Neutral Citation Number: [2007] EWHC 2018 (TCC)

Case No: HT07133

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**TECHNOLOGY AND CONSTRUCTION COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2007

**Before** :

**THE HONOURABLE MR JUSTICE RAMSEY**

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**Between :**

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| **White Young Green Consulting** | **Claimant** |
| **- and -** | |
| **Brooke House Sixth Form College** | **Defendant** |

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**Mr D. Blunt QC (** (instructed by **Beale and Co**) for the **Claimant**
**Mr. P Sutherland** (instructed by **Reynolds Porter Chamberlain**) for the **Defendant**

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# Judgment

**Mr Justice Ramsey :**

## Introduction

1. This is an application for leave to appeal under s.69(3) of the Arbitration Act 1996. The arbitration concerns the appointment of the claimant, White Young Green Consulting Limited ("WYG"), as design and management consultants for a development to be carried out for the respondent, Brooke House Sixth Form College ("the College").

2. The College occupies a site in Kennington Road, Hackney, originally comprising two buildings known as block A and block B. The site had been occupied by Hackney Community College until one block was vacated in about April 2002 and the other block in April 2003.

3. The College wished to convert and upgrade the existing facilities, so that they were suitable for the operation of a sixth form college. Although originally planned as taking place over five phases, the development was in the end reallocated to consist of two phases. Phase 1 was to be carried

out between October 2001 and September 2002, and Phase 2 was to commence in September 2002 and be completed by April 2004.

4. The background to the arbitration between WYG and the College was as follows. Phase 1 of the works, which did not involve WYG, commenced on site in April 2002 and was completed in August 2002. For Phase 2, the College elected to engage a single point consultancy to undertake all necessary design and design coordination and to prepare the necessary documentation to enable the College to engage a building contractor to undertake the physical work.

5. On 18 June 2002 the College invited WYG to tender for the provision of professional consultancy services, which I will refer to as "the Services". The invitation to tender contained a schedule of refurbishment and a revised master plan. In addition to the schedule, the invitation to tender contained a client brief in a simple single A4 sheet which set out the general extent of the work to be undertaken in each of the two blocks and the new sports hall and described other related works which were to be designed by the appointed consultant.

6. The tender invitation was on the basis of the General Conditions for the Appointment of Consultants PC/WORKS/5 (1998), which I will refer to as "the General Conditions". There was a requirement for this invitation to tender to be published in the Official Journal of the European Commission.

7. By letter dated 1 August 2002, WYG responded to the invitation to tender and offered to undertake the services for the sum of £350,872.50. The offer included an outline programme which showed the appointment of the consultant by 10 September 2002; the College's approval of the brief by 8 October 2002; the completion of preliminary design, the cost plan and the invitation to tender for construction by 26 November 2002; completion of the detailed design and the appointment of the main construction contractor by 25 February 2003; construction works commencing on site on 28 March 2003 and overall project completion was scheduled for March 2004.

8. On or about 1 October 2002, Atkins Faithfull & Gould ("AFG"), acting on behalf of the College, advised WYG that its tender had been accepted. Meetings between party representatives commenced on 8 October 2002. WYG was advised that, contrary to the two phase construction which was contained in the invitation to tender, the construction works would now be undertaken in a single phase to be completed by September 2003.

9. Between mid-October and the end of November 2002, meetings continued between the parties and their representatives, resulting in a viability report being produced by WYG. The viability report comprised the strategic

brief, the master plan drawings, the accommodation schedule, the programme and the cost study.

10. During the period leading up to the issue of the viability report, an issue arose between the College and WYG concerning the fees to be paid to WYG for the services. There was a question whether WYG was to be paid a percentage of the eventual construction costs, as the College believed, or whether WYG was to be paid a fixed fee of about £350,000, which WYG considered to be the position.

11. By 6 March 2003 this matter had been resolved and the College accepted that the consultancy fee was a lump sum fixed fee of about £350,000. A deed of appointment was prepared and it was then signed in August 2003. That deed of appointment, which I will refer to as "the Appointment", was signed by both parties.

12. WYG considered that the College had made changes to the extent of the Services and in January 2003 commenced the preparation of an additional fee claim. This additional fee claim was received by the College on 5 August 2003, shortly after the execution of the Appointment. Discussions were held on this claim with the College, and in September 2003 the College rejected WYG's claim. This resulted in WYG advancing that dispute to arbitration.

13. In May 2006 the President of the Chartered Institute of Arbitrators appointed the arbitrator in the present arbitration. There is also another dispute, which has been referred to the same arbitrator, in which the College seeks damages against WYG arising out of the performance of the Appointment.

14. By agreement of the parties in the present arbitration, it was decided that the first stage of the proceedings should concentrate on a number of preliminary issues, which I will refer to as "the Preliminary Issues", the determination of which would narrow the scope and extent of further stages in the arbitration. The arbitrator gave directions in relation to the Preliminary Issues and a hearing took place over a period of days in late 2006 and early 2007, at which evidence was called and oral submissions were made, followed by written closing submissions.

15. In his first interim award dated 28 March 2007 ("the Award"), the arbitrator made his award in relation to 15 preliminary issues. The claimant, WYG, commenced this arbitration claim on 25 April 2007, in which it seeks to challenge the arbitrator's award in respect of 11 of those preliminary issues. Evidence was filed by the parties and directions were also given that there should be an oral hearing of the application for leave, followed by the hearing of the appeal if leave were given.

16. At the hearing the parties were represented, as they were before the arbitrator. Mr. David Blunt QC appeared on behalf of WYG and Mr. Paul Sutherland appeared on behalf of the College. It is convenient first to review the grounds on which leave to appeal may be given.

**Leave to Appeal under s.69 of the Arbitration Act 1996**

17. Under s.69(3) of the Arbitration Act 1996 it provides that:

> "*Leave to appeal shall be given only if the court is satisfied –*
> *(a) that the determination of the question will substantially affect the rights of one or more of the parties,*
> *(b) that the question is one which the tribunal was asked to determine,*
> *(c) that, on the basis of the findings of fact in the award:*
> *(i) the decision of the tribunal on the question is obviously wrong, or*
> *(ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and*
> *(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.*"

18. Section 69(4) also states that:

> "*An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted*."

19. On this application, the following particular points emerge. First, the grounds of appeal for which leave is sought are expressed in many instances, in terms such as "*the arbitrator erred in law*". It is important in these applications that the question of law should be identified and it is, therefore, necessary to be certain that the statement that the arbitrator erred in law properly identifies a question of law which the arbitrator was asked to determine, rather than a determination based on fact.

20. I accept, as has been submitted by Mr. Blunt, that the correct definition of a permissible question of law was identified by Mustill J., as he then was, in *Vinava Shipping Co. Ltd v. Finelvet AG ("The Chrysalis")* [1983] 1 Lloyd's Rep. 503, where at p.507 he divided the process of the arbitrator's reasoning into three stages:

> "*(1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute.*
> *(2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common*

*law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached.*
*(3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.*"

21. Mustill J said that the relevant question of law is that at (2) and that this has to be distinguished from the approach of the arbitrator at (3), which is where, in the light of the facts and the law, the arbitrator reaches his decision. Where there is an error in applying the law to the facts, then that comes outside the question of law. That is why a distinction has, in my judgment, to be made between the arbitrator's determination of a question of law and his application of that law to the facts, the latter sometimes being encompassed within the phrase "*the arbitrator erred in law*". Of course, as Mustill J said, the way in which an arbitrator applies the law to the facts may show that the arbitrator has not properly determined the question of law.

22. In addition, it is important to distinguish between a question of fact and a question of law, in particular, under s.69(3)(c). The question which the court has to decide is whether the decision of the tribunal is obviously wrong or open to serious doubt, but on the important pre-condition that this question is posed "*on the basis of the findings of fact in the award.*" This means, in my judgment, that findings of fact cannot give rise, in themselves, to appeals on questions of law.

23. The second aspect which arises in this case is the question of what documents can be referred to on an application for leave to appeal under s. 69. In his decision in *Kershaw Mechanical Services v. Kendrick Construction Ltd.* [2006] EWHC 727 (TCC), Jackson J. had to consider the extent to which extraneous material might be admissible on an appeal which, in that case, did not require leave. He held that the position, as set out in the decision of Coleman J. in *Foley's Ltd. v. East London Family & Community Services* [1997] A.D.R.L.J. 401 and in *HOK Sport Ltd. v. Aintree Racecourse Co. Ltd.* [2003] Build L.R. 155, where His Honour Judge Thornton QC adopted the relevant passage in *Foley's*, might be too restrictive.

24. In the case of *Kershaw*, Jackson J. held that, for the purpose of the appeal, the court needed to look at the correspondence and documents which the arbitrator had identified in his award because the contract could not be considered in isolation and the court had to read the relevant contractual document in the context of a series of documents, of which it formed part.

25. I respectfully agree. It seems to me that, in general terms, where the court is considering the question of leave to appeal against an award, it is also necessary to have before the court both the award and any documentation

which is referred to in the award and which is needed so as to make clear what the arbitrator is referring to within the part of the award relevant to the appeal. Obviously, if the arbitrator sets out the document in its full terms, there is no need for that document to be supplied but, where documents are merely referred to or summarised, it may sometimes be helpful to have those documents in front of the court. This, however, should not be seen as permitting a great deal of documentation to be provided on these applications. The general principle being that it is only the award, the grounds of appeal and the skeleton arguments which will be referred to and any additional documentation should be properly justified.

26. Obviously, if s.69(3)(c)(ii) is relied on additional material may be relevant to demonstrate the necessary general public importance. In this case, the Appointment of WYG by the College was, as I have indicated, on the General Conditions. Those are a standard set of conditions for Public Works, and that raises the question in this case as to whether or not s.69(3)(c)(i) applies - that is, the test is whether the decision of the tribunal was obviously wrong - or whether s69(3)(c)(ii) applies because the question is one of general public importance, the test being whether the decision of the tribunal was at least open to serious doubt.

27. The evidence before me indicates, as one would expect, that the General Conditions are a commonly used standard form. However that, in itself, is not sufficient to show that the question of law which the arbitrator considered was a question of law of general public importance. Obviously, in many cases, it will be possible to point to some previous uncertainty, either in publications or elsewhere, which indicates that this is not just a matter of importance because it arises under a commonly used clause, but it is a matter of general public importance. I do not consider that the evidence in this case shows that the questions of law raise matters of general public importance. The test therefore that I should apply is whether or not the decision of the tribunal is obviously wrong. I should, however, also say that I have considered whether applying the test of open to serious doubt would have made any difference and I have concluded that, in this case, it would not.

28. A further matter which arises is the question of the relevance of the provision within the arbitration clause at clause 53.1 of the Appointment, which states that the award of such arbitrator shall be final and binding upon the parties. Initially, it was contended that this amounted to an exclusion clause so as to preclude any appeal to the court on a question of law under s.69(3).

29. That is not now proceeded with, but instead, referring to passages in *Merkin on Arbitration Law* and the comments of the authors, it is said that it is a matter which should impact upon s.69(3)(d), which provides that leave for appeal should only be given if the court is satisfied that, despite

the agreement of the parties to resolve the matter by arbitration, it is just in proper in all the circumstances for the court to determine the question.

30. In my judgment, the reference to "final and binding" repeated in the arbitration clause does assist on an argument under s.69(3)(d). But, in the circumstances of this case, it is the only matter which does so. This is not a case, for instance, where a particular chosen arbitrator has been appointed. Rather, in this case the arbitrator was appointed by the default provisions of an appointment by the President of the Chartered Institute of Arbitrators. Equally, there is nothing which I have been referred to elsewhere within the contract which indicates that the present arbitration has particular features which would mean that it would not be just and proper for the court to determine the question of law, if the court was satisfied on the other grounds. In this case, I have come to the conclusion that my decision on whether to give leave should not be determined by the final and binding provision in clause 53.1 of the Appointment.

31. With those general observations, I now turn to consider the application for leave in respect of the 11 Preliminary Issues.

**Issue 1**

32. Issue 1 is concerned with implied terms. The question is, whether there to be implied into the Appointment two particular terms:

    (1) As pleaded in para. 14.1 of the Amended Points of Claim:

    "*[Was there a term that the College] its servants, and agents, including LSM Professional Limited, would do everything reasonably necessary on their part to enable the Contract to be performed in accordance with its terms*."

    (2) As pleaded in para. 42 of the Defence, was there an implied term that:

    "*[The College] would not do anything to hinder [and prevent] WYG's performance of its duties under [the Appointment]*."

33. The arbitrator held that such terms were not to be implied because there was no basis for such implication in the light of the express terms of the contract at clauses 2.1 and 2.2 of the Appointment, which provided as follows:

    "*2.1The Employer and the Consultant shall deal fairly, in good faith and in mutual co-operation with one another, and the Consultant shall deal fairly, in good faith and in mutual co-operation with all members of the Project Team.*

*2.2 Both parties accept that a co-operative and open relationship is needed for success, and that teamwork will achieve this*."

34. In my judgment, the arbitrator properly directed himself on the question of law, which was to consider whether or not there was a need for implied terms in circumstances where there were express terms which covered, as he found and, in my judgment, was correct to find, dealt with the same subject matter. In those circumstances, this is a case where on no view was the arbitrator obviously wrong and I do not give leave to appeal on Issue 1.

**Issue 2**

35. In respect of Issue 2, this again concerned an implied term. WYG contended in para.14.2 of the Amended Points of Claim that:

> "*The Respondent would provide the Claimant with a statement of its requirements (i.e. provide a 'brief') which was sufficiently detailed to enable designs to be developed and the necessary works to be completed within any applicable timetable*."

36. The arbitrator again held that such a term was not to be implied. He made the following findings. At para. 59 of the Award he turned to his opinion on the adequacy and sufficiency of the client brief, as contained in the invitation to tender documentation and said:

> "*[The College's] client brief was, to my mind, a broad brush general description of [the College's] expectations but that this was sufficient in itself to impart adequate information to the consultant whilst retaining enough flexibility to enable the specialist consultant to provide [the College] with an optimum development of its existing facilities and within an affordable budget*."

37. At para. 60, he said:

> "*I consider that WYG had no reason under the Contract to have expected [the College] to provide a more detailed brief than that contained in the invitation to tender*."

38. At para. 61, he said: "*It is my considered view that the brief supplied by [the College] to WYG at the appropriate time was adequate*". He continued in that paragraph to say: "*The express requirements and obligations as set out in the subject document are, in my opinion, adequate to require WYG to proceed with the consultancy agreement (as it did) without [the College] becoming liable for additional fees.*"

39. As a result, the arbitrator held that, on the basis of these findings, the possibility that a term was to be implied was, as he put it, "*removed*" and he held furthermore that the term was not so obvious that it went without saying. In my judgment, on the basis of the findings of fact which the arbitrator made that a brief which was adequate and sufficient for its purpose was provided by the College to WYG with the invitation of tender, he was right to conclude as he did, that there was no need to provide a further brief at any time.

40. So far as it was argued that the term is intended to be one which seeks a finding that there is an implied term for the College to provide continuing information, that term, it seems to me, is comprehended within the terms at clauses 2.1 & 2.2, and within the findings of the arbitrator in Issue 1, to the extent that Issue 2 does raise that matter. In those circumstances, there is certainly nothing obviously wrong with the decision of the arbitrator on Issue 2 and I do not grant leave to appeal.

**Issue 3**

41. Issue 3 raises an issue as to whether the appointment was entered into on the basis that the project and WYG's services were intended to be completed in one phase and by 5 September 2003 or, alternatively. on some other phased basis and, if so, what basis?

42. Although not expressed to be a separate issue, an issue had arisen, certainly by the time the arbitrator was dealing with the preliminary issues, where WYG was contending that the Appointment had originally been entered into on a binding basis either at the end of September or in early October 2002, on the basis of the acceptance of the tender by AFG on behalf of the College.

43. That matter was, therefore, dealt with by the arbitrator, starting at para. 53 of the Award. In brief, after directing himself as to the law on the enforceability of contracts where there is an absence of certainty in respect of fundamental or governing contractual matters, the arbitrator held at para. 54 that:

> "*The financial uncertainty in the minds of the parties as to the nature of WYG's offer is sufficient reason for me to conclude that up to the beginning of March 2003 no enforceable contract existed.*"

44. After the financial basis of the agreement was settled in March 2003, the arbitrator said that it is arguable that sufficient certainty existed so that an enforceable agreement did come into effect. He said at para. 55:

> "*Consequently, if an enforceable contract did come into force in about March 2003, the obligations of WYG under such a contract*

*would have necessitated WYG in undertaking the works as identified in the Viability Report with consideration for such being the lump sum price offered by WYG in its tender for the single point of consultancy*."

45. He added at para. 56 of the Award:

> "*A more fundamental matter, however, overshadows this hypothesis, and that is the clear and unequivocal statement on the face of the executed Deed (Clause 9.2) that the Deed of Appointment supersedes any previous agreement between the parties and that all work undertaken by WYG in connection with the project shall be deemed to have been performed under the terms of the Contract*."

46. On this application, it has been argued that the fact that, within the Appointment, various documents, including the tender, were incorporated has led to a position where the terms of the original tender, as accepted, formed a contract which was acknowledged by the terms of the Appointment. The arbitrator did not accept that there was any pre-existing binding agreement, and I do not consider that he was obviously wrong to do so.

47. It seems to me that the terms of the agreement which set out the phasing provisions, which are contained in the Appointment particulars at paras.7 and 8 are the provisions which apply rather than anything which is incorporated in documents which are annexed to the Appointment. In those circumstances, there is nothing obviously wrong with the decision which the arbitrator came to.

48. It follows that, so far as Issue 3 is concerned, the arbitrator's answer that the project and WYG's services were intended to be completed in one phase and by 5 September 2003, was not a decision which was in any way obviously wrong. In those circumstances, leave is not given to appeal Issue 3.

**Issue 4**

49. Issue 4 raises a similar point. The question under Issue 4 was whether, as set out in para.15 of the Amended Points of Claim, this was the basis on which WYG priced and tendered for the services. Paragraph 16 of the Amended Points of Claim pleaded, first of all, the Appointment particulars at paras. 7 and 8, and then added:

> "*Nevertheless, contractually the basis upon which [WYG] priced and tendered for the Services, namely for the provision of services for a programme of works with construction phased over the*

*period between April 2003 and 30 April 2004 as described in paragraph 3 above remained unaltered*."

50. The arbitrator held, in respect of this issue, that the answer was a qualified "Yes". The reason he said this was explained at para. 72 of the Award. He said it was:

> "*a qualified 'Yes' in that WYG did price and tender for the Services as if they were phased <u>but</u> during the period from tender for the formation of the Contract the construction works were changed from being split into two phases to being undertaken as a single phase and with the (inclusive) price payable for the consultancy services (for the single phase construction) being fixed at £350,872, paid in thirteen instalments from October 2002 until April 2004.*"

51. The issue raised the question of whether the basis on which WYG priced and tendered for the services was as set out in one provision of the contract, or as set out elsewhere. It seems to me that fundamentally that would be a question of fact. However, to the extent that it does raise any question of law, I do not consider that there was anything obviously wrong with that answer. For that reason, leave to appeal Issue 4 is not granted.

**<u>Issue 5</u>**

52. Issue 5 again continues the same theme: if the answer to Issue 4 is "Yes", what, if anything, is the effect of the same? The arbitrator held that he had answered Issue 4 as a qualified "Yes" and, for the reasons he set out there, the effect was irrelevant, as the Appointment is clear on its face as to the phasing and the fee. As he found, it superseded any previous agreement that might have been established. Again, to the extent that this issue raises any issue or any question of law, I do not consider that it is obviously wrong. In those circumstances, there is no leave granted to appeal Issue 5.

**<u>Issue 6</u>**

53. In respect of Issue 6, the question is whether the contract was varied on 8 October 2002 in the manner alleged in para. 16 of the Amended Points of Claim, where it was pleaded that, at the first meeting held on 8 October 2002 following acceptance of the claimant's tender, the respondent varied the contract by instructing that the project was to be carried out in a single phase which had to be completed by 5 September 2003. At the same time, the claimant pleads that it was informed that the sports hall site would not be available until 22 April 2003.

54. The arbitrator said at para. 77 of the Award that, for the reasons given above, he concurred with the submissions of the College and consequently did not find that there were variations instructed in October 2002 that had any contractual significance. This issue raises similar issues to those set

out above and, to the extent that it raises a question of law, it is not one which is obviously wrong. I therefore do not grant leave to appeal.

**Issue 7**

55. Issue 7 posed the question as to whether the College instructed a change in the services in accordance with clauses 37 and/or 46 of the contract and, if so, precisely what change or changes were so instructed? It is now accepted that this issue was agreed to relate to nine particular changes which WYG alleged were instructed before the issue of the viability report.

56. The arbitrator made no findings in relation to those nine changes because, as he said in para. 89 of the Award, he did not have sufficient evidence to do so. In his summary of the Award, he said "*In summary, this matter is reserved for the present*". It was said that the arbitrator should have come to certain conclusions. I do not consider that this matter raises a question of law at all, and certainly not one which can be challenged under s.69.

57. Rather, I consider it is a matter which is more likely to raise other considerations such as whether there should have been a request for a further award under s.57(3)(b) of the Arbitration Act 1996 or whether the arbitrator had not decided the issues under s.68(2)(d) of the Arbitration Act. However, on this application it was said that, in fact, the arbitrator proceeded with the hearing of the Preliminary Issues on the basis that, if he was not able to answer certain questions, he was not under an obligation to do so. Such is generally accepted to be the position where arbitrators or the court deal with preliminary issues and I see no reason why it should not apply in this case. However, as I have said, I do not give leave to appeal in relation to anything arising out of Issue 7.

**Issue 8**

58. As to Issue 8, this raised a question which depended on Issue 7 and the changes which were identified in that Issue. The terms of Issue 8 were: "*If and insofar as any such changes in the Services were so instructed, did WYG provide [the College] with an estimate of the additional or reduced fees in accordance with clause 37, and if so what were those estimates?*"

59. At para. 98 of the Award the arbitrator indicated that he had seen no evidence that estimates pursuant to clause 37.1 had been provided by WYG in connection with instructed changes in the Services, and no criticism is made of that finding. However, WYG does challenge a finding at para. 97 of the Award, where the arbitrator said: "*To my mind, matters of safety apart, WYG had no entitlement to additional payments in respect of alleged additional Services without specific (positive and unequivocal) instructions from [the College] in that regard.*"

60. It is said that this statement was not relevant to the question raised in the Preliminary Issue. The question before me is whether that finding raises a question of law which should be dealt with by giving leave.

61. As has been accepted by the College, the question is raised in the context of clause 46 and in that context it seems to me that the arbitrator was doing no more than paraphrase the provisions of the contract. I do not consider that this is a matter which, insofar as it raises a question of law, has been shown to raise issues which would substantially affect the rights of the parties or is one which can be criticised as being obviously wrong. Therefore, in respect of Issue 8, I do not give leave to appeal.

**Issue 9**

62. In respect of Issue 9, the issue is related to written authority to introduce variations and is in these terms: "*What if any were the instances in which [the College] gave written authority to introduce variations, in accordance with clause 46(2) of the Contract?*"

63. The arbitrator found that certain change control notifications ("CCNs"), being ARC002 - ARC007 inclusive, were given on the written authority of the College.

64. At para. 104 of the Award the arbitrator referred to WYG's contention that written instructions to WYG were contained in a number of documents: within minutes of meetings prepared by WYG and circulated to the College; within drawings prepared by WYG in accordance with these alleged changes; within the viability report itself; within CCNs and in an e-mail from Mr. Joe Manifold to Mr. Graham Rose.

65. At para.105 of the Award the arbitrator added:

> "*I am not satisfied that references and documents published by WYG and circulated to [the College] (without demur) constitutes the prior written approval necessary under Clause 27 or the specific instructions/written authority necessary under Clauses 46.1 and 46.2. I do not believe that WYG, when issuing the minutes or the drawings or the report, contemplated these documents provided the written formality necessary under clauses 27 and 46.2 or would stand as contractual justification to recover additional fees.*"

66. This is a case where, as can be seen from the arbitrator's decision on the e-mail of 16 May 2003 at para. 106 of his Award, although he refers to no specific written minutes of meetings, or drawings or particular provisions of viability report, he had those before him and he had properly set out the legal effect of the terms of the clauses of the Appointment.

67. In those circumstances, his application of that to the particular facts of this case, the particular document or types of document, is something which I consider comes outside a question of law. If it is a question of law, then I do not consider that it is one which is obviously wrong. In those circumstances, I do not give leave to appeal Issue 9.

**Issues 10 and 11**

68. Issues 10 and 11 are not ones for which WYG seeks leave to appeal.

**Issue 12**

69. As to Issue 12, this relates to the substantiation of claims and raises the following issue: "*Has WYG provided [the College] with such substantiation of its claim as [the College] may reasonably require?*"

70. In para.17 of the Defence, from which this issue arises, the College pleads the following contention:

> "*[The College's] first response to WYG's claim for addition fees of 5th August 2003 was to write to WYG on 30th September 2003, requesting that WYG re-formulate its proposal to link the project events relied upon to the alleged entitlement provisions of inter alia clause 46(3). WYG never did provide any such substantiation, and for this further reason WYG is not entitled to the additional fees claimed or any additional fees.*"

71. WYG contended that the letter of 5 August 2003 from WYG to the College, which concerned re-evaluation of professional fees, provided sufficient substantiation of the amounts claimed. The arbitrator held as follows in answering the question in the negative in para. 120 of the Award:

> "*I draw the conclusion that the substantiation provided at that time was not what [the College] reasonably required in order to consider the claim in more detail. ... The letter from WYG dated 5th August set out the claims received by WYG from Ruddle Wilkinson (architects) with a limited amount of background information. However, in that the additional costs claimed amounted to approximately the same as the original lump sum tender for the single point consultancy, it is hardly surprising that [the College] required more motivation for the sums claimed than was contained in 5th August 2003 letter.*"

72. He continued at para.121 of the Award and concluded: "*The claim lacked the degree of particularisation that I consider reasonable in the circumstances*."

73. WYG submit that the arbitrator erred in law in finding that WYG had not provided the College with such substantiation of its claim as the College may reasonably require. The College submit, and I accept, that this is a question of fact. In any event, it is not one which I am persuaded would substantially affect the parties and it is not one where the arbitrator's conclusion can be said to be obviously wrong. I, therefore, do not give leave to appeal Issue 12.

**Issue 13**

74. In respect of Issue 13, this raises the following issue concerning WYG's claim:

> "*In order to recover additional fees from [the College], is WYG: (a) entitled to advance its claim on the basis set out in paragraph 22 and onwards at the Amended Points of Claim or (b) obliged first to provide particulars of each alleged change and/or variation relied upon under Clauses 37, 46 & 47 (and/or the alleged breach of implied term relied upon) and particulars of the consequences of the same as alleged in inter alia paragraphs 15 and 20 of the Defence?*"

75. The arbitrator held in para.123 as follows:

> "*To fulfil the contractual requirements it is, to my mind, necessary for WYG to provide particulars of the effect of each alleged change and/or variation relied upon. ... For the various claims to be capable of proper consideration under the term of the Appointment it would be necessary for the Claimant to further particularise and thereby substantiate the costs claimed in accordance with Clause 46.3. One of the many difficulties with rolled up or global quantum claims is the inability for the adjudicator/arbitrator to be able to justify (and value) an entitlement under one head of claim whilst denying an entitlement under another.*"

76. This issue raises a point which the College says is not a question of law. It seems to me that this issue raises questions of procedure and also potentially a question of law. However, the essence of the pleading in paras. 22 to 24 of the Amended Points of Claim is one which merely states that WYG was required to provide resources and services substantially in excess of those allowed for within the tender sum, because of the effects of all the matters which are pleaded, and it is then said:

> "*The Claimant is entitled to remuneration in respect thereof, pursuant to Conditions 37 and/or 46 and/or 47 of the General Conditions, alternatively as damages for breach of the implied terms pleaded in paragraph 14 hereof.*"

77. The question in Issue 13 is in fact limited to the contractual claims for additional fees and not to the wider claims which may be made. But, in any event, essentially what is said in paras. 15 and 20 of the Defence is that it is necessary for the claimant, WYG, to identify each change or variation, and also to state what are the consequences alleged to follow from that.

78. As has been accepted by the College, the issue as determined here is one is which is aimed at getting that particularisation and is not aimed at precluding the possibility of WYG making a global claim insofar as they wish to advance a claim on that basis. It is one which seeks further particularisation, but does not seek to preclude a global claim.

79. I consider that this is much more a question of procedure and, to the extent that it raises a question of law, it is not obviously wrong that, for the claims under those clauses, the change or variation has to be identified and the consequences also have to be set out, although, as I have indicated, that does not preclude them being put forward on the more risky but frequently pleaded global basis. I do not consider, therefore, that leave to appeal should be given on Issue 13.

**Summary**

80. Therefore, having reviewed each of the issues, my conclusion is that the claimant, WYG, has not succeeded in obtaining leave to appeal under s. 69 of the Arbitration Act 1996 on any of those issues.