Neutral Citation Number: [2005] EWHC 281 (TCC)

No HT-04-380

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

Court No 7

TECHNOLOGY AND CONSTRUCTION COURTS

St Dunstan's House

133-137 Fetter Lane

London EC4A 1HD

25th February 2005

Before:

MR JUSTICE JACKSON

- - - - - - -

BETWEEN:

ALFRED McALPINE CAPITAL PROJECTS LIMITED

Claimant

-v-

TILEBOX LIMITED

Defendant

- - - - - - -

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MR PAUL DARLING QC and **MR PAUL SUTHERLAND** (instructed by CMS Cameron McKenna) appeared on behalf of the Claimant.

MR ROBERT AKENHEAD QC and MR RIAZ HUSSEIN (instructed by Herbert Smith) appeared on behalf of the Respondent.

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JUDGMENT

Friday, 25th February 2005

1.

MR JUSTICE JACKSON: This judgment is in eight parts, namely:

Part 1. Introduction .

2.
The issue in this case is whether or not a clause providing for liquidated damages contained in a building contract made between the parties is valid and enforceable.

3.
The claimant is Alfred McAlpine Capital Projects Limited, formerly known as Alfred McAlpine Special Projects Limited. I shall refer to this party as "McAlpine". The defendant is Tilebox Limited, a development company which was formed in 1998 for the purpose of acquiring and developing Onslow House in Guildford. I shall refer to this party as "Tilebox". The principal directors of Tilebox are Mr Edward Hutley and Mr Charles Money-Kyrle.

4.
By way of introduction, I should also mention three other firms or organisations who feature in this case. Mercer & Miller are a firm of quantity surveyors which acted for Tilebox in relation to the development of Onslow House. The firm Insignia Richard Ellis, which changed its name to CB Richard Ellis, have advised Tilebox in relation to the future letting of Onslow House. I shall refer to this firm as "Richard Ellis".

5.
The organisation which is funding the development of Onslow House is Standard Life Assurance Company. Standard Life Assurance Company and a related body Standard Life Investments Limited have worked in tandem in relation to this investment. The division of responsibility between these two companies is not relevant to the issues in this case. I shall therefore refer to them compendiously as "Standard Life".

6.
This is a sufficient introduction of the main participants in the events with which this court is concerned. It is now necessary to outline the facts.

Part 2. The Facts .

7.
In 1998, Tilebox purchased a leasehold interest in Onslow House. At that time, Onslow House comprised about 50,000 square feet of space. The directors of Tilebox planned to strip the building to its core and completely refurbish it creating in the process approximately 90,000 square feet of space.

8.
Mr Hutley said in evidence, and I accept, that the plan was to create a grade A top of the range building which would be suitable for use as headquarters by a substantial corporation.

9.
During 1999, Mercer & Miller sent out tender documents for the proposed development to a number of contractors, including McAlpine. Tenders duly came in during September 1999. During the following winter the proposal was mooted that Tilebox and McAlpine should carry out the development of Onslow House as a joint venture. Between January and March 2000 there were serious discussions between Mr Walton of McAlpine and representatives of Tilebox about this prospective joint venture. Analyses of the development were produced by both parties but in the end they were unable to reach agreement. So the idea of a joint venture fell through.

10.
Thereafter, Tilebox proposed to carry out the development itself with the support of a funder. In the summer of 2000, Tilebox entered into discussions with two of the contractors who had previously submitted tenders. One of these was McAlpine. On 10th October 2000, Mr Money-Kyrle of Tilebox sent a letter to McAlpine in effect appointing McAlpine as the prospective contractor.

11.
On page 4 of this letter, Mr Money-Kyrle wrote as follows:

"Sectional Completion of the Contract is essential. At present there will be two binding sections of the Contract.

"Section 1 -- We will be contractually obliged to provide our tenant at levels 2-4 with handover to a shell state at a date to be agreed in October 2001. This date will be subject to Liquidated and Ascertained damages at a rate of £20,000 per week or part thereof.

"Section 2 -- We wish to complete the works as soon as possible but approximately by February 2002 at a date to be agreed. Liquidated and Ascertained Damages for this Section of the Works will be a further £24,000 per week or part thereof. We will require you to agree this sum and determine your programme in such a way that the date for completion is realistic."

12.
The part of the building referred to in that paragraph as "section 1" was at this stage proposed to be occupied by a company called Regus Limited. Regus was proposing to enter into a tenancy agreement whereby Regus would become the tenant of section 1 as soon as building works were complete. This pre-let to Regus remained part of the Tilebox's planning during October, November and December 2000. Shortly before Christmas, however, Regus made alternative arrangements for its future accommodation and the proposed pre-let was abandoned. After the end of 2000, the whole of Onslow House was viewed as a speculative development in the sense that no future tenant was firmly identified.

13.
I turn now to the funding arrangements. In the summer of 2000, Tilebox entered into discussions with Standard Life as prospective funder of the development. Mr Craig Thomson, a surveyor employed by Standard Life, handled much of the negotiations on behalf of Standard Life. It was clearly necessary to carry out detailed analyses of the likely costs of and the likely returns from the proposed development. Three firms of letting agents or property consultants were instructed to assist and advise. They were Richard Ellis (instructed by Tilebox), Holley Blake (instructed by Standard Life) and Wadham Isherwood. These three firms produced various reports on the property market and appraisals of the proposed development.

14.
Discussions and negotiations between Tilebox and Standard Life continued through the autumn of 2000 and the early part of the 2001. On 12th February 2001, Tilebox and Standard Life entered into a development funding agreement which all parties refer to as "the DFA". The scheme of the DFA was that Tilebox surrendered its leasehold interest in Onslow House and Standard Life acquired a long lease of the property for a price of £10 million. Tilebox would enter into a building contract with McAlpine to carry out substantial rebuilding works at Onslow House. Tilebox would procure architects, engineers and other professionals to provide the necessary professional services. Standard Life would fund the costs of the development subject to a maximum figure. Tilebox would arrange for the completed building to be let to one or more tenants for a term of at least 15 years. As reward for its services Tilebox would receive (i) a management fee of £225,000 and (ii) a development completion payment calculated in accordance with a formula set out in the contract. The development completion payment has been referred to by all parties as "the DCP" and I shall use the same term.

15.
Clause 3 of the DFA provided as follows:

16.
"The Developer hereby covenants with the Fund (but without prejudice to the requirements of the Developer's other covenants with the Fund in this Agreement) forthwith to commence and carry out and complete the Works or cause the same to be carried out and completed in every regard at the Developer's own cost (subject to the provisions of clause 9.1) as soon as reasonably practicable and in the event in accordance with the provisions of this Agreement."

17.
Clause 6 of the DFA included the following provisions:

"The Developer hereby covenants with the Fund: ...

"6.8.1. Without prejudice to any other rights and remedies of the Fund, whether arising by virtue of the terms of this Agreement and/or any deed or other document executed in favour of the Fund either at law or otherwise (and without prejudice to the rights and remedies of any other person in which the benefit of these covenants or any of them shall for the time being be vested), that:

"(A) the Works and each part of them have been and shall be carried out and completed in accordance with the various engagements under which the Works have been instructed;

"(B) the Developer will supervise the Works and the Project so that all its objectives are met in accordance with this Agreement and the Programme.

"6.8.2. As soon as reasonably practicable after the Unconditional Date to commence the Works and thereafter to take all reasonable steps to insure that Practical Completion is achieved on or before 30th November 2002 but so that (subject and without prejudice to the provisions of clause 20.3) the date shall be extended by the period of any delay due to any cause in respect of which the Employer's Agent (acting properly) shall have issued a certificate authorising an extension of time update the Building Contract and for which cause neither the Developer nor any of the Consultants is responsible."

18.
The phrase "employer's agent" in clause 6.8.2 is a reference to Mercer & Miller.

19.
After entering into the DFA it was necessary for Tilebox to finalise the terms of its building contract with McAlpine. These negotiations took place during February, March and April 2001. One of the matters discussed in these negotiations was the level of liquidated and ascertained damages which would be payable in the event of delayed completion of the works. Tilebox proposed £45,000 per week. This figure was calculated by Mr Hutley as representing the minimum weekly rental value of the completed building. McAlpine initially resisted this figure as being too high. However, there was give and take about numerous issues in the course of the negotiations and in the end McAlpine agreed to accept the figure of £45,000 per week. The final phase of this part of the negotiations can be traced through the following documents: a note by Masons', Tilebox's solicitors, of a meeting on 4th April 2001; an e-mail from McAlpine to Mercer & Miller dated 9th April; a letter from Masons to Mr Tiplady, McAlpine's in-house legal adviser, dated 10th April; an e-mail from Mercer & Miller to McAlpine dated 11th April.

20.
On 27th April 2001, Tilebox and McAlpine entered into a written building contract in the JCT Standard Form with Contractor's Design 1998 subject to a number of amendments. The contract sum was £11,573,076. The date for completion was 12th July 2002. Clause 24 of the contract conditions provided that McAlpine should pay liquidated and ascertained damages for delay at the rate specified in appendix 1 to the contract. Appendix 1 to the contract in its amended form provided as follows in relation to clause 24:

"At the rate of £45,000 per week or part thereof."

21.
Clause 25 of the contract conditions provided for extensions of time to be granted in certain events.

22.
By a supplemental agreement dated 24th August 2001, the completion date for the building works has been changed from 12th July to 9th August 2002. During the course of the works extensions of time have been granted to McAlpine under clause 25 of the contract conditions, so that the extended date for completion of the works has now become 14th August 2002.

23.
McAlpine duly commenced work in accordance with the contract. Unfortunately, very substantial delays have occurred in the course of the works. It has been no part of this trial to investigate the cause of these delays. I have been told, however, that a substantial cause of delay was defective work by the cladding subcontractor.

24.
Building works were not completed by the due date, namely 14th August 2002. Indeed, even today, some 2.5 years later, those works are still not completed. It is anticipated by the parties that practical completion will probably be achieved in May or June of this year.

25.
Against this background, McAlpine became concerned about its potential liability to liquidated and ascertained damages under clause 24 of the contract conditions. McAlpine realistically acknowledges that, on any view, there must be a substantial period of delay for which it cannot be granted any extension of time. Accordingly, McAlpine took legal advice and, having done so, formed the view that the rate of liquidated and ascertained damages specified in the building contract was excessive. In a letter to Tilebox dated 7th December 2004, McAlpine asserted that the liquidated damages provision contained in clause 24.2 of the contract conditions was a penalty clause and therefore invalid.

26.
Tilebox responded to that assertion by three letters dated between 17th and 20th December 2004. In these letters Tilebox denied that clause 24.2 was a penalty clause. Furthermore, Tilebox intimated a claim under clause 24.2 for liquidated and ascertained damages in respect of delay up to 2nd December 2004 in the sum of £5.4 million. There was clearly an issue between the parties as to the status of clause 24.2 and a substantial sum of money turned on that issue.

27.
In order to achieve a resolution of that issue, McAlpine commenced the present proceedings.

Part 3. The Present Proceedings.

28.
By a claim form issued on 20th December 2004 under part 8 of the Civil Procedure Rules, McAlpine applied to the Technology and Construction Court for a declaration that clause 24.2 of the building contract was an unenforceable penalty.

29.
At a directions hearing on the following day, namely 21st December, I gave directions for the service of evidence and the future conduct of this action. On 26th January 2005, Tilebox served its response to the claim.

30.
The parties have made appropriate disclosure and have exchanged their evidence and skeleton arguments without any need for further case management hearings. With commendable despatch both parties were ready for trial by the beginning of this week. That is just two months after the date when proceedings were issued. The trial commenced on Tuesday of this week, namely 22nd February. Mr Paul Darling QC and Mr Paul Sutherland represent McAlpine. Mr Robert Akenhead QC and Mr Riaz Hussain represent Tilebox.

31.
The following witnesses were called to give evidence at the trial on behalf of McAlpine: Mr Steven Goulston, a senior director of McAlpine, and Mr Matthew Walton, a development and construction executive employed by McAlpine. Mr Goulston did not join McAlpine until February 2003. So he could not give any direct evidence about events during the crucial period, namely late 2000 and early 2001. However, he makes helpful and considered comments about the issues in the case and I take into

account those comments. Mr Walton, likewise, was not involved with Onslow House during the crucial period. His involvement effectively ended in March 2000. Nevertheless, Mr Walton is a chartered surveyor by profession and he comments on some of the issues in the case. Again, I find these comments helpful and I take them into account.

32.
The following witnesses were called to give evidence on behalf of Tilebox: Mr Edward Hutley, a director of Tilebox, and Mr Andrew Meikle, an associate director of Richard Ellis. Tilebox also relied upon the written witness statements of Mr Craig Thomson, a surveyor employed by Standard Life; Mr David Stewart, a portfolio manager employed by Standard Life; Mr Michael Fitzgerald, a partner in the firm Mercer & Miller.

33.
The defendants' witnesses have the advantage of having been involved with Onslow House during the crucial period, late 2000 to early 2001.

34.
I have formed the view that all of the witnesses in this case were entirely honest in their evidence. They made concessions where they felt it appropriate to do so. They are experienced professional people who have done their best to assist this court in resolving some quite difficult issues.

35.
As the battle lines were finally drawn at the end of the trial, four crucial issues have emerged for resolution by this court. The issues are:

(1) Does clause 6.8.2 of the DFA require Tilebox to secure completion by a specific date?

(2) Does clause 6.8.1 of the DFA require Tilebox to secure completion by the date required under the building contract?

(3) What losses flowing from delay were foreseeable on 27th April 2001?

(4) Having regard to the foregoing matters, is clause 24.2 of the building contract unenforceable as a penalty clause?

36.
Before I embark upon these four issues, however, I must first outline the law relating to penalty clauses.

Part 4. The Law Relating to Penalty Clauses .

37.
It is an anomalous feature of the law of contract that the court will strike down penalty clauses. This is not part of any wider doctrine which requires or permits the courts to rewrite contracts or to strike out clauses which are unduly harsh as between the contracting parties. The Law Commission refers to the doubtful origins of the rule in paragraph 15 of its Working Paper Number 61, "Penalty clauses and forfeiture of monies paid."

38.
In his well known work "The Rise and Fall of Freedom of Contract" (Clarendon Press, 1979) Professor Atiyah traces how both judges and textbook writers developed the concept of freedom of contract

during the 19th century and moved away from the notion that the courts would mend unfair bargains on an equitable basis. Nevertheless the rule about penalty clauses survived from an earlier age.

39.
In **Law v Local Board of Redditch** [1892] 1 QB 127 (a case to which counsel have drawn my attention) Kay LJ describes how the courts of equity developed the rule against penalty clauses. That rule was then taken over by the courts of law, which looked behind phrases used, such as "penalty" or "liquidated damages" and considered the substance of each clause. In **Law v Local Board** the court held that a clause, providing for liquidated damages at the rate of 100 guineas per week for delay in the construction of a sewage works, was enforceable.

40.
In **Clydebank Engineering and Shipbuilding Company Limited v Don Jose Ramos Ysquierdo y Castaneda and Others** [1905] AC 6. The appellant defendants were late in delivering four torpedo boats to the Spanish Government. The House of Lords upheld the decision of the Court of Session that a clause providing for payment of £50 per vessel per week was valid and enforceable. The appellants argued that the loss flowing from the late delivery of a warship was extremely difficult to quantify and may on some scenarios be nil. Therefore, the clause should be struck down. The House of Lords rejected this argument roundly. The Earl of Halsbury, Lord Chancellor, expressed the view that the liquidated damages clause served a useful purpose, precisely because the true amount of damages was uncertain and difficult to assess. See page 11 of the report.

41.
In **Commissioner of Public Works v Hills** [1906] AC 368, Lord Dunedin formulated the test in this way at pages 375 to 376:

"The general principle to be deduced from that judgment seems to be this, that the criterion of whether a sum -- be it called penalty or damages -- is truly liquidated damages, and as such not to be interfered with by the Court, or is truly a penalty which covers the damage if proved, but does not assess it, is to be found in whether the sum stipulated for can or can not be regarded as a 'genuine pre-estimate of the creditor's probable or possible interest in the due performance of the principal obligation'. The indicia of this question will vary according to circumstances. Enormous disparity of the sum to any conceivable loss will point one way, while the fact of the payment being in terms proportionate to the loss will point the other. But the circumstances must be taken as a whole, and must be viewed as at the time the bargain was made."

42.
Lord Dunedin returned to this topic in the well-known decision **Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited** [1915] AC 79. The facts of that case are far removed from the present. However, after a review of the earlier authorities, Lord Dunedin set out a series of propositions, which have often been cited and relied upon for the last 90 years. At pages 86 to 88, Lord Dunedin said this:

"1. Though the parties to a contract who use the word 'penalty' or 'liquidated damages' may **prima facie** be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.

"2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damage (**Clydebank Engineering and Shipbuilding Company v Don Jose Ramos Yzquierdo y Castaneda**).

"3. The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged as at the time of making the contract, not as at the time of the breach (**Public Works Commissioner v Hills** and **Webster v Bosanquet**).

"4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration, may prove helpful, or even inclusive. Such are:

(a) It will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in **Clydebank** case) ...

(c) There is a presumption (but no more) that it is a penalty when, 'A single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage.' (Lord Watson in **Lord Elphinstone v Monkland Iron and Coal Company)**

"On the other hand:

"(d) It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility on. On the contrary, that is just the situation when it is probable that pre-estimate damage was the true bargain between the parties (**Clydebank** case, Lord Halsbury; **Webster v Bosanquet ,** Lord Mersey).

43.
In **Campbell Discount Co Ltd v Bridge** [1962] AC 600 the House of Lords struck down as a penalty a clause in a hire purchase agreement requiring the hirer to pay compensation for premature termination. The objectionable feature of this clause was that it provided a sliding scale which operated in the wrong direction. The less the depreciation of the vehicle, the greater was the compensation payable.

44.
In **Robophone Facilities Limited v Blank** [1966] 1 WLR 1428, the Court of Appeal by a majority upheld a liquidated damages clause in a hiring contract. The relevant clause in this case was subject to closer arithmetical scrutiny than appears to have been applied earlier cases, before a decision was reached that this was a reasonable pre-estimate of the loss. At the end of his judgment, at page 1449 Diplock LJ said this:

"I see no reason in public policy why the parties should not enter into so sensible an arrangement under which each know where they stand in the event of a breach by the defendant, and can avoid the heavy costs of proving the actual damage if litigation ensues. And I see no ground in authority which would permit, much less compel me to hold that this clause is a 'penalty clause' and so unenforceable by the courts ...

"In the present case there is clause 11, and pacta sunt servenda is still a useful principle of English law which in my view applies."

45.
In **Philips v The Attorney General of Hong Kong** [1993] 61 BLR 41. The Privy Council upheld the decision of the Hong Kong Court of Appeal that the liquidated and ascertained damages clause in a construction contract was valid and enforceable. Lord Woolf, delivering the judgment of the judicial committee of the Privy Council, cited with approval the passage from Lord Dunedin's speech in **Dunlop** which I have already read out. At pages 58 to 59, Lord Woolf said this:

"Except possibly in the case of situations where one of the parties to the contract is able to dominate the other as to the choice of the terms of a contract, it will normally be insufficient to establish that a provision is objectionably penal to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than his actual loss. Even in such situations so long as the sum payable in the event of non-compliance with the contract is not extravagant, having regard to the range of losses that it could reasonably be anticipated it would have to cover at the time that the contract was made, it can still be a genuine pre-estimate of the loss that would be suffered and so a perfectly valid liquidated damage provision. The use in argument of unlikely illustrations should therefore not assist a party to defeat a provision as to liquidated damages. As the Law Commission stated in Working Paper No 61 (page 30):

"'The fact that in certain circumstances a party to a contract might derive a benefit in excess of his loss does not ... outweigh the very definite practical advantages of the present rule upholding a genuine estimate, formed at the time the contract was made of the probable loss'.

"A difficulty can arise where the range of possible loss is broad. Where it should be obvious that, in relation to part of the range, the liquidated damages are totally out of proportion to certain of the losses which may be incurred, the failure to make special provision for those losses may result in the 'liquidated damages' not being recoverable. (See the decision of Court of Appeal on very special facts in **Ariston SRL v Charly Records Limited** (1990) The Independent 13 April 1990.) However, the court has to be careful not to set too stringent a standard and bear in mind that what the parties have agreed should normally be upheld. Any other approach will lead to undesirable uncertainty, especially in commercial contracts."

46.
The **Ariston** case to which Lord Woolf referred to in that passage was an extreme one. In **Ariston SRL v Charly Records** , Court of Appeal, 13th March 1990, the offending clause required a fixed amount of compensation to be paid for wrongful failure to return items, quite regardless of whether many items or only a few items were withheld. After that digression, let me now return to one more passage in **Philips** . At pages 59 to 60, Lord Woolf said this:

"Likewise, the fact that two parties who should be well capable of protecting their respective commercial interests agreed the allegedly penal provision suggests that the formula for calculating liquidated damages is unlikely to be oppressive."

47.
In addition to the authorities which I have mentioned, counsel have also drawn my attention to the relevant passages in Chitty on Contracts (29th edition) and Hudson's Building and Engineering Contracts (11th edition). At paragraph 10-021 of Hudson, the editor states:

"It may be a consequence of producer influence, but there would appear in fact to be virtually no reported cases in the United Kingdom where periodical liquidated damages for delay in building contracts have been held excessive so as to constitute a penalty. Liquidated damages clauses in

general are not looked on with the same disfavour at the present day, and modern disallowances seem to arise almost entirely in the field of hire-purchase where Lord Dunedin's principle 4(c) above has frequently been violated."

48.
Let me now stand back from the authorities and make four general observations, which are pertinent to the issues in the present case.

1. There seem to be two strands in the authorities. In some cases judges consider whether there is an unconscionable or extravagant disproportion between the damages stipulated in the contract and the true amount of damages likely to be suffered. In other cases the courts consider whether the level of damages stipulated was reasonable. Mr Darling submits, and I accept, that these two strands can be reconciled. In my view, a pre-estimate of damages does not have to be right in order to be reasonable. There must be a substantial discrepancy between the level of damages stipulated in the contract and the level of damages which is likely to be suffered before it can be said that the agreed pre-estimate is unreasonable.

2. Although many authorities use or echo the phrase "genuine pre-estimate", the test does not turn upon the genuineness or honesty of the party or parties who made the pre-estimate. The test is primarily an objective one, even though the court has some regard to the thought processes of the parties at the time of contracting.

3. Because the rule about penalties is an anomaly within the law of contract, the courts are predisposed, where possible, to uphold contractual terms which fix the level of damages for breach. This predisposition is even stronger in the case of commercial contracts freely entered into between parties of comparable bargaining power.

4. Looking at the bundle of authorities provided in this case, I note only four cases where the relevant clause has been struck down as a penalty. These are **Commissioner of Public Works v Hill s** [1906] AC 368, **Bridge v Campbell Discount Co Limited** [1962] AC 600 **, Workers Trust and Merchant Bank Limited v Dojap Investments Limited** [1993] AC 573, and **Ariston SRL v Charly Records** (Court of Appeal 13th March 1990). In each of these four cases there was, in fact, a very wide gulf between (a) the level of damages likely to be suffered, and (b) the level of damages stipulated in the contract.

49.
That concludes my review of the authorities on penalty clauses. It is now time to address the four key issues in this case.

Part 5. Issue 1: Does clause 6.8.2 of the DFA require Tilebox to secure completion by a specific date?

50.
Mr Akenhead's submissions on the interpretation of clause 6.8.2 are set out in paragraph 5.12 of his skeleton argument, in the transcript of Day 1 at pages 12 to 17, and in the transcript of Day 2 at pages 160 to 162 and 175 to 177. In essence, Mr Akenhead's argument may be summarised in three stages:

1. The completion date specified in clause 6.8.2 of the DFA is 30th November 2002. However, that is subject to any extension of time which may be granted to the contractor under the building contract on grounds for which neither Tilebox nor the consultants are responsible. Thus the completion date required by clause 6.8.2 of the DFA can readily be ascertained by examining the extensions of time

issued under the building contract. I will refer to this completion date, which is capable of future ascertainment, as "the clause 6.8.2 date". This term is not part of Mr Akenhead's armoury, but it is a convenient shorthand.

2. Tilebox is under an obligation to secure completion by the clause 6.8.2 date. This obligation arises because clause 6.8.2 must be read in conjunction with clause 3 of the DFA. Also the phrase in clause 6.8.2, "but so that the date shall be extended", connotes an obligation to achieve the extended date.

3. Accordingly, in clause 6.8.2 the phrase "take all reasonable steps to ensure" means simply "to ensure". See Day 2 at page 175.

51.
Mr Darling, for his part, accepts the first stage of this argument, but he submits that the second and third stages are incorrect. The words "take all reasonable steps" must be given their natural meaning.

52.
Although Mr Akenhead's argument has been attractively presented, I am not persuaded by it. The phrase "take all reasonable steps" is a familiar one. It is regularly used in contractual documents to connote a low level obligation. It is the antithesis of a contractual provision requiring the promisor to achieve a particular result. In my judgment, it is not possible read clause 6.8.2 of the DFA in such a way as to disregard the phrase "take all reasonable steps".

53.
What then does clause 6.8.2 require? In my view, it requires Tilebox to take all the reasonable steps to secure completion on or before the clause 6.8.2 date. There is, nevertheless, a limit to what Tilebox can do. Tilebox is not the builder. Tilebox is not the architect. If substantial delay to completion occurs because of default by the contractor or a subcontractor then, absent special circumstances, this does not put Tilebox in breach of clause 6.8.2 of the DFA. For these reasons, my answer to the question posed in Part 5 of this judgment is "No".

Part 6. Issue 2: Does clause 6.8.1 of the DFA require Tilebox to secure completion by the date required under the building contract?

54.
Mr Darling's submissions on this issue are set out in paragraphs 23 to 30 of his skeleton argument and in the transcript of Day 2 at pages 99 to 112. Mr Akenhead's submissions on this issue are set out in paragraphs 3.3, 3.4, 5.9 and 5.10 of his skeleton argument, in the transcript of Day 1 at pages 9 to 12, and in the transcript of Day 2 at pages 156 to 160.

55.
In essence, Mr Darling contends that clause 6.8.1 imposes a duty upon Tilebox to ensure that the various consultants comply with their contractual obligations. It does not require Tilebox to secure compliance with a building contract which had not been entered into at the time when the DFA was executed. Alternatively, if clause 6.8.1 does bite upon the building contract, that clause only relates to the manner in which building works should be carried out. It does not relate to the time for completion.

56.
Mr Akenhead, on the other hand, submits that clause 6.8.1 embraces both the contract of engagement with the various consultants and also the building contract which was shortly to be entered into with McAlpine. Furthermore, says Mr Akenhead, clause 6.8.1 requires Tilebox to secure compliance with

those various contracts, not only in relation to manner of performance but also in relation to time of performance.

57.
Both counsel deployed a range of ingenious arguments in support of their rival interpretations of this clause. I have already given the paragraph and page references where those arguments can be found. I shall not lengthen this judgment by reading out those passages. Instead I shall state my conclusion and my reasons.

58.
In my judgment, the interpretation of clause 6.8.1 for which Mr Akenhead contends is correct. That clause imposes upon Tilebox an obligation to secure that the contractor shall perform its obligations under the building contract, including its obligations as to completion.

59.
I reach this conclusion for six reasons:

(i) Although the building contract had not been entered into on 12th February 2001, all parties intended the building contract to be entered into shortly. Negotiations on the terms of the building contract had reached an advanced stage. There are frequent references to the building contract in the DFA and it is defined very specifically on the third page of the definitions clause in the DFA. The DFA and the building contract, although entered into on different dates, formed part of an interlocking group of contracts. This was the commercial reality and it was the intention of all participants in the project.

(ii) The phrase, "the Works", which occurs three times in clause 6.8.1 of the DFA clearly connotes the physical building works. See the definition of "Works" on the 18th page of the definitions clause in the DFA.

(iii) Clause 3 of the DFA imposes upon Tilebox an obligation to cause the building works to be carried out and completed. Clause 6.8.1 of the DFA meshes in with this. It requires that the building works shall be designed, carried out and completed in accordance with the provisions of the various contracts between Tilebox, on the one hand, and the professionals and the contractors, on the other hand.

(iv) Ownership of Onslow House was passing from Tilebox to Standard Life. If the professionals or contractors failed to perform their contracts, this was likely to cause loss to Standard Life. The obvious commercial purpose of clause 6.8.1 was to create back-to-back liability. This would enable Standard Life to recover its losses through the medium of Tilebox. If back-to-back liability was not created, it was clearly foreseeable that there would be a variety of "no loss" arguments in the event of future claims.

(v) The fact that clause 6.8.2 imposes an obligation in respect of the completion date does not prevent clause 6.8.1 from imposing a separate and more onerous obligation as to timing. I say this for two reasons. First, clause 6.8.1 begins with the phrase, "Without prejudice to any other rights and remedies". Secondly, McAlpine has succeeded and Tilebox has failed in the battle about the true construction of clause 6.8.2. The practical consequence of McAlpine's victory on that issue is that clause 6.8.2 provides only modest and insufficient protection for Standard Life in the event of delay.

(vi) It is quite true, as Mr Darling says, that the draft building contract annexed as appendix 3 to the DFA did not state a specific completion date. On the other hand, this did not mean that time would be

at large under the building contract. It was inevitable that a completion date would be specified and that that completion date would precede 30th November 2002. The fact that the exact completion date for inclusion in the building contract was left to be determined later cannot prevent clause 6.8.1 from fulfilling its obvious commercial purpose or from having the effect which was obviously intended by the parties.

60.
Let me now draw the threads together. For the reasons set out above I conclude that clause 6.8.1 of the DFA requires Tilebox to achieve completion of the building works by the date specified in the building contract, subject to any extensions of time which may be granted under clause 25 of the building contract. Accordingly, my answer to the question posed in Part 6 of this judgment is "Yes".

Part 7. Issue 3: What losses flowing from delay were foreseeable on 27th April 2001?

61.
The 27th April 2001 was, of course, the date on which the building contract was executed. It is necessary to identify the losses flowing from future delay which were foreseeable on that date. In this context I use the word "delay" to denote failure by McAlpine to complete the building works by the date stipulated in the building contract, subject to any extensions of time granted under clause 25 of the contract conditions. The period of delay would be the period between (a) the contractual completion date or the extended completion date and (b) the actual date of practical completion.

62.
In my judgment, the losses flowing from delay which were foreseeable on 27th April 2001 fall under three heads, namely:

(i) Diminution of the DCP which Tilebox would receive from Standard Life.

(ii) Tilebox's own direct losses.

(iii) Tilebox's liability in damages to Standard Life.

63.
It is convenient to deal with these three heads separately.

(i) The Diminution of the DCP .

64.
The formula for calculating the DCP is set out as follows in clause 1 of the DFA:

"(A minus B) + C

"Where:

"A = the aggregate in respect of each Lettable Unit of:

"(1) an amount equal to the capitalisation factor multiplied by the Base Rent; plus

"(2) an amount equal to one half of the Capitalisation Factor multiplied by the amount (if any) by which the Initial Rental Income exceeds the Base Rent.

"And for the avoidance the doubt the Capitalisation Factor will be applied individually to each Granted Lease and not to the aggregate of the rents payable under all the Granted Leases.

"B = the aggregate of:

"(1) the Interim Commitment at the Development Completion Date;

"(2) the total of the rent that would otherwise be payable during all Rent-free Periods which are unexpired at the Development Completion Date;

"(3) the total of all Capital Contributions which are unpaid at the Development Completion Date;

"(4) save to the extent any element of such amount may already have been included in the interim commitment by virtue of paragraph C of that definition, an amount equal to 125 per cent of the Fund's Surveyor's reasonable estimate of the total cost of carrying out all work required by any notice served by the Fund under clause 6.14 on or before the date on which the Development Completion Payment is paid; and

"C = VAT ... "

65.
The "capitalisation factor" is defined as 11.8189, provided that the lease granted is for 15 years or more. The "base rent" is defined as £25 per square foot. The term "capital contributions" refers to the various forms of incentive payment which may be made to or for the benefit of a tenant at the start of his lease.

66.
The term "interim commitment" has a somewhat lengthy definition. In essence, however this comprises the total costs of the development. Within these total costs, there is an element of finance charge which is called "notional accumulation". This notional accumulation is assessed at the rate of 7.5 per cent compound interest with quarterly rests. It can be seen at once that the longer completion is delayed, the greater will be the amount of notional accumulation. Every pound of notional accumulation which accrues constitutes a deduction from the DCP.

67.
Tilebox's case as pleaded in its response is that, absent any delay, Tilebox would have expected to receive a DCP of at least £1,666,310. However, the effect of delay upon this DCP was to erode it at the rate of £38,182 per week. Thus the anticipated DCP was completely eroded over a period of 43 weeks. No one expected the building works to be delayed for anywhere near as along as that. Accordingly, a loss under this head of £38,182 per week was foreseeable as a consequence of delay. The detailed calculations in support of this contention appear in paragraphs 18 to 22 of Mr Hutley's witness statement.

68.
McAlpine strongly dispute these contentions. McAlpine assert that, on a proper analysis of the evidence, Tilebox were unlikely ever to receive any DCP at all. If that is wrong, the DCP would be very low. McAlpine further contend that the weekly erosion of any DCP would be at a lower rate than alleged by Tilebox.

69.
In paragraph 2(c)(iii) of his skeleton argument, Mr Darling suggests that a maximum weekly loss of about £31,000 per week could be envisaged under this head. In paragraph 63, he suggests that the weekly figure might range between £17,300 and £36,000 per week depending upon the stage at which delay occurs.

70.
Let me now turn to the evidence. Much of the written evidence and most of the oral evidence was directed to the question what DCP Tilebox could reasonably have expected to achieve in the absence of any delay. The amount of DCP would depend upon a number of factors including, in particular:

(i) What rent per square foot would be achieved.

(ii) How soon after completion the whole of Onslow House could be let to one or more tenants upon a lease or leases of 15 years.

(iii) What rent-free period, if any, would be granted to the tenants.

(iv) What other incentives, if any, would be given to the tenants.

(v) What would be the net internal area of the building.

(vi) The amount of the total costs of the development.

71.
Let me deal first with the rent per square foot which was likely to be achieved. A helpful table of comparables was put in evidence. This table is part of a joint report on the Guildford office market prepared in January 2001 by Richard Ellis, Holley Blake and Wadham Isherwood. The two comparables upon which most attention has been focussed are both at Cathedral Hill in Guildford. They are new buildings. The first one has an area of 110,000 square feet. This was let in January 2001 on a 15-year lease at a rent of £28 per square foot. The second one has an area of 55,000 square feet. This was let in December 2000 at a rent of £27.22 per square foot. It can be seen that the first of the two Cathedral Hill properties is comparable in size to Onslow House.

72.
Mr Meikle of Richard Ellis comments as follows on the state of the market in his witness statement:

"6. At the end of 2000 market conditions were strong. The M25 office market peaked in this year in terms of the demand and the resulting level of take up. As a consequence rents exceeded £26 and there was an expectation of a rising market throughout the building contract.

"7. I would say that in 2000 and 2001 we considered that there was an exceptionally good chance that the building would have been let very quickly, either during the construction period or very soon after practical completion was achieved. This was because of the relatively low supply of office space and competition within Guildford and the high level of demand for offices."

73.
Mr Meikle went on to state, in paragraph 12, that during early 2001 he was hoping and expecting that there would be a rise in rent levels above £28 per square foot.

74.
In his oral evidence, Mr Meikle was questioned in some detail about the likely rent which would be foreseeable for Onslow House in the spring of 2001. He said that, in some respects, the first Cathedral Hill property had an advantage over Onslow House. In particular, Cathedral Hill was a brand new building and had its own extensive car parking. In other respects, Onslow House had an advantage over Cathedral Hill. In particular, Cathedral Hill was out of town whereas Onslow House was not. Also, Onslow House was close to Guildford railway station which has an excellent service to London. Furthermore, Onslow House is next to a large multistorey public car park with over 1,000 spaces.

75.
In January 2001, Mr Meikle considered that a rental of £28 per square foot was established for properties such as Onslow House. In his opinion, the highest rent that might possibly be achieved for Onslow House on a 15-year lease was £30 per square foot.

76.
I turn now to Mr Hutley's evidence. In paragraph 19, of his witness statement, Mr Hutley took a rental figure of £27.50 per square foot. He then added that he and his colleagues were hoping to achieve something between £28 and £30. When pressed in cross-examination, Mr Hutley did not retreat from these figures. Indeed, in re-examination he became somewhat more optimistic and expressed the view that, "the early 30s" might be achievable.

77.
I have carefully considered the written and oral evidence of Mr Hutley and Mr Meikle, as well as the contemporaneous documents and the evidence of Mr Walton. I do not think that in early 2001 a rent higher than £30 per square foot was realistically achievable for Onslow House on a 15-year lease. In my view, £26 per square foot was a conservative figure. Tilebox had a reasonable prospect of securing a rent somewhere in the range between £27 and £30 per square foot.

78.
I turn next to the factors (ii), (iii) and (iv). These factors are all affected by the level of supply and demand for office accommodation in Guildford at any given time. It can be seen from the joint report of Richard Ellis, Holley Blake and Wadham Isherwood that, during 2000, the demand for office space in Guildford substantially increased and the supply of office space substantially diminished.

79.
Factor (ii) is the void period, if any, between completion of the building and commencement of the lease. Mr Meikle said in cross-examination that the void period on Cathedral Hill was 12 months. Whilst I take this fact into account, it should be noted that that void period occurred at a time when the balance of supply and demand was not established in the same way that it was by January 2001. It is, of course, possible to start marketing a building well before practical completion. Whether a tenant is found promptly or not must depend in part upon chance. Mr Hutley, in his evidence, went so far as to say that he did not expect any void period on Onslow House. In my judgment, that was over-optimistic. In my view, it was certainly possible that there would be no void period. It was also possible that there would be a void period. If so, that void would probably have been for six months or less. I find some support for this conclusion in paragraph 9 of Mr Walton's witness statement and in the cross-examination of Mr Walton at Day 1, pages 98 to 116.

80.
I turn now to factors (iii) and (iv). Tenants are often offered an incentive to take up a lease. Such incentive may take the form of a rent-free period. Alternatively, it may take the form of a capital contribution to fitting out works or some similar sum.

81.
In cross-examination, Mr Meikle expressed the view that on Onslow House there would probably be a rent-free period of between six and nine months. Mr Hutley was more optimistic. In the course of his evidence he was taken through a large number of appraisals which were carried out for Tilebox or Standard Life during 2000 and 2001. In most of these appraisals allowance was made for a rent-free period of about six months or for a capital contribution of similar value. In the last two appraisals, however, these items were omitted. Mr Hutley made the point that appraisals were done for different

purposes. Those which were shown to Standard Life had to be based upon conservative figures. However, Mr Hutley's own expectations based upon his long career as a developer were more optimistic. There is some support for Mr Hutley's optimism to be found in one of the contemporaneous documents. On 23rd January 2001, Standard Life prepared an internal memo approving the proposed development. Paragraphs 1 and 2 on the second page of this memo read as follows:

"1. This is a good opportunity to acquire grade A space in a prime position within Guildford Town Centre. Completion is due in April 2002 and we consider the timing to be good. Demand is strong, rents are established at £27/£28 [per square foot]. There is no competing space, over 10,000 [square feet] currently on the market and the supply pipeline is very limited for the next two years.

"2. The development cost figures given above do not include a sufficient allowance for void/rent free periods. However, developers profit provides total cover of 11 months on an interest basis or 9 months on a rent basis. We are therefore accepting the letting risk but there is considerable upside potential through both an improvement in rents and yield once the building is fully income producing."

82.
My conclusion on factors (iii) and (iv) is as follows: it is probable that a rent-free period would have been required. That period might have been about six months. It might have been more, perhaps in the region of nine months. It might have been less, perhaps in the region of three months. Alternatively, it may be that a similar incentive would have been given to the tenant not by means of a rent-free period, but by means of some form of capital contribution.

83.
I turn now to factor (v). The contractual provisions concerning floor area are neither simple nor straightforward. An amendment to clause 24 of the building contract required McAlpine to pay liquidated and ascertained damages at a specified rate in the event that the net usable floor area fell below 89,000 square feet. On the other hand, the specification attached to the building contract required McAlpine to use its best endeavours to achieve 90,000 square feet. Immediately above that passage is a breakdown of areas on each floor. The figures in this table, when added together, amount to 90,787 square feet. What I have to do is to look at what was expected in April 2001. In my view, the expectation then was for a floor area of 90,000 square feet. There was a possibility, which was acknowledged, that the area would be greater, namely up to 90,787 square feet. There was also a possibility, which was acknowledged, that the area would be less, namely down to 89,000 square feet.

84.
I come finally to factor (vi). There was little evidence about this. The figure used for costs in Mr Hutley's calculations s £26,473,276. It is quite true, as Mr Akenhead pointed out in closing, that the actual figure might be less than this. On the other hand, there is no evidence as to what that lower figure may be.

85.
Let me now draw the threads together. Mr Darling and his team have prepared a very helpful schedule showing what the DCP might be depending upon a number of variable factors. The figure for the DCP in this schedule varies between nil and £1,640,554. I agree with Mr Darling that there was a risk, if things went badly, that Tilebox would get no DCP at all. On the other hand, if everything went well, it is possible in my view that Tilebox would have done somewhat better than the top figure shown in Mr Darling's table. The range of possible DCPs lies between nil and about £1.7 million. The DCP was unlikely to be as low as nil. It was unlikely to be as high as £1.7 million. Viewed, however,

from the perspective of early 2001, it was perfectly possible that the DCP would fall anywhere within that range.

86.
I turn next to the weekly loss through the erosion of the DCP. Mr Akenhead has prepared a helpful chart showing how the weekly loss would be affected by the date when delay occurred. The date of any future delay would of course be unknown in April 2001. In my view, it would have been reasonable in April 2001 to expect the weekly loss attributable to erosion of the DCP to be in the region of £30,000. The actual figure may be somewhat higher or it may be somewhat lower. This could not be foretold at the time when the building contract was executed.

(ii) Tilebox's own direct losses .

87.
This head of loss is dealt with in paragraphs 5.3 to 5.6 of Mr Akenhead's skeleton argument, and paragraphs 64 and 65 of Mr Darling's skeleton argument. It is dealt with by Mr Goulston at paragraphs 10 to 14 of his second witness statement. It is dealt with by Mr Hutley at paragraphs 30 to 36 of his first witness statement. These matters were explored in cross-examination of Mr Hutley on Day 1 at pages 166 to 170 of the transcript and in re-examination at page 174.

88.
McAlpine's final position on this issue is that a weekly loss of £4,000, but no more, was foreseeable under this head. See Mr Darling's closing speech at Day 2, pages 144 to 145. Tilebox's case is that a weekly loss of £15,160 was foreseeable. The items which make up this head of loss are set out in Mr Hutley's witness statement.

89.
In my view, all of these items are real and foreseeable, but they are not easy to quantify in advance. Tilebox would certainly incur management costs during the period of delay, but it is difficult to predict precisely how much. Clearly, Tilebox would incur additional professional fees during that period but the amount is uncertain. There might be savings if, for example, the quantity surveyors were not required to carry out valuations. There would certainly be continuing overheads and insurance costs. In addition to that, delayed receipt of the DCP would result in a diminution of capital available for use on other projects.

90.
I do not consider that a minute analysis of each of these heads is appropriate. What I am concerned with is what was sensibly foreseeable in April 2001 as the likely weekly loss under these heads. In my judgment, it would have been reasonable in April 2001 to foresee a weekly loss falling somewhere within the range between £5,000 and £10,000 under this head.

(iii) Tilebox's liability in damages to Standard Life .

91.
It was foreseeable in April 2001 that if McAlpine delayed completion, then Tilebox would be liable to Standard Life for breach of clause 6.8.1 of the DFA. Both McAlpine and Tilebox had copies of this provision. Tilebox has suggested that the measure of damages as between Tilebox and Standard Life would be loss of rental income. In my judgment, that is not quite right. In the event of litigation between Standard Life and Tilebox, Standard Life would have to give credit for the notional DCP. One benefit which Standard Life has gained from the delay is that it no longer has to pay any DCP to

Tilebox. Once this credit has been given, however, I agree with Mr Akenhead that the starting point for assessing damages is the rental income which has been lost.

92.
There is no dispute between the parties that it was foreseeable in April 2001 that lost rental income would be somewhere in the region of £45,000 per week. Tilebox would say that the true figure is higher but this contention is not relevant for present purposes.

Part 8. Issue 4: Having regard to the foregoing matters, is clause 24.2 of the building contract unenforceable as a penalty?

93.
On the basis of the conclusions set out in Parts 6 and 7 of this judgment, clause 24.2 of the building contract was an entirely reasonable pre-estimate of damages. Indeed, when one adds together Tilebox's own losses and Tilebox's liability in damages to Standard Life, it can be seen that £45,000 per week is too low.

94.
There is, however, a separate question which I must address. Suppose that I am wrong in my interpretation of clause 6.8.1 of the DFA. Suppose that this clause does not impose upon McAlpine a back-to-back liability to Standard Life in the event of delay by McAlpine. In those circumstances, would clause 24.2 of the building contract become a penalty clause?

95.
On this hypothesis, Tilebox's foreseeable losses flowing from delay would fall under two heads, namely: (i) diminution of the DCP, and (ii) Tilebox's own direct losses. For the reasons set out in Part 7 of this judgment, the amount of Tilebox's future losses under each of those two heads would, in April 2001, have been difficult to quantify. A weekly loss somewhere in the region of £30,000 could have been foreseen under head (i), although the actual figure might turn out to be higher or lower than that. A weekly loss somewhere between £5,000 and £10,000 could have been foreseen under head (ii). From the viewpoint of April 2001, it was most unlikely, although just conceivable, that the total weekly loss would be as high as £45,000. Against that background, should clause 24.2 be struck down as a penalty? In my judgment, it should not, for five reasons.

1. The figure of £45,000 was at or slightly above the top of the range of possible weekly losses flowing from delay. Whether one takes the top of the range or the middle of the range of possible future losses as the yardstick, it seems to me that the gap between that yardstick and £45,000 was not nearly wide enough to warrant characterising this clause as a penalty.

2. Mr Hutley did make a genuine attempt to estimate the losses which would flow from future delay. Mr Hutley, unlike me, did not have the good fortune to listen to two days of legal argument about what that loss was likely to be. Instead, perfectly sensibly, he took as his yardstick a conservative estimate of rental value. I accept, of course, that if Mr Hutley's estimate was substantially wrong, then the genuineness of his efforts cannot save the clause. Nevertheless, this is a relevant factor.

3. The difficulty which was inherent in the exercise of estimating future losses makes it particularly sensible in this case for the parties to have agreed upon a weekly figure. See the **Clydebank Engineering** case at page 11. See also Lord Dunedin's speech in **Dunlop** at pages 87 to 88, sub-paragraph (d).

4. This court, following the lead set by higher courts, is predisposed where possible to uphold contractual terms which fix the level of damages. This predisposition is somewhat stronger in the present case for the following reason: the building contract dated 27th April 2001, is a commercial contract made between two parties of comparable bargaining power.

5. During the course of the pre-contract negotiations, the level of liquidated damages was the subject of specific debate. A figure of £45,000 was considered not only by the parties, but also, as can be seen from the documents, by their legal advisors. The fact that clause 24.2 and its appendix survived such scrutiny is further evidence that, as at April 2001, the liquidated damages provision was reasonable.

96.
There is, next, a further point to consider (in the event that I am wrong in my interpretation of clause 6.8.1). On Tilebox's case the weekly erosion of the DCP would come to an end after 43 weeks. On McAlpine's case, such erosion would end very much sooner. After that point in time, Tilebox's losses flowing from delay would reduce to somewhere between £5,000 and £10,000 per week. Does this circumstance cause clause 24.2 to become a penalty? In my judgment, it does not, essentially, for three reasons.

1. The precise length of time before this head of loss would end was uncertain. It was, however, foreseeable that this head of loss might continue to run for up to about 40 weeks.

2. At the time of negotiating the contract, both parties took the view that, if there was delay, it would be for substantially less than 40 weeks. See paragraph 51 of Mr Fitzgerald's witness statement and paragraphs 2 to 3 of Mr Goulston's second witness statement.

3. Against this background, it was perfectly sensible and reasonable for the parties to agree a weekly figure which included allowance for erosion of the DCP.

97.
Let me now draw the threads together. If I am right in my interpretation of clause 6.8.1 of the DFA (as set out in Part 6 of this judgment) there can be no suggestion that clause 24.2 is a penalty clause. On this hypothesis, clause 24.2 is clearly an enforceable provision for liquidated damages and Mr Darling does not argue otherwise. If I am wrong in my interpretation of clause 6.8.1, then I still conclude, for the reasons set out above, that clause 24.2 of the building contract is not a penalty clause.

98.
Accordingly, my answer to the question posed in Part 8 of this judgment is "No."

99.
Before parting with this case, may I express my appreciation of the immense labours by solicitors, junior counsel and leading counsel on both sides. This case has been prepared immaculately. It has progressed from commencement to trial within the space of two months. The advocacy on both sides has been of a high order.

100.
Finally, for the reasons stated above, McAlpine's claim for a declaration fails and must be dismissed.