with B&NES Highways Department. Their initial response is that, whereas the Highway Authority may have the responsibility to maintain such a wall, they would normally try to recover the cost from others. I am pursuing this question with others in the department. My judgment is that, whereas it may ultimately transpire that B&NES have both the responsibly and the liability, that we are not going to get a commitment from them, within the short timescale before the 13th March, for them to confirm any contribution to the works to stabilise the wall.

14.4 It may be that each of the parties directly affected by any failure of the contractor to complete the works according to his obligations (Developer, University and Funder) may hope that one of the others will commit to the requested contribution, so that they would not have to. If no agreement is reached with Jarvis, then the ultimate cost to each of these three parties may be considerably in excess of what is being proposed by Jarvis at this stage. It would thus be prudent for there to be a meeting between these parties to ensure that there is as full a consideration of the possibilities of such contributions as possible, prior to informing Jarvis that their proposals are not acceptable. A meeting has currently been scheduled between PWA and Gleeds for 8th March at 10.30 am at PWA offices, and at the least, instructions are sought from the Employer prior to then as to their response to this situation.

15. **Options if no agreement with Jarvis in respect of their proposal.**

15.1 The ball would be in Jarvis’ court, to see if they would risk a confrontational strategy, rather than simply abide by their contractual obligations. Our primary objective will be to seek to persuade them to do so, but that can only be personal encouragement and cajoling, as we would not be authorised to give them any other considerations than are in the building contract. Although we would need to be prepared for this encouragement to be refused. I would recommend that we should not immediately refer to the dispute to adjudication.
15.2 It is prudent to determine now what strategy the Developer would adopt, should Jarvis’ offer not be accepted and they stick to their stated two options, both of which would be to breach their Contractual obligations. Although it is the Developer who, in the first instance, responsible for taking such a decision and driving the matter forward, this should not be done without full consultation with the Funder or his representatives. Their first stated option, in letting the wall potentially collapse, would put the site in a position that the university may not accept at handover and will risk injury or damage to 3rd parties. Their second stated option, in stopping work, will exponentially escalate the potential losses arising from this event. Any delay whatsoever in getting started with the wall stabilisation works will almost certainly jeopardize the programme, exponentially increase the likely losses, and rapidly bring a confrontation situation which may involve determining the contract and throwing Jarvis off site. That is the last thing anybody could want and the losses could then spiral into several million.

If – despite our encouragement – we are faced with Jarvis’ refusal to comply, and if given Masons’ advice that our case would be a particularly strong one, then my opinion is the only way to recover the initiative so as to minimise the potential losses, would be to refer the matter to Adjudication. It is fast, relatively cheap, and designed just for this kind of situation where there is impasse and intention is to resolve the dispute temporarily to allow the Contract to complete. Once a party refers the matter to Adjudication, the other party generally has 7 days to respond and the Adjudicator has to produce his Award within 35 days, and may give a verbal response earlier. In these circumstances, legal costs are inevitably kept to the minimum, as no party has the time to work up and expensive case. Masons advise me that they would estimate their own time in such a case would be likely to be 1 - 2 days, together with any expert evidence costs. The Adjudicator normally awards his against the party whom he considers has lost the arguments. Enforcement by the courts of the adjudicator’s properly rendered award is generally immediate and automatic.

15.3 It cannot be judged if relations with Jarvis will significantly deteriorate if we submit the reference to adjudication. There is no need for a reference to adjudication by one party necessarily to be seen as adversarial by the other, as one would simply be jointly leaving it to a third party to resolve the dispute fairly to allow the parties’ to get on with the job in hand. However, faced with a refusal to proceed with complying with the contractual obligations, there would be nothing to lose.

15.4 Gleeds have expressed strong reservations to me of the benefit of an Adjudication, and have referred to the potential for the lawyers fees to takeover, for the whole legal process to drag out for a long time and for relations with Jarvis to deteriorate so badly that they might as well just be thrown off the job. I believe that this view misunderstands the potential nature and benefit of this process, when one is faced with and impasse, and do not equate at all this process with the draconian step of determining the contract. I certainly am not advocating a reference to adjudication until every realistic opportunity has been pursued to seek an agreement, whilst bearing in mind that all parties will lose a legal deal if the resolution the longer the situation goes unresolved.”

48. Throughout discussions took place with Jarvis. On 24 April 2000 WDK sought advice as to whether a breach of condition 38 would entitle it to recover damages other than and above liquidated damages. Mr Collingwood’s advice was that it would, but as he said in evidence he was more optimistic than Ms Howells, and that his ultimate advice was that counsel’s view should be obtained as the outcome was not easy to predict. I agree with Mr Sweeting’s submission that Masons’ view was that the answer was evenly balanced - 50/50 or 60/40 - hence advice from counsel was required, which WDK subsequently obtained. This was the first time that WDK (through Mr Whitley) had sought advice from Masons on condition 38. Mr Whitley was thinking of issuing an instruction and then seeking adjudication. Mr Whitley summarised the position in a letter of 9 May 2000 to Mr Weinberg (who had taken over from Mr Sanghvi at WDK):
Dear Malcolm,

RE: PROSPECT GARDENS, BATH

You requested me to set out the reason for my opinion that – in the decision of how to respond to the current situation on site and Jarvis’ response to that – one cannot treat making a deal with Jarvis and enforcing the contract as mutually exclusive options.

1.0 I should first highlight certain key facts on the current site situation:

1.1 Since the landslip event occurred, Jarvis have kept their statements ambiguous regarding their liability, and whether they intend to either carry out the work, arising from the event. They have verbally refused to accept that this additional work is entirely their responsibility though have never challenged in writing my letters confirming my view that they are liable. Implicit in their many statements given orally has been the threat to not proceed with the additional work unless an agreement is made giving them an additional consideration.

However it was not until the last site meeting on the 27th April that they first explicitly stated (in an open and recorded forum) that if such an agreement was not confirmed in writing that day, then they would stop the additional work forthwith. In response to that explicit statement, I wrote to them advising them that if they did so then they would be committing a repudiatory breach which the Employer was entitled to accept, and they have not yet carried through their threat.

As Jarvis have therefore neither formally disputed their liability in writing, and have, apparently not yet materially breached their obligations (with the exception of the failure to provide certain programming), so therefore no dispute has arisen which can be the subject of an adjudication.

On my judgment, the programme to complete the works, for either of the two Completion Dates, is extremely tight. Jarvis are telling me that they will still complete on time, although they acknowledge the tightness. I have no criteria - apart from my instinct and experience - to make a proper assessment of whether they will be able to complete on time on the basis of their current programme, as Jarvis still have not provided me with the critical path information I need to properly assess it. I would guess that there is a very high risk that - even if they are not so far behind already that they are unable to complete on time - there will nonetheless be further slippages, resulting in a failure to meet either or both the Completion dates.

2.0 I now highlight certain aspects of potential losses and funding issued due to delay

2.1 You have calculated the relative "profit/loss" situation on the basis of 3 scenarios: Jarvis completing the buildings by the revised dates, one of those dates being missed, and both missed. In this context, (although I acknowledge Jayant’s point of the wider context of losses brought forward to Phase 11), I assess that the decision at this stage is on the basis of a judgment of which response would produce the maximum benefit to WDK. The results of your calculation was that:

(i) Both sections completed to revised dates: profit £431K
(ii) August completion on time but December late: profit £256K
(iii) Both sections completed late: loss £40K
You have not calculated the effect of the August completion being late but December on time. I would assess that losses would be almost as much as that for both sections being late, and for the purposes of this exercise, the loss should be taken to be in the same order.

2.2 I understand from Beverley Pike that if any part of the buildings are not completed by the 30th August 2000, then the investor is entitled to withhold a sum to the value of the element of the first year rent, to which the University was not committed to pay at that time, where this sum is not covered by the projected Balancing Payment. This sum would be withheld, from the funding the Investor provides to the Developer on the latter’s interim payment applications, the Developer would then be required to make up the shortfall on the interim payments from its own resources until practical completion of all the buildings.

If no buildings were to be handed over by 30th August, then the investor will withhold £680K less its assessment of the sum which would be left in the Balancing Payment. If Buildings 1 + 2 were not handed over, then the sum withheld (equivalent to the first year rent for those two buildings) would be £350K, not £680K.

As you have calculated that it would appear likely, at this stage, that the net sum of the Balancing Payment to be released to the Developer is a sum of between £350K and £680K, so Scenario 1 (all buildings completed to the revised timescales) would result in the project being funded to completion by the Investor. Scenario 2 or 3 would result in WD King having to inject further funds to allow the Developer to fulfil its payment obligations. Should WD King have to do that, then clearly it is further exposing itself to significant further risk of losses, particularly if the Developer consequently found itself trading at a loss.

3.0 I now address what would be achieved, at best, as a result of a reference to adjudication in the absence of any deal being struck with Jarvis.

3.1 Let us say that:

Jarvis stopped the piling to stabilise the ground which is what they threatened to do, and which is the critical path activity necessary to progress Buildings 1 + 2;

In response I issue an instruction;

Jarvis refuse to comply with that;

We make a reference to an adjudication;

The adjudicator finds in the Employer’s favour that the Contractor is obliged to carry out this work at no additional cost to the Employer.

3.2 The “best” result does nothing to reduce the risk of the Contractor being late, and the risk of consequent losses to the Developer. Even if the Contractor then complied with the PM’s Instruction, and restarted the work under protest that the Employer was not entitled to require that at his cost, the damage in terms of slippage of programme would already have been done.

On the contrary, I judge that as the Contractor would be forced to comply, (as opposed to have willingly signed up to a deal), so he will continue his work strictly in accordance with whatever he sees as his own commercial interest, after taking account of his relative costs in the differing amounts of LADs he will suffer. The best and worst case LADs for the Contractor are a cost to him of £190K and £300K respectively. If it will cost him more than £110K to maintain an accelerated method of working to meet the revised completion dates, then he won’t do it. It will be of no concern to him that the Employer may suffer £470K (the difference between Scenario 1 and 3).

3.3 If we go to adjudication before August 30th for any failure of the Contractor to comply with instructions, then the Employer at that stage will have suffered no consequential loss and so nothing could be claimed from an adjudicator, even if that is likely to be suffered
later on. If the Employer was entitled to such consequential losses (which Mark Collingwood advised he probably would not be), then that would have to be withheld as a set-off from payments to the Contractor and then – when that is disputed – potentially subject to a further decision of an Adjudicator in a further reference.

3.4 However, Mark Collingwood has advised that the Employer would not be entitled to consequential loss, other than that provided for in the LADs, should the Contractor’s failure to comply with an instruction to do works meant that the Employer was entitled to redress under Clause 53 of the BC, which entitles him to bring in other labour to carry out those Works.

3.5 The Project Manager has the power, within the BC, of instructing the Contractor to accelerate the Works at the Contractor’s cost, if he assesses that the Contractor will otherwise complete late.

The exercise of this power is fraught with risks to the Employer, and it is clear that the Contractor will fight any attempt to do so.

He will allege that the specific works that the PM required him to do were either unreasonable or would have no effect on accelerating the programme. In the absence of detailed and continually updated information from the Contractor of his own sub-consulting arrangements and the specifics of what were the problems on site to be overcome (as appeared to what we alleged to be, or appear to be the problems), which will require the full co-operation of the Contractor, it will be hard to defend such a charge by the Contractor.

Furthermore, even if the Employer successfully proves that the acceleration instruction was reasonable at an adjudication, so that the Adjudicator issues an Award requiring the Contractor to carry out the specific task which is the subject of the Instruction, there is nothing stopping Contractor then being late for some other reason. It will be a continual battle, day by day to the end of the job (similar to trying to stop the tide from coming in).

4.0 I now address the potential advantages of an agreement with the Contractor as previously set out.

4.1 I judge that the best way to look at such an agreement is like an insurance policy, where:

(1) The risks of losses of up to £470K is very high.

(2) The “premium” for the insurance is the consideration that the Developer would be pay in the deal.

(3) This premium would only be paid to the Contractor is the “risk event” did not occur, i.e. the Contractor finished on time and the Employer suffered no further loss.

4.2 The Developer would be committing to paying the consideration in the Agreement, not WD King, if, at some future time, the Developer were to find that he is likely to be trading at a loss if it continued with the development, then if it ceased trading, no other party would be liable for that consideration.

5.0 I now address what could be achieved of a reference to adjudication, if the Employer and contractor had previously made a new agreement varying the terms of the BC which included a readjustment of the LAD regime against the Contractor which covered all the Employer’s losses upon late completion.
5.1 If the contractor failed to comply with Instruction and such failure meant that he was late in completing the project, then if an adjudicator found that the Contractor was in default and that such default delayed the contract, then the Employer would be able to recover the whole of this losses given the revised LAD regime.

6.0 Summary of my Opinion

6.1 No material breach of the BC has yet apparently occurred (save for providing certain programming information) which is being formally disputed and which may form the subject of an adjudication.

6.2 There is a very high risk that the Contractor will fail to meet the revised completion dates.

6.3 The further loss/reduction in profit to the Developer if the contractor failed to meet the revised completion dates is £470K.

6.4 If the contractor completed on time to the revised dates, then the Investor would be obliged to continue to fund the interim applications, but if the August date was not met for Buildings 3 + 4, then the Developer would have to fund some of those interim payments out of their own resources.

6.5 If the Contractor breaches the BC and the Adjudicator in a reference prior to 28 August found in favour of the employer, nonetheless no loss could be claimed.

6.6 In the absence of an agreement with the contractor to vary the terms of the BC so that the LADs reflected the full losses to the Employer, an Adjudication award rendered when those losses had been suffered and claimed, would probably not compensate the Employer for anything above the level of LADs presently set in the BC.

6.7 Any instruction to accelerate carries great risks which potentially exposes the Employer to further costs, and would have only a limited effect in achieving the desired result of completing the buildings on time.

6.8 The proposed agreement could best be considered as if it were an insurance policy, the premium for which would only have to be paid if the risk event (delay to completion) did not occur.

6.9 Even if the Developer decided to sign up to an agreement, no other party would be liable for the consideration for that, and the Developer's statutory rights and obligations if it subsequently finds itself trading at a loss still applies.

6.10 If the Contractor was in breach of his time obligations following the making of an agreement with the Employer on the terms discussed, then the Employer would be awarded the whole of his losses from an Adjudicator.

7.0 Conclusion

I have set out my opinion, based on an understanding of the legal position as I see it. I am copying this letter to Beverley Pike (who has given advice relevant to 2.2) and to Mark Collignwood (who has given advice relevant to 3.2, 3.3, 3.5 and 5.1), and I request them to confirm or comment on the legal interpretation I have taken.

As always, I shall do precisely was WD King and/or the Developer would like me to do. I trust that the foregoing opinion assists you in making that decision.
I look forward to your instructions.”

49. Lengthy negotiations with Jarvis did not result in any agreement. (They were explored with Mr Whitley in cross-examination). Accordingly on 16 May 2000, after consulting Ms Howells, Mr Whitley issued the following instruction to Jarvis:

“Project Manager’s Instruction 003

1. I am of the opinion that the contractor’s rate of progress in carrying out the works is likely to prejudice the completion of Section 2 by the date for completion given in the Building Contract, and it is my opinion that this is due to a cause which is not listed in condition 36(1)) of the Contract.

I therefore instruct you under Clause 38(1) to increase your resources and/or to resequence your work in order to accelerate the progress of the works so that this rate of progress is not likely to prejudice the completion as described.

2. I am also of the opinion that that Contractor’s rate of progress in carrying out the works is likely to prejudice the completion of Sections 1 & 3 by 23rd December 2000 and 7th January 2000 respectively. The effect of any such failure to complete the sections would place the Employer in breach of his obligations in the Agreement for Lease and Development Finance agreement which the contractor under clause 20(1) has covenanted not to do.

I therefore instruct you under clause 40(2)(e), (f) and (s) to allocate adequate resources and to sequence your works in order to progress the works so that the employer is not placed in breach of his obligations in the aforesaid Agreements.

3. I also instruct you under clause 33(3) to issue amended programmes in relation to the completion of each section revised to take into account any delays to the works (whether actual or anticipated) and to take into account of this instruction which you the contractor warrants:

s a) that it shows the sequence in which he proposes to execute the Works.
b) that it is achievable
c) that it permits the effective monitoring of progress
d) that in relation to Section 2 that the Programme is based on a period for the execution of the Works to the Date for completion in the Contract.

Signed: ____________________________________________
For Paul Whitley Architects

This instruction has no cost effect in the Contract.”

I observe that the instruction did not set out the measures which Jarvis should take. It was in quite general terms. Such steps as Jarvis took did not achieve the result intended by Mr Whitley, but not
expressed by him, as his evidence showed. The completion dates were not met. Practical completion
was not certified until 21 August 2001.

50. On 17 May 2000 Mr Whitley wrote to Ms Howells to record her advice:

“We discussed today what may be the potential losses the Employer would be able to recover
from the Contractor in the event that he fails to comply with the Project Manager’s
Instruction No. 003. You advised that the Employer would be likely to be able to claim all
consequential losses, not just those capped at the level of the LADs. You noted however that
there could be argument from the Contractor taking an opposing view and you assess that
the chances of success in your opinion is 60:40.”

This was followed, on 22 June, by a fuller letter from her:

“Further to our recent conversation on the subject of a potential adjudication against Jarvis, I
have finally had a chance to review the correspondence that you have sent me and to give
some further thought to what might be achieved by an adjudication against Jarvis. For
reasons I explained on the telephone, I am sorry that I have not been able to get this advice
to you earlier. The letter would have come to you yesterday were it not that I felt I needed
to discuss elements of it with Mark and unfortunately he has only been able to look at the
questions this morning. Accordingly, Mark has seen this letter and agrees with the points I
have made.

It seems to me that there are two potential objectives of an adjudication at this stage. The
first would be the object of securing confirmation from the adjudicator that Jarvis is in breach
of contract for:-

1. Failing to comply with PM’s instructions (failure to accelerate, and possibly for failing
to provide you with a programme);

2. Failing to mitigate any delays to the works, as is required by the Contract; and

3. Failing to provide Sub-Consultant warranties in accordance with Condition 63 of the
Contract.

The Adjudicator could simply be asked to confirm these breaches and direct Jarvis to comply
with the Contract at this stage.

The second objective would be to obtain from the Adjudicator a declaration as to the
consequences the first of these breaches should it persist, namely whether in circumstances
where Jarvis’ failure to comply with the acceleration instruction leads to late completion,
Prospect Gardens, Bath Limited would be entitled to recover damages beyond the liquidated
damages figure on the basis that late completion flowed from Jarvis’ failure to comply with
the acceleration instruction.

In order to determine the likelihood of success in an adjudication which dealt with 1 above
and the second objective, we must look at the various matters that Prospect Gardens will
need to demonstrate in order to satisfy an adjudicator first that there is a breach by Jarvis
and secondly that an entitlement to general damages arises as a result.

1. For Jarvis to be in breach, it must have failed to comply with a valid acceleration
instruction. For the instruction to be valid - see clause 38(1) - the PM must have:

(a) acted reasonably in issuing it, taking account of Jarvis’ representations; and

(b) been of the (reasonable) opinion that the rate of progress was likely to
prejudice completion of the Works or any Section by its date for completion; and
(c) been of the (reasonable) opinion – see clause 36(10 – that the prejudicial rate of progress is due to a cause other than:

(i) a change in the Employer's Requirements;

(ii) any act/neglect/default of the Employer, the PM or other person for whom the Employer is responsible;

(iii) an Accepted Risk;

(iv) the exercise by Jarvis of its right of suspension for non-payment.

The case and supporting evidence as to all these requirements will need to be given by you in a statement which will form part of the case put to the adjudicator.

We must also anticipate, and know how we will meet, the points that Jarvis can be anticipated to raise by way of response. For example, will they not deny the works will not be completed by the relevant Completion Dates? Will they not say that any delay that has been caused to date has in fact been caused by matters that might be covered by (c)(i) and (ii) above? What there arguments can they be expected to raise?

Bearing in mind that Jarvis currently says that it is able to meet the relevant Completion Dates notwithstanding any delay to date, you will need to demonstrate why this is not the case in order to justify the reasonableness of your opinion that the relevant Completion Dates are unlikely to be met because of Jarvis' own failure to progress the Works. Their failure to provide you with a programme which demonstrates that they can make the relevant Completion Dates will be relevant here, but is not of itself conclusive evidence that they will not make the dates.

2. On the assumption that the above points are demonstrated by you by reference to correspondence and/or conversations with Jarvis, we will then need to demonstrate Jarvis' failure to comply with what we will have shown to be a validly issued instruction to accelerate. You will again need to set out the basis on which Jarvis are failing to comply with the instruction.

3. Having done this, the issue of Prospect Gardens’ entitlement to recovery on breach is the next point to consider. Condition 55(6)(b) of the Contract says that "no challenge shall be made or sought to be made to the liquidated damages by the Employer or by the Contractor on the basis that they ... do not represent a genuine pre-estimate of the Employer's losses arising from delay". It is likely that Jarvis will try to rely on this provision to argue that since the liquidated damages figure represents a genuine pre-estimate of the Employer's losses in respect of delay any damages recoverable as a result of a breach of the acceleration instruction which leads to late completion should themselves be limited to the amount of liquidated damages in respect of delay. We do not believe this argument to be correct, though it is not impossible that it would find favour with an adjudicator who is less than robust.

Subject to being able to satisfy the adjudicator as to points 1 and 2 above, which go to the validity of the acceleration instruction, and Jarvis' failure to comply with it (all of which rest on factual evidence) we consider that the chances of winning an adjudication on the point of Prospect Gardens' ability to recover general damages for breach of an acceleration instruction are good. The next step, if Prospect Gardens wishes to go down this route, is to establish the existence of a dispute as to the acceleration instruction and Jarvis' compliance with it, and in the meantime for you to start preparing a written statement with supporting evidence to deal with points 1 and 2 above. Once we have seen the strength of that case, we would be in a better position to advise on overall merits.
I appreciate you and the client would wish this letter to give a yes or no answer as to whether to adjudicate, but I do not think I can give this absent full details of our case on the facts, i.e. on points 1 and 2 above.”

51. On 20 September 2000 Mr Collingwood and Ms Howells wrote jointly to Mr Rosenbaum. It usefully summarises the position and sets out Masons’ view that the opinion of specialist construction counsel might be sought:

“Dear Jeffrey

PROSPECT GARDENS (BATH) LIMITED

You will have seen the various letters that Paul has written to us in the week or so since his return from holiday, concerning the current position on taking disputes with Jarvis to adjudication. You will also know that he has instructed us to cease work for the moment on the claim in relation to the retaining wall because Jarvis has now provided some design information which is being reviewed by Buro Happold to determine whether it will deal with the concerns which Buro Happold have about the wall’s stability.

What I would like to look at now is the benefit to Prospect Gardens of adjudicating the other areas of dispute with Jarvis, all of which are linked. I said in my letter of 1st September that these issues are complicated and will take longer to prepare for adjudication than the case on the wall, and in the light of Paul’s feeling that this somehow represents a change of heart on our part, I thought it might be helpful if I looked in more detail at:

(a) what the remaining disputes are

(b) what needs to be done to prove Prospect Garden’s case in each of the disputes.

(c) what Jarvis is likely to argue in defence of the case put by Prospect Gardens and, in the light of this, the merits of the case.

(d) how long the preparation will take in the light of all this.

(e) what the costs of preparation and running the adjudication might be

(f) the consequences of losing.

(g) what benefit there is to Prospect Gardens of adjudicating these issues.

I apologise at the outset for the length of this advice but there is quite a lot of ground to cover and the issues are complicated.

Paul has said that prospect Gardens currently faces losses in the region of £1 million. I have not done any calculations but accept that there is a likelihood that the late completion of the works will mean that Prospect Gardens may not recover any element of the Balancing Payment, and that it will face a claim from the investor for finance costs and liquidated damages payable to the University to the extent that these take the investor beyond the Maximum Commitment. I do not know if this brings us to a total of £1 million but for the moment will assume this figure to be correct. Clearly, it will be necessary to confirm the position and I return to this later.

The claims against Jarvis.
The claims against Jarvis essentially fall under 2 headings:

Claim 1 – Failure to comply with the acceleration instruction in respect of Blocks 3 and 4.

The case on this is that Paul, despite the lack of detailed programming information from Jarvis (as to which see below), took the view on the information available to him that completion of blocks 3 and 4 was unlikely to be achieved by the completion date and issued an acceleration instruction requiring Jarvis to increase its resources in order to achieve that date; and that they failed to comply with that instruction.

Paul will have to evidence the basis on which he believed completion would be late, and how Jarvis have failed to comply with the instruction – for example, that they made no effort to increase their resources on site after the instruction was issued. Assuming that the evidence is such that we are satisfied that this claim is good on its merits, we then have to consider what defence Jarvis will raise to it. It seems clear these would include saying that the instruction was not reasonable; the Contract says that such instructions must be reasonable.

They will say that it was not reasonable because there are a number of things that have happened which they believe entitle them to an extension of time under the contract. One of these is the zinc issue in respect of which Paul has already refused an extension, and Jarvis have challenged this refusal. We know that Jarvis intend to bring other claims but have yet to be told the detail of these.

The merits of each and our ability to defend each on the facts would need to be considered carefully and it is possible that Jarvis will seek to bring into the arena delays that they allege arose from the dispute over liability for the retaining wall works and from he alleged agreement to pay them additional sums made at the meeting of 18th April. If Jarvis were to succeed in establishing an entitlement to an extension of time this would mean that for an acceleration instruction to be reasonable it would have to take account of the factor giving rise to that entitlement (in my view, that is true even if Jarvis had not actually claimed an extension of the time when the acceleration instruction was issued, as long as it was a favour of which Paul was aware). If the instruction was not reasonable then it would not be properly issued and Jarvis would therefore be under no obligation to comply with it.

You will understand therefore that there are a large number of potential issues, all linked, that are likely to need to be addressed under this head of claim before we can say with some conviction that the case has sufficient merit for an adjudication on it to be commenced. More generally, I do not know what advantage, if any, Jarvis might seek from the fact that Paul is both Project Manager and has an interest in Prospect Gardens (Bath) Ltd. However, this would certainly be an area I would probe were I to be advising Jarvis.

Claim 2 – Failure to provide adequate programme information, in breach of the requirements of the Contract.

The case, in outline, is that the failure to provide proper detailed programme information meant that Paul was unable effectively to monitor the progress of the works. This meant, at least in relation to blocks 1 and 2, that he was unable to make a judgment about whether the completion date was in fact likely to be achieved by Jarvis until it was too late to do anything about it. The Contract permits Paul to issue acceleration instructions to require Jarvis to accelerate the works in order to achieve the completion date. He can only do this reasonably. By the time Paul became aware that blocks 1 and 2 were unlikely to be completed by the August completion date, he could not issue an acceleration instruction because by that stage the delay was so great that it would be impossible for Jarvis to comply with that instruction. He would have been able to make the judgment sooner had he been provided with the programming information that the Contract requires Jarvis to provide. Non-provision of that information has deprived him of the opportunity to instruct acceleration in respect of blocks 1 and 2. This means that he has been unable to intervene and prevent
late completion of those blocks and consequently PGBL has suffered losses which it would not
have suffered had the programme information been provided.

Proving this case will require:

(a) that there is a contractual entitlement to receive the programming information that
permits monitoring of progress (and we are satisfied that the contract is clear on this point);

(b) that Jarvis did not comply with this 9and on what we have seen so far we believe
that this can be shown);

(c) that the lack of the information is the cause of Paul being unable to issue an
acceleration instruction - this is a more difficult point to prove and is dependent upon Paul
being able to come up with a detailed explanation of his reasoning on this point, which we
would need to review. A hurdle that we will have to get over is explaining why he was able
to issue an acceleration instruction in respect of blocks 3 and 4 in the absence of the
programming information, but not blocks 1 and 2. We have to show the absence of
programming information actually caused Paul to be unable to issue an instruction to
accelerate.

(d) that if Paul had had the programming information he would have issued an
acceleration instruction, the point in time at which he would have issued it and that such an
instruction would have been reasonable (i.e. that it would not, amongst other things, have
been issued at a point so close to the completion date as to render it incapable of being
complied with) – and against this Jarvis are again bound to argue that it would not have been
reasonable because the cause of any delay to the works was In fact the acts or omissions of
Paul as Project Manager – and the same points would then apply to this claim as I have made
in respect of claim 1 above.

We have not seen the detailed case on either of claims 1 and 2. In my letter of 22 June I
outlined the matters that would need to be proved and on which we would need evidence
from Paul. We have not had anything from him yet and in reality the best way to get the
necessary information now would be for a senior solicitor, under Mark’s supervision, to sit
down with Paul and spend time working through all these issues to put together a
comprehensive “story” that explains the case in detail and the supporting evidence.

So as to crystallise the disputes, we would probably also need Paul to write to Jarvis
confirming the breach of the instruction to accelerate and breach of the obligation to provide
programming information and to give them, say, a period of 7 days to respond to his letter
accepting or rejecting what Paul says. (I believe that I advised Paul to do this at our meeting
before his holiday but do not know if it has been done).

Loss suffered

Assuming that we are satisfied after carrying out the detailed exercise referred to above that
the merits of the claims are good, we then have to look at the way in which we prove the
loss suffered by PGBL. In the case of both claims 1 and 2, we would have to show that if
Jarvis had complied with the acceleration instructions, one factual and the other hypothetical,
they would have been able to complete by the August completion date. For both, the case
would then be that the blocks would have been completed by the end of August and PGBL
would have (a) recovered the full Balancing Payment and (b) not been liable to the investor
for any additional amounts; accordingly the loss is any sum which puts them in a worse
position than that. To the extent that anything has happened since the date on which
acceleration was instructed/would have been instructed to cause delay to the works which
would entitle Jarvis to an extension of time, this would reduce the amount of damages
recoverable. This brings us back once again to the importance of being satisfied that we can
defend any claim for additional time which Jarvis may raise.
Assuming that all of the factual causation matters are proved, there is then the issue of entitlement to consequential loss (as against damages being limited to liquidated damages) I have advised previously that a decision on this point ought on balance to be favourable but is by no means certain and would be likely to need a robust adjudicator. It might be worthwhile taking a second opinion from construction counsel in this issue.

Timescale for preparation and to obtain a decision

Concurrently with the 7 day period that I say above Jarvis should be given to respond to the allegation of breaches of contract, we would need to sit down with Paul to work out the detailed case and evidence. In view of the issues to be covered, this will take at least 7 days; we will then need to spend a few days reviewing the case, “shaping” it and finally considering all the merits including the areas of weakness. It will take a further 7 days to appoint an adjudicator and a final period of say a week needs to be allowed for the collection of all the documents in support of the case (some of which will of course be done in the week that appointment of the adjudicator will take) and service of the “Statement of Case”.

The adjudicator then has 28 days to decide the issues put to him. He can ask - and in our view is bound to ask - for an extension of time. He is allowed any longer period with the agreement of both parties, up to 14 days longer with the agreement of only the referring party (i.e. PGBL). I am sure it will be inadvisable not to agree to, say, a 2 or 3 week extension if, as I anticipate, the Adjudicator requests it. On the assumption that this is a reasonable timescale to anticipate, the Adjudicator will not give a decision until, say, early/mid December.

The question then will be whether the Adjudicator’s decision is favourable. This is not a valuation type dispute where the decision can be “down to middle”. Here the decision has to be in favour of Prospect Gardens in relation to all of the hurdles I have identified. Given the likely factual complexity of the issues, there has to be a possibility of the Adjudicator finding against prospect gardens on the basis of the case simply not having been proved within the time constraints and procedural straight jacket that are inherent within the adjudication process.

If the decision is favourable, there will at early/mid December only be a few weeks left before completion of the remaining blocks – if the present rate of progress on site is maintained and if no intervening events cause delay. By this stage, I presume that the bulk of the Contract Sum will have been certified to Jarvis on an interim basis, and aid by the investor. Withholding any significant amounts may not therefore be an option.

Costs

The following might be a reasonable assessment of the costs to be incurred by Prospect Gardens in relation to the adjudication but excluding Paul Whitley’s fees and the fees of the Adjudicator, the latter which I would estimate at being perhaps £10,000.00.

Masons fees

Me – say 50% of 10 weeks
say
£35,000

Senior Assistant – say 100% of 8 weeks
say
£35,000

Total
say
£70,000
The adjudication clause permits the Adjudicator to award costs to the winning party. We should therefore be able to recover costs (say 70% of expenditure) against Jarvis if we were to be successful. Paul’s fees are unlikely to be recoverable. Conversely, if Jarvis were to win, Prospect Gardens are likely to be ordered to pay their costs. As their lawyers are City based, their legal fees are likely to be rather higher than those estimated for Masons above.

Conclusion

You will understand form all this why we say that this matter is complicated, and why it is very important that we try to achieve greater certainty about the merits of the case before taking it to adjudication. However, the reality is that we will never achieve anything approaching certainty on the merits in the circumstances.

An alternative strategy is that the works continue to practical completion, that liquidated damages are then deducted from subsequent payment certificates (and I calculate the retention ought to be sufficient to cover liquidated damages) and at the point for payment of the next interim certificate following practical completion, consideration is given to whether further amounts can justifiably be deducted.

Whether there is merit in this course of action depends to an extent on the amount of loss over and above the liquidated damages that prospect Gardens expects to suffer. If it is as much as £1 million then recovery by this route would not be a complete answer but, obviously, all other things being equal, recovery of any shortfall could be made other than by way of set off in, say, a subsequent arbitration.

It would be useful to have Paul’s view as to the amount that might remain due to Jarvis following practical completion, so that we know the total anticipated fund from which it might be possible to operate a set off of sums over and above liquidated damages. Another factor will be whether the investor would have a say in the matter (of set off post practical completion – I would need to check this) and if so what their views would be likely to be.

If our calculations show that there is likely to be sufficient funds still to fall due to Jarvis after practical completion to make effective set off, I think we should very seriously consider set off prior to practical completion. It would be illogical for Jarvis’s reaction to the set off of liquidated damages (or perhaps a part of them) to be to raise the stakes so enormously by suspending works. If that suspension turned out not to be justified, it is likely to be a repudiatory breach by Jarvis. Jarvis’s logical reaction to any set off of liquidated damages should be to say that they will adjudicate or arbitrate their claims for extension of time in due course. We could consider setting off our further claims from payment certificates issued after completion.

All things considered, I suspect that we will conclude adjudication is not a viable proposition at this stage and that we should investigate the alternative course of set off, before or after practical completion, outlined above.

As you may know, I am on holiday as you receive this letter. It has been substantially prepared by me but I have had lengthy discussions with Mark in connection with it. The advice therefore given in this letter is the advice of both Mark and me.

Best regards

Yours sincerely

Alyson Howells”
52. In 2001 PGBL referred to adjudication its claim for unliquidated damages for Jarvis’ non-compliance with PMI 003 and condition 38. By that time WDK/PGBL had evidently taken counsel’s advice, as suggested by Masons in the spring of 2000. On 7 August 2001 the adjudicator issued a decision against PGBL’s claims. In the course of a lengthy decision the adjudicator said:

“6.48.4 JCUK [Jarvis] knew what the effect of the instruction was, and they claim that they did in fact accelerate, although not with the result required (paragraph 19 of the Response).

6.49 As it was instructed under PMI 003, the nature of the accelerative measures to be adopted was left in the hands of JCUK save that whatever measures were adopted were to be sufficient to ensure that:

(a) the rate of progress was sufficient not to be likely to prejudice completion of Section 2 by the Date for Completion given in the Contract (28 August 2000).

(b) PGBL was not placed in breach of its obligations in the Development Finance Agreement (DFA) and the Agreement for Lease (AFL) to complete Sections 1 by 23 December 2000 and Section 3 by 7 January 2001. (The instruction incorrectly refers to 7 January 2000, but it is not contended that anything hangs upon that).

6.50 The evidence offered by JCUK in its Response to the Referral to demonstrate that some acceleration was achieved relies on data illustrating that at some times there was more labour on the site than at others together with copies of their sub-contractors’ financial claims. I do not accept that any of that is persuasive evidence of acceleration. In a project such as this, where the majority of the work is subcontracted, it would not be possible to accelerate the progress of very much without the active co-operation of JCUK’s sub-contractors. If they were to achieve such acceleration I would expect to find short term programmes for discussion, notes of meetings held with the sub-contractors indicating what they were going to do, how the interfaces were going to change and some correspondence confirming their Sub-contractors’ agreement to bring forward sections of the Works. I drew this to the attention of Mr Ward of Eversheds [representing Jarvis] during our telephone conference of 16 July and asked for such information and evidence to be disclosed. Nothing persuasive has been provided by JCUK in response to that request.

6.51 By the same token, I find nothing persuasive of PGBL’s allegation that JCUK reduced their resources, but nothing turns on that.

6.52 I accept the Referring Party’s evidence on this element of the case and I determine that JCUK did not make any bona fide effort to comply with PMI003 by accelerating progress in order to achieve the completion dates specified, they did not comply with PMI003, which was properly issued, and hence were in breach of contract.”

In the section dealing with damages the adjudicator said, amongst other things:

“7.10 ... The instruction in this case was not an instruction to provide certain resources or to resequence the work in a specific way, carrying out particular tasks on fixed dates in a prescribed sequence. The instruction was to adopt an unspecified change in resources and sequence so as to achieve a particular effect. The intended effect was completion of specified Sections of the Works by fixed dates. Certainly there would be acceleration that did not achieve those dates that would nevertheless be acceleration, but there could not reasonably be any partial performance of the instruction. Either the instruction is complied with by achieving completion by the specified dates, taking whatever measures in resources and sequencing as are necessary, or is not complied with at all.

7.11 The object of compliance with an acceleration instruction is that, if put into effect, the acceleration achieved will break the chain of causation so as to prevent the delay to progress from having its likely effect on the completion date.
7.12 What is claimed here is not that compliance with the instruction has broken the chain of causation but that the failure to comply with the instruction has broken the chain of causation and has developed into a new cause of delay to completion, of itself. Causation is a matter of common sense and common sense dictates that that cannot be right.

7.13 At the point in time at which the instruction to accelerate as given, although delay to progress had occurred, the likely effect of that delay on the Completion date had not materialised. A party that is properly instructed to take action to avoid the likely effect on the completion date of a delay that has already occurred where such action in compliance with the instruction, had it been taken, would have avoided the delay to completion, does not, simply by failing to take such action, cause the delay to completion. For these reasons, in my view the failure to accelerate did not cause delay to completion.

7.14 The losses that have been claimed are all losses that flow from delay. Accordingly, it is my decision that none of these losses have been caused by the breach proved and are not recoverable. As the failure to accelerate did not cause delay to completion I do not have to decide whether damages for the breach would be actual damages for delay, over and above the liquidated damages agreed.” … [The adjudicator did in fact do so.]

There is much sense in that reasoning.

53. In October 2001 PGBL was told that, as a result of the delay in completion, its funders’ commitment to the project had been exhausted as a result of which PGBL (and thus WDK) had to shoulder the overrun. It was decided not to pursue the case to arbitration since, on Mr Whitley’s advice, the contract had provided that for the same person to be both adjudicator and arbitrator so it was thought that the outcome of an arbitration was predictable.

54. As appears from a letter from Mr Whitley of 15 August 2001 Masons had, during the adjudication (for which WDK’s present solicitors acted) obtained the views of Frances Alderson on PGBL’s case. She wrote a note which said:

1. Please note that I was not involved in drafting the contract and therefore was not privy to the details of why various clauses were included in the contract.

2. Secondly, my advice now on the acceleration clause is based on my recollection of looking at the clause approximately 12 months ago and advising on its effect.

3. In my experience, it is unusual to have an express acceleration clause in a UK construction contract, and most particularly unusual to have a mandatory clause, i.e. where the contractor is obliged to accelerate if instructed.

4. The client specifically required the clause, because if completion were not achieved at the beginning of the academic year, they would lose an entire year’s revenue by failing to achieve one date. Liquidated damages, which apply at a set rate over time, could not have compensated for such a loss. A possible alternative might have been to apply liquidated damages at the full rate of the loss if completion was not achieved by the “drop dead” date (with liquidated damages at a nil rate thereafter as the client’s loss would not increase), but such a clause would have been totally unacceptable to any contractor on a commercial basis.

5. In those circumstances, both parties agreed to a contract containing the compulsory acceleration clause, since clearly the costs of accelerating were a more attractive option to the contractor than bearing the full loss of the rate which would be incurred if they failed to meet simply one date.

6. The effect of the acceleration clause in the contract, is that, if the contractor is in delay, the client can elect:
(a) to allow the work to continue at its original progress and recover liquidated and ascertained damages, or at his option.

(b) require the contractor to accelerate to avoid the delay.

The reason for choosing option (b) would be to cover the circumstances outlined above where liquidated damages could not compensate for the loss.

7. If the contractor refuses to obey an instruction to accelerate, he would be in breach of contract. If the result of that breach were to be damages the equivalent of liquidated damages, this would make the acceleration clause in the contract totally superfluous. This clearly was not the intention of the parties.

8. The requirement to accelerate is a different (and unusual) obligation in the contract, and is not the same as the obligation to complete on time. There is therefore no legal reason why damages for a different obligation, i.e. to accelerate when instructed, should be the same as the damages which arise from the obligation to complete on time. In fact, as explained above, the very fact that there are two different results of breach. Given that the intention of the acceleration clause was specifically to avoid the client having to accept liquidated damages for delay, it would be entirely inappropriate if they were the damages to be applied. In fact, the normal rule for damages applies, as in any other breach of contract, i.e. it is the damages directly and foreseeably flowing from the breach. As the contractor knew that the acceleration clause was to avoid delay and liquidated damages, he would also have known that his failure to accelerate would have resulted in different damages than the liquidated damages for delay.”

Mr Collingwood said, and I accept, that he understood that the purpose of the note was to support PGBL’s case and that it was an expression of objective opinion.

Answers to Issues

Issue 1

1. Did Masons enter into a contract of retainer with PGBL as alleged in paragraph 4(a) of the Amended Defence? (Amended Defence paragraph 4(a); Amended Counterclaim paragraphs 9-12 inclusive; Amended Defence to Counterclaim paragraphs 8-11 inclusive)

55. The references to the pleadings (and the pleadings themselves) are not particularly helpful. It is said by WDK/PGBL that the contract was “agreed subsequently”. In paragraphs 9-12 of the Counterclaim, it is said that the contract or contracts were made between Mr Whitley for PGBL and were evidenced by the minutes of the meeting of 18 January 1999 and Masons’ letters of 12 and 19 January 1999. Masons therefore knew that the building contract that was to be drafted was for the benefit of PGBL and that, subject to King’s indemnity, carelessness on the part of Masons would cause loss to PGBL. However WDK was the client.

56. In my judgment the Masons’ contract was made with WDK, not with PGBL. It is clear that Mr Whitley had authority to retain Masons. Did he act for WDK or PGBL? The answer comes from his own words: in his letter to Masons of 14 January Mr Whitley said:

“9. The client, to whom Masons shall be contracted is:

W D King Ltd
120 High Street
Edgware
Thus Mr Whitley said that W D King was the client, that he was its architect, and by virtue of his
company's interest in the project he was acting on behalf of the joint venture comprising W D King
and was therefore acting on its behalf. The instructions might also have come from City and County
or any other member of the participants in the joint venture but no other person was named as the
client and only Mr Taylor was to be sent copies of the correspondence. The preceding paragraph
(8) of the letter makes it clear that the terms of the letter are to form part of any contract.

57. In my judgment the contract was made essentially as set out in the counterclaim. Masons'
letter of 12 January was an offer; Mr Whitley's letter of 14 January did not accept it but set out more
of the relevant terms or instructions which would form the basis of the retainer; as did the meeting of
18 January; a fee of £8,500 was ultimately agreed as Mr Collingwood said; it was confirmed at the
meeting of 18 January: "The first thing Paul [Whitley] did was to ask for confirmation of acceptability
of his letter of 14 January which confirmation MAC gave although he could not help wondering
whether we are going to be doing rather more work for £8,500 than might at the outset have been
imagined!". Furthermore Masons acted on the instructions on 21 January; as did WDK in the person
of Mr Whitley. It must be remembered that PGBL as a SPV, was a shell. It was unlikely that
Masons would have accepted it as the client any more than PGBL would have been so designated by
the entity which effectively retained Masons, namely WDK, and which had the major financial interest
in protecting its SPV, PGBL, from loss. If PGBL had been the client then WDK would or might not
have been able to recover its losses.

Accordingly the answer to the first issue is: No.

Issue 2
2. Did Masons owe PGBL a duty of care as alleged in paragraph 16 of the Amended
Counterclaim? (Amended Counterclaim paragraph 16; Amended Defence to Counterclaim paragraph
18)

58. WDK/PGBL submit that the answer to that question is in the affirmative since Masons knew
that PGBL, the SPV, would be the employer under the building contract and its rights and liabilities
would be affected. Mr Wilmot-Smith drew attention to Mr Collingwood's evidence. However Mr
Collingwood said

Q. And if the drafting of the building contract fell down in any way, the loser was going
to be the special purpose vehicle?
A. I am not sure that is entirely right. Ordinarily, obviously, I would accept that when I
am drafting an early building contract for an employer, then if I make a mistake it is likely to
be the employer named in that contract who would suffer loss. But in the circumstances of
this project, where my understanding was that Prospect Gardens' obligations in relation to
the building contract were only guaranteed by King to the extent of the side letter and where
I understood all their capital and funding was to come from or did come from King, then
perhaps the position is that PGBL would only have suffered any loss to the extent that that
loss was not made up by King, and I am not sure that there was any such loss here.
Q. If the special purpose vehicle makes a loss, then that loss, if it is made up by King, is King's loss as well, is it not?
A. The point I am making is that it might just be King's loss."

59. Mr Sweeting for Masons submitted that the case against Masons as set out in paragraph 16 of the counterclaim was of a duty of care co-extensive with concurrent with an implied contractual duty of care and that there was no pleading of a duty of care based upon an assumption of liability towards a third party with whom there is no contract. Thus none of the particular features of the relationship were set out. He submitted that the answer to this issue was the same as that to be given to the previous issue. There was no implied retainer and no need for one. The mere fact that work is done or to be done for a person but under a contract with another party (e.g. where the object of that is to prepare documents, or to give advice which may have some effect on that person) is not enough, in itself, to give rise to a duty.

60. In my judgment the submissions made on behalf of Masons are correct. Subject to overriding law (such as that now found in the Contracts (Rights of Third Parties) Act 1999) it is not enough for a person to be the object of a contract to found a duty of care to that person owed by whomsoever is responsible for drawing up or advising on the contract. If the loss that such a person might suffer would be financial or, as it termed, “economic loss”, it is now well established that there must be more than foreseeability of loss, there must be a reliance and an assumption of responsibility and it must be right for the law recognise that the relationship is one which gives rise to a duty of care to avoid such financial loss, before breach of that duty is actionable.

61. The circumstances in which Masons were invited to advise made it clear that, although PGBL was naturally in the contemplation of Mr Collingwood and others, the firm was not asked to treat PGBL as its client. PGBL was an SPV. The client was the entity which would or might suffer the real loss, namely the sponsor or guarantor of the SPV, here WDK. If the SPV is to be able to claim then it must have the benefit of a contract or there must be special circumstances to take the situation out of the norm and to create a duty of care towards it and, if not discharged properly, resulting liability. Here there were no such circumstances. The situation was essentially commonplace. The answer to this issue is: No

Issue 3

3. Did the building contract permit PGBL to recover unliquidated damages for delay in the event that Jarvis was in breach of an acceleration instruction issued by the Project Manager under Condition 38? (Amended Counterclaim paragraph 67(i); Amended Defence to Counterclaim, paragraphs 42.2, 51 and 52.)

62. WDK say that this issue should answered: No, but that is the foundation for later submissions. It will be recalled that adjudication was sought and pursued against Jarvis (on the advice of leading counsel) on the basis that the answer to the issue was: Yes. Masons’ contention was that if condition 38 allowed the recovery of unliquidated damages for delay, or, rather, if that was arguably so, then the main complaints about drafting and advice would fail would fail or be irrelevant since WDK’s losses were recoverable from Jarvis had the claim been pursued to arbitration. It is therefore necessary to answer the issue. In addition the reasons may be material to the answers to later issues.

63. The point was presented simply. Mr Wilmot-Smith argued that the contractor, Jarvis, was under a primary obligation to complete by the terminal dates. The obligation to accelerate or catch up pursuant to an instruction under condition 38 was additional to that primary obligation. The result was the same whether the contractor failed to complete on time whether by reason of its own lack of effort or because it failed to comply with the instruction under condition 38. Therefore, under the
contract, the remedy should be the same, namely that of liquidated damages. Mr Wilmot-Smith referred to a number of cases to support the proposition that liquidated damages will normally be the employer’s sole and exclusive remedy for delay of any kind to practical completion (including Pigott Foundations Ltd v Shepherd Construction Ltd (1993) 67 BLR 48 (at pages 67G-68E); Temloc Ltd v Errill Properties Ltd (1987) 39 BLR 30 (at pages 38-39); Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd (1970) 1 BLR 114 at page 121).

64. Mr Sweeting submitted that, as a matter of general principle, it is necessary to exclude liability to pay damages for a breach of contract for it otherwise exists or remains. He referred to Modern Engineering v Gilbert Ash [1974] AC 689. He argued that since condition 38 did not specifically exclude liability Jarvis was liable for breach of it. Condition 55 was only a limitation on liability for damages for failure to complete on time. The obligation (and thus the breach) under Condition 38 was not a failure to complete on time. He also referred to McGregor on Damages, 16th ed., paragraph 487 where the editor says:

“The (Claimant) …will be entitled to sue for unliquidated damages in the ordinary way, in addition to suing for liquidated damages, if other breaches have occurred outside those that fall within the ambit of the liquidated damages provision.”

He submitted that issue 3 should be answered: Yes.

65. The purpose of condition 38 is clear. It is unusual in that it goes beyond the ordinary provision whereby power is given to instruct the contractor to make up time that has already been lost as a result of which it is probable or certain that the contractor will not finish on time. It authorises such an instruction where “the PM is of the opinion that the Contractor’s rate of progress in carrying out the works is likely to prejudice completion of the works or any section by its date for completion”. To that extent it intrudes into the contractor’s sphere of operations and risk management since a contractor is basically entitled to decide how best to fulfil its primary obligations under the contract, especially where, as here, the contractor is responsible for design so it can be even more important to a contractor to be free to plan and to co-ordinate its operations as it considers to be appropriate in its own best interests and the interests of those that it has engaged. Nevertheless its essential purpose is the same as an unmodified provision: it is to enable steps to be taken in the interests of the employer which, if carried out, may or should avoid a delay in completion. The obligation of compliance imposed on the contractor is therefore ancillary or conducive to its primary obligation. Failure to comply will or may result in the work being completed late. The contract sets out its own sanctions for non-compliance. The principal sanction is the payment of liquidated damages. In this instance, as Jarvis of course fully accepted, and as recorded in condition 55(6), the graduated and limited scheme was specially devised to meet the needs of the employer who would not otherwise have been able to obtain an acceptable contract price. Jarvis negotiated and concluded the contract on that basis (although that is irrelevant to the interpretation of the contract.) The authorities, including those relied on by WDK/PGBL, make it clear that liquidated damages may well also serve to limit a contractor’s liability. Temloc v Errill is a notable and striking example (but there are others which adopt the approach of Estey J in Elsey v JG Collins Insurance Agencies Ltd (1978) 83 DLR (3rd) 1 at pages 14-16). Certainly a contractor prices a contract on the basis that liability for damages for delay will not exceed the contractual rate and, as Mr Clark’s evidence shows, the figure for liquidated damages helps a contractor to take an informed decision as to whether or not to spend money to make up lost time. A construction contract, like other commercial contracts, contains numerous obligations: some merely administrative or part of the machinery; some preliminary (e.g. the giving of notices and other conditions precedent); some ancillary and some are substantive. Non-compliance with those in the former categories either does not or is unlikely to give rise to claim for damages by the other party, not least because none will have been suffered, (or none discernible). Failure to give a notice, if a condition precedent will preclude a claim and avert a payment that might otherwise be made. Non-compliance may be beneficial not detrimental. Condition 1A(1) provided:
“The Employer and the Contractor shall deal fairly, in good faith and in mutual co-operation, with one another, and the Contractor shall deal fairly, in good faith and in mutual co-operation, with all his subcontractors and suppliers.”

Such a provision is intend to infuse an understanding of how the contact is to be read and performed. Notwithstanding the seemingly comprehensive statement of the parties’ respective rights and liabilities, it might conceivably, and exceptionally, give rise to an independent obligation but it at first sight hard see how, in a contract of this breadth and complexity, failure to comply with it could create liability which did not otherwise exist.

66. The obligations in condition 31(1) lay the found ation for the obligations to complete properly and on time. They say:

“The Contractor shall execute the Works in accordance with the Contract and –
(a) with diligence;
(b) in accordance with the Design;
(c) in accordance with the Programme;
(d) with all reasonable skill and care;
(e) in a workmanlike manner; and
(f) in accordance with any quality control or assurance system, standards, and/or procedures specified in the Employer’s Requirements.”

Non-compliance will or may lead to action under the contract and ultimately to a liability for damages for failure to complete the Works properly or on time, not for liability under this provision alone which is a description or measure of what is required upon completion. So too with the obligation created by an instruction issued under condition 38(1). Until the Works are completed or handed over (or are due to be completed) the employer will generally not be able to demonstrate that any breach of contract has caused loss. Non-compliance may however lead to use of the provisions leading to determination of the contract. In GC/Works/1 they include in Condition 56 provisions for determination by the employer:

“56 (1) Without prejudice to any other power of determination, the Employer may determine the Contract by notice to the Contractor if:
(a) any ground mentioned in subparagraphs (6) (a), (b) or (c) has arisen: the Employer has given notice to the Contractor specifying the relevant ground and facts; and such ground was in existence 14 Days after such notice was given; or has arisen again at any subsequent time; or
(b) any ground mentioned in paragraph (6) has arisen, other than those mentioned in sub-paragraphs (6) (a), (b) and (e).

(2) The Employer shall specify in a notice of determination under paragraph (1) which of the grounds mentioned in paragraph (6) apply.

(3) The Employer shall specify in a notice of determination under paragraph (1) which of the grounds mentioned in paragraph (6) apply;

(4) The Employer may, after giving notice of determination under paragraphs (1) or (8), give directions in relation to the performance or completion of any work and any other matters connected with the Works, the Site and any other contract or subcontract.”

(6) The grounds referred in paragraph (1) are –
(a) the failure of the Contractor to comply with an Instruction within a reasonable period of its issue;
(b) the failure of the Contractor to execute work in a proper and workmanlike manner, or to proceed regularly and diligently .... so that in the opinion of the PM the Contractor has not completed or will be unable to secure the completion of the Works or any relevant Section by the Dates for Completion.
67. Mr Wilmot-Smith drew attention to the views of Mr I. N. Duncan Wallace QC at page 127 of
in his commentary on the ICE Conditions, where he has said of clause 46 of those conditions (which
is comparable to condition 38, at least in its unamended form):
“...in the Employer's interests the choice of the wording, including the use of the word “shall”
is lamentable, since it is self evident that no sanction has been provided for the enforcement
against the Contractor of clause 46, which therefore is mere verbiage from this point of view
and adds nothing...”

Mr Sweeting countered with an extract from Mr Max Abrahamson's Commentary (pages 146-147):
“Such notification is important in case the Engineer eventually has to forfeit the contractor's
employment under Clause 63(1)(d). More important, the preventive use of this clause
should not be overlooked. The employer usually wants his works on time not liquidated
damages and the engineer is entitled to bring pressure on the contractor to increase his
resources in good time where he is not proceeding with “due expedition” within Clause 41.
The engineer's moral and legal authority to do so will be stronger if he has meticulously
administered Clause 44 on extensions of time .... the contractor must propose the steps; the
engineer merely notifies and approved under this clause and if he is wise carefully refrains
from any instruction which might attract a claim under Clause 13 (delay and extra cost)...”

Both commentaries deal with superseded editions of the ICE conditions and with another form.
However clause 46 has the same objectives as condition 38 so both commentaries are relevant, as is
the divergence of opinion. I have to say that I do not agree with Mr Duncan Wallace QC if his views
are as set out in this limited extract. Both the ICE Conditions and GC/Works/1 (in common with
many other standard forms) contain provisions for the determination of the contract or the
employment of the Contractor under it for non-compliance with instructions. As is apparent from an
examination of such clauses (and the references in them such as to time or progressing with
diligence) the instructions include those to make up lost time (or to accelerate). That is certainly so
under GC/Works/1 both in its original form and as amended here (see condition 56(1)(a) or (b)).
Although determination is not achieved swiftly (since it is necessary to give the contractor to give a
contractor at least a last clear opportunity to comply before such the drastic sanction can be
effectively and lawfully be applied), nevertheless the threat of such a sanction is conducive to realism.
The cynical, such as those who have only a jaundiced view of the performance of contractors, tend to
dismiss the commercial utility of determination provisions. In my view, they do not recognise that
contractors, certainly those of some standing, will do everything possible to avoid a determination.
Expulsion from a site is not just bad for a contractor's finances but affects the contractor's reputation
and it can have significant consequences in terms of relationships with bankers and insurers. It will
lead to a bond being called with immediately detrimental effect. It was part of Mr Whitley's initial
instructions to Masons in January 1999 that a bond would be required. Jarvis provided a bond. (In
2000 Mr Whitley considered with Ms Howells whether it could be used, in particular, in relation to
condition 19 to recover damages for delay.) Obviously a contractor will be aware that, in some
situations, the threat of determination may not be a bluff where, for example, the employer cannot
afford the additional delay to completion that determination will almost always bring. In such
circumstances the sanction, or the threat of it, may not in practice be effective. However it is not
always possible to tell at the time, still less at the date of contract, that a threat is a bluff. The
adjudicator's decision suggests that Jarvis may have made such an assessment. That does not, in my
view, detract from how this contract should be read, i.e. when it was made. At that time, should Mr
Whitley have found it necessary to resort to issuing an instruction under condition 38, WDK/PGBL and
Mr Whitley had a commercially and legally effective sanction as an available alternative to liquidated
damages.

68. In my judgment failure to meet the obligation to comply with an instruction given under
condition 38 does not of itself give rise to any claim for damages. The primary obligation to complete
on time remains. The additional obligation created by the instruction does not supersede that
primary obligation. It is created to secure its due performance. If it is not observed the consequence
may (or may not) be a failure to complete on time. The obligation is therefore preliminary, ancillary or
subservient to that primary obligation. It overlaps that obligation. Failure to comply with it means
only that the contractor has not remedied non-compliance with its general obligation to execute the
Works with diligence or with the Programme (see Condition 31(1)(a) and (c). The result may not be
that the Works are finished late. If they are, the true cause (if one need be found) lies in the
contractor’s failure to proceed with diligence or to comply with the programme, or some other failing
or mishap for the consequences of the risk of which the contractor is contractually responsible but
which the contractor did not correct or surmount and not the failure to comply with the instruction
under condition 38. The answer to this issue is: No.
Issue 4

4. Were Masons under any of the duties alleged in paragraphs 14(a)(iii) and (b)-(d) of the Amended Defence and Counterclaim and, if so, which of them?

69. The reference to paragraph 14(a)(ii) is a mistake: in the relevant paragraph of the Reply Masons deny paragraph 14(d)(iii) (was there a duty to warn WDK/PGBL of the risks of the contracts that they would be making?) and so the reference to 14(a)(ii) is thus unnecessary as it is included within (b)-(d). Paragraph 14 sets out terms which said to be "express and/or implied". They are either one or the other. Sub-paragraph (b) pleads a general duty to provide legal advice or services in connection with other aspects of the development and therefore neither adds or detracts from the case. It was not an express term and I see no reason to imply it, given the precision with which Masons' duties were set out by Mr Whitley in his letter of 14 January 1999. Sub-paragraph (c) pleads another general duty to advise whether or not requested to do so, "on all matters relevant to their retainers(s), in so far as such advice was and/or appeared to be reasonably necessary". Again, in my judgment, there was no such express term and it cannot be implied as part of the original retainer, not least since it runs counter to the express terms of Masons' retainer by WDK which was to ensure that the work was kept to the minimum so as to obtain a fixed fee from Masons and thus to keep the costs down. The fact that, subsequently, costs rose does not justify ascribing to the parties a change of mind and the assumption of such a general duty.

70. Sub-paragraph (d) supplements the preceding sub-paragraphs by pleading that, "in so drafting, advising or acting, Masons would

(i) take all reasonable steps to further King's objective of avoiding risk where possible and otherwise minimise risk where it was unavoidable

(ii) take due account of King's lack of experience of and expertise in a development of this size and nature;

(iii) warn King and/or PGBL of any significant or material risk to them in the contracts they would be entering into.

I have already decided that Masons did not owe PGBL any contractual duty. The duties pleaded were not expressed either in so many words or as a matter of the interpretation of the relevant documents or conversations. There is occasionally a recognition in the pleading that the standard expected of Masons was the exercise of reasonable professional skill and care. The arrangements made did not create anything in the nature of a warranty or unqualified promise. Subject to that standard and by virtue of it, Masons' duties had to take account of or comprehend those outlined in sub-paragraph (d) since they were necessary to the proper fulfilment towards WDK (here excluding PGBL) of Masons' obligation to prepare alterations to the conditions of contract required by WDK that were reasonably suitable for this project and this client. This is exemplified by Mr Collingwood's ready acceptance that Mr Bloch's letter of 17 March 1999 was a request to Masons to minimise risk as far as possible and to bear in mind the inexperience of WDK of this type of development, as appears from his reply of 19 March 1999 in which he set out the risks. In my judgment in that letter was full and clear and accurate. In my view Masons fully discharged its duties to advise on risk. However, in relation to the central point of this case, Mr Whitley's evidence is also directly relevant to the ambit of Masons' duties (or the discharge required) and telling against WDK. When asked about the correspondence in August 2000 in which he had confirmed that liquidated damages did not reflect PGBL's real loss in the event of late completion, he said: "I had advised Masons in the first place that there was a shortfall, therefore it was not something that they needed to advise us about." With that in mind, the answer to this issue: Under their retainer Masons owed WDK contractual duties as set out in paragraph 14(d) of the Amended Defence and Counterclaim.

Issue 5

5. Subject to the answers to issue 4, were Masons in breach of contract and/or in breach of their duty of care at common law as alleged at paragraph 67(i) and (ii) of the Amended
Counterclaim? (Amended Counterclaim paragraph 67(i) and (ii); Amended Defence to Counterclaim paragraphs 42.1, 42.4.1, 43-50 inclusive and 54).

71. Paragraph 67 (i) pleads that
“Masons failed to draft the building contract and/or to advise [WDK] that the building contract should be drafted as expressly to permit PGBL to recover unliquidated damages in the event that Jarvis was in breach of an acceleration instruction issued by the Project Manager under Condition 38. For the avoidance of doubt, as pleaded in the Reply, King’s and PGBL’s case is that Masons ought properly to have drafted the building contract so as to expressly provide for unliquidated damages to be recovered by the employer in respect of the failure to mitigate and/or to eliminate delay by acceleration as instructed by the Project Manager.”.

Paragraph 67 (ii) pleads
“At the least, Masons ought properly to have warned of the risk of the irrecoverability of the principal (delay) loss which [WDK] were likely to incur as a result of any breach of Condition 38. ...”

These are the main allegations. Mr Wilmot-Smith in opening referred to Yager v Fishman [1944] 1 All ER 552 at page 555F which shows that a solicitor is not retained to advise on business matters and to the judgment of Lightman J in Hurlingham Estates Ltd v Wilde & Partners, unrep. 10 December 1996, (except Times Law Reports, 3 January 1997), which he said supported the proposition that a solicitor was obliged, in light of his retainer and the client’s instructions, to form a reasonable appreciation of the advice that the client requires. I do not read the report in that way. The case was about a solicitor taking on work which he was not qualified to handle. He failed in his obligation to warn the client so that somebody competent could be instructed. Masons were plainly competent and had indeed been chosen as they are leading specialists in all aspects of transactions of this kind. I have already decided that their duties included warning WDK, if need be, of the consequences of the contract conditions which they had prepared.

72. WDK placed great importance on its inexperience in projects that were not simple house building or conversions. However the inexperience was, in my judgment, that of Mr Rosenbaum. Every other member of the team that comprised the venture that included WDK as one of its members had either sufficient relevant experience or were otherwise well able to assess the risks on this project. In addition Mr Rosenbaum relied on them, which he would not have done if they were not able to provide him with good advice. Masons dealt with them, notably Mr Whitley. Masons were not asked to deal with Mr Rosenbaum. Clearly Mr Collingwood was, on occasion, specifically asked to consider the position of Mr Rosenbaum.

73. In considering whether or not Masons were in breach of their duties, that is to say whether they were professionally negligent, it is first necessary to bear in mind that WDK was well aware that if the contractor (Jarvis) failed to complete in time for the University then it would not be possible to recover anything like a year’s loss of rent and that the amount of liquidated damages was accordingly capped.

74. I agree with Mr Sweeting that, in reality, the main case against Masons is that they should have advised on Condition 38 and should have explained its scope. (Mr Sweeting referred particularly to the implications of paragraphs 67A and 69 of the defence.) I do not accept that case. All that Masons did was to extend the scope of Condition 38 to give the PM additional powers. They did not create Condition 38. Should Masons have explained its scope? In my judgment they did so quite sufficiently, first, in the spring of 1999 to the person principally interested in its effective operation, Mr Whitley, and thereafter on each occasion that it came to be considered. Masons set out precisely why it was being included. By September 1999, as I have already said, Masons’ task was to see that the building contract matched the commercial deal that had been done between Jarvis and
WDK/PGBL. It did, in all the respects with which I am concerned. Even then, Masons were asked to
and did explain punctiliously every relevant alteration so as to demonstrate, amongst other things,
that they had minimised risk so far as possible.

75. Masons did not advise WDK or Mr Whitley that damages for delay could not or might be
recovered for failure to comply with an instruction which resulted in late completion. I do not
consider that in the circumstances they fell short of the standards expected of a competent specialist
solicitor in not doing so. In my view condition 38 did not give risk to a liability for unliquidated
damages if the contractor did not comply with the instruction so that the works finished so late that
the ceiling on liquidated damages was reached and a year's rent etc was lost. One has only set out
the proposition to see how extreme it is. Masons were not therefore in breach of their duties not to
have pointed that out, at any stage. In addition it is material that Masons did not in fact know, until
after Condition 38 had been drafted, what the extent of the actual losses that WDK might incur. It
was not until Mr Collingwood had written his entirely correct letter of 19 March 1999 on the risks that
faced WDK that Masons began to be told something about the figures (although they were not to be
concerned with them). In his letter of 19 March 1999 in which Mr. Collingwood set out his assessment
of the risks he said in relation to delay:

“Nor do I believe we have yet achieved a position where the employers potential liability to
the University in respect of delay is covered under the Construction Contract. (I may be
wrong about this, in any event, I do not know how damages for delay were ultimately dealt
with in the invitation documents).”

Mr. Collingwood’s subsequent letter of 22 June 1999 and Ms Howells’ letter of 1 September 1999 are
also relevant. They sufficiently record that “the employers’ loss is potentially going to be greater than
the amount of liquidated damages that will be included in the contract”. WDK had by then accepted
the risk that if the contractor finished very late then it would not be able to recover any loss incurred
by the University postponing taking up the lease until the next academic year. First, as I have set
out, damages would not have been recoverable so if advice had been given it would not have
assisted WDK. Any attempt by WDK to have extended condition 38 still further so as to impose an
express liability on the contractor would have failed since Jarvis would not have accepted it. That is
clear from the evidence of Mr Clark and Mr Terry. It is clear also from the amendments made e.g. to
clause 20 which reflected the same concern. Mr Whitley’s letter of 10 August 1999 (paragraph 8 and
especially paragraph 10) shows that he understood very well the true relationship between condition
38 and liability for liquidated damages and that an attempt to make unliquidated damages
recoverable would be futile. As a result, as I have found, Jarvis had the whip hand in any
negotiations. By the time Eversheds came on the scene, WDK had virtually lost any leverage and by
September its own finances precluded anything other than going ahead with Jarvis. Jarvis had
negotiated an acceptable attenuation of the liquidated damages recoverable and had secured other
amendments to avoid or significantly to reduce the risk of liability for unliquidated damages for delay,
such as the addition to Condition 55(6)(b) and the limitation of the indemnity in Condition 20. Its
queries about Condition 19 were to similar effect. Mr Whitley was aware of and involved in these
aspects of the negotiations on behalf of W D King and accepted the amendments. In September
1999 Mr Whitley obtained an extensive and meticulous commentary to ensure that the terms drafted
by Masons matched the deal. They did.

The case against Masons seems to suppose that the views that Ms Howells expressed informally and
off the cuff to Jarvis would also have been given to WDK formally. I do not think that this is likely as
Mr Collingwood was not of the same view. Although I have no doubt what the answer is, it is clear
that competing views are held by distinguished commentators, by highly competent solicitors within
Masons, and, it seems by leading counsel (when instructed for the adjudication). In these
circumstances it is impossible to conclude that Masons would have been negligent if the views given
to Jarvis (or views contrary to them) had been expressed as formal advice to WDK or PGBL.
Nevertheless should Masons have advised of the very risk? I do not consider that they were in breach of contract in not doing so expressly. WDK was already aware of the risk of the shortfall, in the worst case, between the maximum liquidated damages recoverable and the potential losses. At its highest Masons’ duty was to advise WDK of a risk of which it was unaware and which might affect its decision to go ahead with the project. So Masons were not fault in not pointing out that which WDK knew and accepted. I cannot believe that it would have made any difference to WDK if Masons had repeated the obvious. What if WDK had been told that if the contractor did not comply with an instruction given under condition 38 and the works finished late, there might still be a shortfall. WDK knew that. It would not have affected its decision. It could hardly be that WDK would be better off than if no instruction had been given, as Mr Clark pertinently and tartly remarked, and as the adjudicator’s decision also shows. Moreover, as I have pointed out, Mr Whitley actually said that he never did expect Masons to advise on it and that is borne out by Ms Howells’ attendance note of February 2000. He also confirmed that the liquidated damages did not even begin to reflect PGBL’s real loss should completion be delayed – restated in a letter of 17 August 1999. It is possible to construct a case on the basis that once a shortfall was to be accepted it was necessary to remind WDK of all the circumstances in which that risk might arise but it would be bound to fail, such as when Jarvis required alterations, e.g. to condition 20. However the risk of shortfall would only arise if Jarvis finished late. It was not incumbent on Masons to demonstrate by reference to the contract conditions the numerous reasons why Jarvis might finish late. They are irrelevant once the risk of the shortfall is accepted. Acceptance of the risk is essential dependent on a judgment of the contractor and the technical and other reasons why it might not be able to design and execute the project on time.

The principal attack pleaded was however that Masons should have provided an effective sanction for non-compliance with an instruction given under condition 38. I also reject this submission. First, the contract already contained the primary sanction of possible determination for non-compliance in condition 56. Secondly, if that “sanction” had been an express liability for unliquidated damages it would have been commercially unacceptable, for, as the evidence from Mr Clark (and Mr Terry) shows, no contractor would have accepted such an open ended risk, at least without making provision for it in the contract price. But that would not have acceptable to either Jarvis or WDK/PGBL as it would have made the project uneconomic. To have added such a provision to this condition (and to other provision such a Conditions 33 and 40, breach of which might also cause delay) would have been inconsistent with the arrangements for liquidated damages that had been negotiated and concluded with Jarvis.

In his final speech Mr Wilmot-Smith said “it is always difficult when a professional, especially competent professionals like [Ms Howells] and Mr Collingwood obviously are, and distinguished in their field, [when] they are accused of slipping up”. I agree. I too find it difficult to accept, if it were so obvious that condition 38 was lacking or that its weakness was apparent, that these points did not occur to two highly experienced specialist solicitors at any time over the many months that they were engaged on this project, especially since they had throughout to deal with a client’s representative who was both decisive (and difficult) and knowledgeable and who questioned or tested virtually everything that he was told. Masons were put on their mettle by Mr Whitley and in my view they rose admirably to the occasion. I do not consider that any competent specialist solicitor could reasonably have done more and advised WDK as it is now suggested that they should have done.

These amendments were proposed and were seen by WDK as a preventative measure designed to avert or minimise that eventuality. Risk averse though Mr Rosenbaum was, he and the other participants in the venture and his other advisers were prepared to run the risk of such a shortfall. Even if Masons had told WDK of the risk I have no doubt that it would not have affected the decision to go ahead with the project. There is, I regret, a high degree of being wise after the event on the part of most of the WDK team (with the exception of those with perciption such as Mr Isaac).
Mr Whitley agreed that Masons own useful summary (see their letter of 22 January 2003) was accurate as to the facts (which it is):

"Accordingly, we reiterate that it was our understanding of the commercial deal between the parties that delay losses were to be compensated by liquidated damages. It was only well after execution of the building contract that Mr Whitley, in the circumstances in which the project then found itself, began to search around for arguments that might be adopted to recover the shortfall. Reliance on condition 19 was one avenue explored, the bond another. Later, a claim for breach of condition 38 was canvassed. The advice we gave as to the prospects of such arguments was provisional and by no means unequivocally favourable. We refer you to the documents attached [i.e. Masons attendance notes of 22 February and 10 March 2000, the latter with attachment with Ms Howells’ manuscript notes; Mr Whitley’s faxes of 16 and 17 May 2000; Masons letters to Mr Whitley of 22 June 200 and to Mr Rosenbaum of 20 September 2000]."

The answer to Issue 5 is: No.

**Issue 6**

6. If the answer to question 5 is “yes” did such breach cause PGBL to lose the opportunity to:

(i) contract with Jarvis on the basis that Jarvis would be liable to pay unliquidated damages for delay in respect of loss caused by PGBL by Jarvis’ breach of Condition 38 (Amended Counterclaim paragraphs 68, 69(a); Amended Defence to Counterclaim paragraphs 54.1 and 55; and/or

(ii) decide whether or not to proceed with Jarvis as contractor whether on alternative terms or at all (Amended Counterclaim paragraph 67(b)

An answer to these issues is strictly not required. It is however clear from my previous conclusions that my answer to each would still be: No. In opening Mr Wilmot-Smith submitted that it was necessary to consider what WDK would have done had the proper advice been given - what opportunity did WDK lose as a result of the deficient advice? He referred to Allied Maples Group v Simmons & Simmons [1995] 1 WLR 1602 at pages 1610D-G, 161B-1613E and to Benjamin Boakye Boateng v Hughmans [2002] EWCA Civ 593. He contended WDK did not have to establish that a different course of events would have occurred, merely that it lost a reasonable chance of a different course of events occurring. In his final speech, Mr Wilmot-Smith suggested that, as a result of Masons’ supposed breaches, WDK/PGBL had lost opportunities, including deferring the project; selling the property; negotiating or contracting on different terms with Jarvis or contracting with some one else on other terms. I regard these suggestions (some of which go further than Issue 6) as unrealistic and even fanciful. First, the time when Masons should have advised could not have arisen until March 1999. It really only arose when it was decided to proceed with the project but to accept the risk of a shortfall. I have already pointed out the effect. Secondly, it was not long after that date that WDK committed itself with the issue of the letter of intent. The die was cast once the letter of intent was signed. Jarvis would not have accepted materially different and disadvantageous terms. Thirdly, it was only as a result of the conclusion of the negotiations with Jarvis that, assuming my earlier conclusion, was wrong, that Masons should have advised WDK of the effect of condition 38 in the circumstances. By that time WDK could theoretically have brought to an end the work being done by Jarvis. It could not have negotiated any better terms with Jarvis then or at any earlier stage. There was no other contractor. The next lowest tenderer was Ernest Ireland at £6.8 million which was far above the money available of £5.5 million. The final offer from Ernest Ireland was £6.8 million so as Mr Whitley later recorded:

"Given that the [Ernest Ireland] proposal for GMP is £6.8 million, [Jeffrey Rosenbaum] really cannot see how we are going to proceed any further."

Mr Whitley also accepted that, at least at that stage there was no other contractor who was prepared to tender at the price which WDK was prepared to pay. Thus Jarvis was the only contractor available. In my judgment it would not have contracted on the basis that it might be liable to
liquidated damages, or at least not without raising its price beyond WDK's reach. Issue 6 (i) can only be answered: Does not arise but if it did: No.

80. It would have served no useful purpose to have deferred the project. It could have sold the property, although it would not have been an attractive proposition. Literally, the answer to issue 6(ii) might be: Yes, but the issue is really concerned with some alternative. There was none so the issue is answered: Does not arise but if it did: No.

**Issue 7**

7. If the answer to either or both of the questions at issue 6 is "yes", would PGBL have taken advantage of this opportunity or those opportunities if it or they had been available? (Amended Defence to Counterclaim paragraphs 54.2 and 56).

81. Again this issue does not now arise. On the assumptions underlying it (which are in my judgment completely unrealistic), then the answer would obviously be: Yes, if it had the money (bearing in mind the limits on its finances and the effect of partially built works). It is therefore answered: Does not arise, but if it did: Yes (if it had the resources).

**Issue 8**

8. Did the Adjudicator decide that:
   (a) had Jarvis taken accelerative measures which it was within Jarvis' power to take, it would have achieved Completion of the Works by the dates referred to in PMI 003;
   (b) the Building Contract did not permit PGBL to recover unliquidated damages in respect of losses caused by Jarvis' breaches of PMI 003;
   (c) on the true construction of the Building Contract PGBL's recovery was limited to liquidated damages under Condition 55 (Amended Counterclaim paragraph 60)?

82. This issue and its components parts only arise because of the state of the pleadings. Although the adjudicator decided that Jarvis did not comply with PMI 003 (see paragraph 6.52 of his decision), he did not go further and make findings as to the effect of that failure. That may be not strictly correct. In paragraphs 7.13 and 7.14 of his decision the adjudicator effectively said Jarvis failure to comply with the instruction was not the cause of late completion. However it is agreed that the answer to sub-issue (a) is: No. The answer to each of the other two is: Yes. Masons therefore submitted, with some force, that as a matter of causation, WDK's losses stemmed from the adjudicator's decision and the consequent, but, in my view, understandable, decision not to go arbitration because the arbitrator was the same person (which Mr Collingwood had expressed reservations about – see paragraph 8 of the notes of the meeting in January 1999).

**Issue 9**

9. If the answer to issue 5 is "yes", and assuming without deciding, that Jarvis were in breach of PMI 003 to the extent held by the adjudicator, did Masons' breaches of duty cause PGBL to lose the opportunity to recover unliquidated damages for delay from Jarvis' breaches of Condition 38 of the Building Contract? (Amended Counterclaim 69(a)).

83. This issue does not now arise. If it did, then since it assumes that the adjudicator's findings were correct (in itself a reasonable assumption, in my view) then the answer would be: No. Leaving aside (1) that failure to comply with an instruction under condition 38 would not give rise to liability for unliquidated damages and (2) that Jarvis would not have accepted an express term for such liability, the adjudicator's decision makes it clear that the failure to complete did not lie in any such non-compliance but in the event which caused the delay in completion. Failure to comply with the instruction given when it is probable or likely that delay in progress will result in delay in completion merely means that the chain of causation that started with the event which has caused the delay in progress is not broken by lack of the compliance that is expected from the instruction, although it
would be broken had there been compliance which averted the delay in completion. This issue and
the answer to it provide some sort of key as to why WDK finds itself in such a parlous position. Risk
cannot be avoided in any business but timing is important. The risk of the shortfall occurring was
increased by the works being started so late. That left too little leeway for the effects of the
eventuality that occurred the nature of which was foreseeable (and which led to an amendment to
condition 20). The issue will be answered: Does not arise, but if it did: No.

84. I am grateful to counsel and solicitors for the care and clarity brought to the preparation and
presentation of this case.