Neutral Citation Number: [2008] EWHC 1301 (TCC)

Case No: HT 07 364

IN THE HIGH COURT OF JUSTICE
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 June 2008

Before:

MR JUSTICE COULSON

- -

Between :

Fitzpatrick Contractors Ltd	**Claimant**
- and -	
Tyco Fire and Integrated Solutions (UK) Ltd	**Defendant**

- -
- -

Mr Bernard Livesey QC and Mr Paul Sutherland (instructed by **Maxwell Winward LLP**) for the Claimant
Mr David Thomas QC and Mr Jonathan Lee (instructed by **Cobbetts LLP**) for the Defendant

Hearing dates: 17, 18, 19 and 28 March, 22 April 2008

- -

Judgment

The Honourable Mr Justice Coulson :

A. INTRODUCTION

1. In March 2002, Transport for London ("TFL") engaged the claimant, Fitzpatrick Contractors Limited ("Fitzpatrick") to carry out the refurbishment of the southbound bore of the Blackwall Tunnel in East London. Fitzpatrick sub- contracted the design, manufacture and installation of the principal M and E works to Tyco Fire and Integrated Solutions (UK) Limited ("Tyco"). The works were significantly delayed. In addition, Fitzpatrick claim that the works carried out by Tyco were incomplete and defective. Fitzpatrick's total claims against Tyco amount to £19 million odd, of which the two principal components are £7.7 million in respect of delay losses, and £9 million in respect of incomplete and defective work.

2. It is apparent from the pleadings that one of the main issues between the parties concerns the relevant terms and conditions of the sub-contract. Fitzpatrick claim that a basic contract was entered into between the parties on or about the 7 May 2002, and that this contract was varied by agreement, culminating in a meeting on 19 June 2002 at which all remaining contractual matters were agreed. On Fitzpatrick's case, the terms of this detailed sub-contract, agreed no later than 19 June, impose a number of clear obligations on Tyco with which they failed to comply.

3. Tyco's case is, and has always been, rather more complicated. Originally, Tyco disputed that there was any sub-contract between the parties at all. However following the commencement of these proceedings, by their defence dated 8.10.07, Tyco accepted that there was a sub- contract agreed on or around 7 May 2002, although they disputed a number of the important terms on which Fitzpatrick relied. By an amended defence produced in December 2007, Tyco altered their position again. This time they alleged that the contact of 7 May 2002 incorporated a number of oral agreements emanating from a meeting on the 24 April between Mr Paul Ward of Tyco and Mr Iain Robinson of Fitzpatrick (the so-called 'first meeting'). It is this new case that Tyco advocated in the trial of the preliminary issues before me.

4. I propose to set out shortly, in **Section B** below, the relevant principles concerning contract construction. At **Section C**, I set out the factual background to the contract between the parties. At **Section D**, I set out the relevant events by reference to the contemporaneous documents and, at **Section E**, I make various observations about those documents and what they show as to the making of the contract and its relevant terms. At **Section F,** I then deal with the oral evidence called by the parties, in order to see whether or not that evidence was consistent with the contemporaneous documents and what, if anything, it might add. At **Section G** below, I set out my analysis of Tyco's new case and my conclusions as to the making of the contract between the parties and the relevant terms of that contract. At **Section H** below, I then set out my answers to the Preliminary Issues. Additionally, in **Section I** below, I address one distinct point of construction, concerned with clause 3(4), which only emerged clearly after the conclusion of the main hearing.

B. THE RELEVANT PRINCIPLES

B-1 The Importance of the Factual Background

5. In his well-known speech in **Investors Compensation Scheme v West Bromwich Building Society** [1998] I WLR 896, Lord Hoffmann identified five key principles concerning the interpretation of contracts. He summarised them as follows:

> (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
>
> (2) The background was famously referred to by Lord Wilberforce as the 'matrix of fact' but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.
>
> (3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent…
>
> (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars: the meaning of the document is what the party using those words against the relevant background would reasonably have been understood to mean…

> (5) The 'rule' that words should be given their 'natural and ordinary meaning' reflects the common sense proposition that we do not easily accept people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the rule does not require Judges to attribute to the parties an intention which they plainly could not have had….

6. In **BCC v Ali** [2001] 1 AC 251, Lord Hoffmann said that the true test of admissible extrinsic evidence was "anything which a reasonable man would have considered relevant" and that he was not, in **Investors Compensation Scheme,** "encouraging a trawl through 'background' which could not have made a reasonable person think that the parties must have departed from conventional usage".

7. The factual matrix should always be considered in any dispute as to construction of contractual terms, even if the wording could be regarded as unambiguous and sensible: see, for example, **Westminster CC v National Asylum Support Services** [2002] UKHL 38: [2002] 1 WLR 2956: and **Chartbrooke Limited v Persimmon Homes Limited and Others** [2007] EWHC 409 (Ch): [2007]; All ER (Comm) 1083. However, it is important that a proper balance is retained between the factual background and the words used. In **Wayne Martin v David Wilson Homes Limited** [2004] EWCA Civ 1027: [2004] EGLR 77, Buxton LJ said,

> "One has to remember, when looking at issues about the factual matrix, that although reference to that matrix is not limited to cases where the words are clearly ambiguous, the first place where one expects to find the meaning of the words and the intention of the draftsmen is in the words themselves. If they yield a fairly clear conclusion, and in my judgment these words do, then one has to pause long before concluding that at that point the draftsmen has used words with a meaning that do not fit in with the objective that he was seeking to attain".

B-2 Negotiations Generally

8. Particular problems can arise where there have been lengthy negotiations between the parties, but no formal contract has ever been signed. Helpful guidance as to the proper approach in such a situation can be found in the well-known case of **Pagnan SpA v Feed Products Ltd** [1987] 2 Lloyds Rep 601. If there are difficulties in the determination of whether or not an offer was made and accepted, then it may be necessary to consider all negotiations, including meetings where oral statements may have been made which were not referred to in the correspondence: see for example, **Drake Insurance v Provident Insurance PLC** [2004] QB 601 at 632, CA.

9. However different considerations will usually apply where the transaction has been fully performed. In those circumstances, the court will more readily conclude that there was a contract, even if it is impossible to identify the coincidence of offer and acceptance. The best-known guidance on this topic can be found in the judgment of Steyn LJ (as he then was) in **G Percy Trentham v Archital Luxfer** [1993] 1 Lloyds Rep 25, CA when he said:

> "The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often be difficult to submit that the contract was void for vagueness or uncertainty. Specifically, the fact that the transaction was executed makes it

easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised as inessential".

B-3 General Rules of Construction

10. A number of the other rules relating to the construction of documents, summarised in Chapter 7 of **The Interpretation of Contracts** by Lewison J, were referred to by leading counsel during the course of their final submissions. Amongst those of particular relevance is the rule, identified at paragraph 7.03, that effect should be given, wherever possible, to all parts of the contract, and that no part of the contract should be treated as inoperative or surplus: see, for example, **S.A.Maritime et Commerciale of Geneva v Anglo Iranian Oil Co Limited** [1954] 1WLR 492.

11. On at least one occasion during his submissions, Mr Livesey QC, on behalf of Fitzpatrick, pointed out that the contract did not say in clear terms what Tyco now contended for and he asked forensically: 'if the parties meant that, why did they not say it'. In answer to that, Mr Thomas QC referred to paragraph 2.11 of **The Interpretation of Contracts,** where the learned author makes the point that it is inherent in most disputes about the interpretation of a contract that the words in question are susceptible of more than one meaning, and that if the words were clear, there would be no room for dispute at all: see, for example, **The Rio Assu** [1999] 1 Lloyds Rep 115 at 126, CA.

C. THE FACTUAL BACKGROUND.

12. The factual background to the contract between the parties was as follows:

12.1. Both Fitzpatrick and Tyco had been involved with TFL for some years prior to 2001 in the maintenance of the Blackwall Tunnel and its control systems.

12.2. During 2001, Fitzpatrick were one of a number of main contractors who were invited to tender for the proposed refurbishment work contract. The successful contractor would be appointed on a design and build basis. Fitzpatrick had little in-house M and E experience and were therefore going to be reliant upon their specialist M and E sub-contractor in relation to any detailed consideration of the M and E element of the main contract works.

12.3. On 16.10.01, Fitzpatrick invited Tyco to tender, as a prospective sub-contractor, for the M and E works. The request made plain that the M and E works were to be carried out "in accordance with the main contract conditions and other information generally as noted within this enquiry". The letter enclosed 2 CD's which contained the main contract documentation as it was then proposed. This information was passed on by Tyco to its own sub-sub-contractors when preparing their tender bid.

12.4. On 31.10.01, Fitzpatrick sent Tyco written clarifications of their requirements. The covering letter said that Tyco "shall allow in your quotation for compliance with all Employer's Requirements and Main Contract Conditions…" The clarification documents that were enclosed repeatedly referred to the specific provisions of the Employer's Requirements, as set out in the documents on the two CD's. Another document sent to Tyco under cover of the same letter, entitled "Blackwall Tunnel Refurbishment: Additional notes for Sub-Contractors" made plain that sub - contactors were to submit outline proposals for both design and construction "which must meet, or better, the minimum requirements stated in the Employer's Requirements".

12.5. On 23 November 2001, Fitzpatrick informed Tyco that any sub-contract "would be based on the Civil Engineering Contractors Association [CECA] Form of Sub-Contract of

November 1998…. Supplementary Terms and Conditions to be analogous to Main Contract Terms and Conditions".

12.6. Tyco's first tender was provided on 30 November 2001. This was updated on a number of occasions over the next few weeks, so that by January 2002, the tender was at revision 4. Each of the tender documents stated on their face that:

> (a) They were submitted "in response to" the letter of 16.10.01 and attached documents, "including the Employer's Requirements":
>
> (b) Tyco had studied the relevant specification references in the Employer's Requirements and they expressly confirmed that "their tender is compliant in respect of scope of supply, health and safety standards, and environmental standards".

12.7 However, although it was not readily apparent from the face of the tender itself, a detailed analysis of the technical detail within Tyco's tender demonstrated that it was not necessarily compliant with the main contract and the Employer's Requirements: for example, they proposed in certain circumstances to use materials that were different to those specifically identified in the Employer's Requirements. These differences were not highlighted, and at no time was it expressly stated in the Tyco tender that the tender was not compliant with the Employer's Requirements. This was, on any view, poor tendering practice on the part of Tyco.

12.8. At a meeting on 7 January 2002, Tyco agreed to reduce their tender price by 10%. The documents indicate that this was in order to buy exclusivity: in other words, in exchange for the 10% discount, Fitzpatrick would not negotiate with any other potential sub- contractors for the M and E package. At no time prior to the agreement of the contract between Fitzpatrick and Tyco was this 10% discount ever linked to or connected with any suggestion by Tyco that their tender documents should somehow take precedence over the Employer's Requirements.

12.9. On 6 March 2002, Fitzpatrick entered into the main contract with TFL. This meant that the finalisation of their sub-contract with Tyco was now a matter of some urgency for Fitzpatrick.

D. THE RELEVANT EVENTS, AS RECORDED IN THE CONTEMPORANEOUS DOCUMENTS

13. On 4 April 2002 there was a sub-contract review meeting attended by Mr Davey, Mr Robinson and Mr Carson of Fitzpatrick and Mr Haworth, Mr Marshman, Mr Race and Mr Ward of Tyco. Mr Robinson kept manuscript notes of that meeting. It appears that, at that meeting, the Tyco representatives indicated that the 10% discount which had been agreed in January might be difficult to achieve; according to Mr Robinson's notes of the meeting, they said that they now "could not find" the reduction that they had promised. Unsurprisingly perhaps, there was a good deal of discussion about that revelation. One of the possible ways around the problem was the award by Fitzpatrick to Tyco of an additional work package, known as the Radio Re-Broadcast works. Mr Robinson's notes of the meeting reveal that giving Tyco that package "would alleviate some of their financial difficulties…."

14. Also at the meeting on 4th April, Tyco asked for a draft sub-contract, and this was promised the following day. In fact, the first draft was not sent to Tyco until 9 April 2002. That draft was not considered in any detail by Tyco themselves, although a copy of it was forwarded by Mr Ward of Tyco to his contracts advisor, Mr Gus Pearson of Atlas Consultants. Before Mr Pearson gave his views on that version of the sub-contract, a second

draft was sent by Mr Robinson to Tyco on the 15 April 2002. This filled in some of the gaps in the version sent on 9 April 2002.

15. The proposed sub-contract sent by Fitzpatrick to Tyco on 15 April 2002 consisted of the CECA Form largely un-amended. The first schedule set out the particulars of the main contract. Appendix 1 identified more precisely the main contract documents. Appendix 3 set out the scope of the sub-contract works on a package-by-package basis, each time defining the work by reference to the relevant paragraphs of the Employer's Requirements. Appendix 4 was entitled "Supplementary Sub-Contract Terms and Conditions". Clause 1 of appendix 4 provided that, in case of discrepancy, the terms and conditions of appendix 1 (the main contract documents) prevailed over everything else. In similar vein, clause 33 of appendix 4 provided that, if there was any discrepancy or conflict between the Tyco tender and the terms and conditions of the sub-contract, then the terms and conditions of the sub-contract should prevail.

16. A further meeting to review the proposed sub-contract was fixed for the 24 April 2002. The day before that meeting, Mr Pearson of Atlas sent Mr Ward two copies of the amended CECA form which he was proposing on behalf of Tyco. One was a version to be returned to Fitzpatrick; the other was for Mr Ward's own use and contained what Mr Pearson called 'guidelines' to Mr Ward in relation to the changes to the CECA form which he proposed. Mr Ward sent on the former version to Fitzpatrick and retained the 'guidelines' version for his own use. He said in evidence that he did not look through the detail of the document that he was sending on to Fitzpatrick.

17. The version of the proposed sub-contract sent back by Mr Pearson (and forwarded to Mr Robinson) contained a number of important differences from the version which had been sent out by Fitzpatrick a few days earlier. Amongst other things, it sought to limit the scope of Tyco's design responsibility. It also attempted to limit Tyco's liability under clause 3(4) of the CECA terms to a maximum of 10% of the sub-contract sum. As to the supplementary conditions at appendix 4, this new version made a number of major changes, including the proposal that the Tyco tender offer would take precedence over any other documents. Some of these changes had been foreshadowed in Tyco's tender; others, such as the attempt to ensure that Tyco's tender took precedence over all other documents, were entirely new.

18. It is Tyco's case that, between about 10am and 11-15am on the morning of the 24 April 2002, there was a meeting – the so-called 'first meeting' - between Mr Ward and Mr Robinson, at which it was alleged that the two men went through the proposals made by Mr Pearson (and passed on by email the previous day to Mr Robinson) and agreed many of them. Importantly, even on this case, Mr Ward accepted that Mr Robinson did not agree either the precedence proposal or the suggested 10% limit of liability. This first meeting is un-minuted and is the subject of, at most, about half a page of manuscript notes. It was not subsequently referred to in any of the voluminous correspondence between the parties, and was first referred to and relied upon by Tyco as late as December 2007. It is therefore a part of the case that needs to be examined principally by reference to the oral evidence, which is a task I undertake at **Section F** below.

19. Returning to the main meeting on the 24 April 2002, which all parties accept took place at Fitzpatrick's offices at Poplar High Street, the record of what was discussed and agreed was set out in Fitzpatrick's standard document entitled 'Sub-Contract Review Agenda'. This document was signed by all parties. Amongst other things, it filled out the contact details of both the Tyco and the Fitzpatrick representatives; it identified the agreed sub-contract price and the method of measurement; it identified the contract programme; and it identified the form of the main contract and the form of the sub-contract. There was a reference to the main contract documentation having been sent out on CD, and a reference to subsequent "tender amendments" in respect of those documents. There was also a reference to the main contract

liquidated and ascertained damages of £6,335.62 per day. The design work to be carried out by Tyco was said to be "all design in relation to the sub-contract scope". In addition, at clause 7.1, the agenda document provided:

> "Only the rates or prices contained within the quotation will form part of the Sub-contract agreement. Are there any other issues not covered by this agenda that are contained within the sub-contractor's quotation which require assessment or discussions…"

The only answer to this was "Radio Re-Broadcast inclusion to be confirmed…"

20. As previously noted, this agenda document was signed by both parties. Mr Ward's signature was appended to a note in his handwriting which said: "Subject to sub-contract signing and execution as deed by Wormald Ansul UK (precedence of sub-contract)". Wormald were Tyco's owners. There was a suggestion by Tyco - and it was Mr Ward's positive evidence - that the words in brackets ("precedence of sub-contract") were, in some way, a reference to or recognition of the fact that Tyco wanted their tender to take precedence over the Employer's Requirements. I reject that contention as a matter of construction: it is not what the words say. Indeed, there is no mention in the addendum of the Tyco tender at all.

21. Instead, I find that the manuscript addendum was a reference to a perfectly reasonable request by Mr Ward, to the effect that the sub-contract document, as and when it was signed and executed, would take precedence over the review agenda that was being signed and agreed at the meeting on 24 April. It had nothing whatsoever to do with the Tyco tender, which is not mentioned in the addendum. In my judgment, that is the only sensible and commercial interpretation that can be ascribed to these words.

22. If there were any doubt about that interpretation of the words used in the signed version, I would draw comfort from Mr Ward's own wording of the caveat, recorded on his version of the review agenda document. That read: "In order of precedence: the executed sub-contract precedes this review document". It seems to me that this notation makes even clearer the interpretation I have noted above. Accordingly, to the extent that the submission was maintained, I reject the suggestion that the manuscript addendum on the agenda had anything to do with, or was expressly linked at all, to any question of the Tyco tender taking precedence over the Employer's Requirements.

23. On 7 May 2002, Tyco wrote to Fitzpatrick. There is no dispute that this letter awarded to Tyco the sub-contract works, and that it was accepted as doing so by Tyco in their written reply of that same day and/or by their subsequent conduct. The letter identifies the relevant sub-contract packages, now including the Radio Re-Broadcast package, in the same sequence as they are set out individually in the Employer's Requirements. The letter goes on:

> "We hereby award the Design and Construct Sub-contract for the above Works to yourselves based on the following:
>
> - The prices for Design, Manufacture and Installation of the above to the Employer's Requirements amounting to a total sum of £3,802,887 excluding VAT.
>
> - The Main Contract documents as previously handed to you.
>
> - The Tender/Post-tender amendments as attached.
>
> - The Sub-contract based on the CECA Form of Sub-contract November 1998 for use in conjunction with the ICE Conditions of Contract

Design and Construct (to be sent to you from our Hoddesdon Buying Department).

- All other Special and Standard Terms and Conditions as reviewed by P Ward and I Robinson on 24 April 2002 and included in the formal Sub-contract

- The Period for Completion as detailed on the submitted Clause 14 Programme reference BWT/001/001 Rev A as attached (note that we await agreement from the Employer's Agent).

- The Sub-contract Review meeting notes as attached

- Agreed Design phase commencement date 24 April 2002

- The Design, Manufacture and Installation of the Radio Rebroadcast System is included in your sub-contract and included in the above amount for the price of £502,152 subject to the Employer's Agent's approval.

Formal sub-contract documents based on the above will be sent to you from our Buying Department in due course for your signature.

You are therefore requested to take the following action:

i) Continue with the Design-phase previously commenced on 24 April 2002

However in the meantime, this letter of award and your subsequent acceptance of this letter of award shall form a binding Contract between us.

Please confirm your acceptance of this award by return and confirm that you are proceeding as above".

24. Enclosed with this letter was the tender/post-tender correspondence under the main contract which post-dated the information on the two CD's sent out in November 2001, and which had therefore not previously been seen by Tyco.

25. On the same day, Tyco replied in the following terms:

> "Tyco Control Systems would like to thank FCL for the order for the sub-contract works on the Blackwall Tunnel S/b refurbishment as detailed in Appendix 3 of the sub-contract document, reference C836/IMR.
>
> Could FCL please forward as soon as possible all the Tender/Post-tender Correspondence as detailed in section 1.4, Appendix 1 to the sub-contract document, reference 836/IMR."

26. On 13 May 2002, Mr Robinson of Fitzpatrick sent to Mr Ward of Tyco a list of proposed amendments of the CECA form, and the schedules and appendices, together with a hard copy of this proposed version. The covering letter said that these documents were being sent "further to our discussions regarding the Sub-contract documentation on 24 April 2002 and subsequent to our own 'in-house' review".

27. Amongst other things, this version identified a 25% limit within clause 3(4), and an expanded version of appendix 4. In addition, in this version of clause 1 of appendix 4, it was made plain that the main contract documents prevailed over all others, and clause 33 of the same document said in terms that, if the Tyco tender conflicted with the terms and conditions of the sub-contract, then the latter would prevail.

28. On the 17 May Mr Ward sent a brief reply saying:

> "…on brief pass, I would request that you revisit Clause 3(4) issue, as we are poles apart; cannot see relationship as you refer being applicable. Secondly, the Supplementary Conditions do not reflect our discussions which, until I fully evaluate causes me some concern."

29. Mr Robinson replied on the 21 May saying that he would take further advice on the limit of liability expressed within clause 3(4). He went on:

> "I was under the impression that the Supplementary Terms and Conditions reflected our discussions on 24 April; if that is not the case please accept my apologies. Please could you give me a call on your return from holiday so we can finalise these and approve the Sub-contract."

30. On 29 May 2002, Mr Ward replied to Mr Robinson, saying that he had 'a final commercial review' the following Thursday with his Commercial Department and indicated that he would send "some script for consideration prior to a meeting on, say, 19 June to wrap up and allow the Directors to sign". This made it clear beyond doubt, not only that the negotiations were moving towards a conclusion as far as Tyco were concerned, but also that, following his own internal review meeting, Mr Ward would have the necessary authority at the proposed meeting to 'wrap up' the contract. Accordingly, the alleged limitation within Tyco on Mr Ward's authority, on his own, to conclude a contract of this size is nothing to the point, because he was seeking to obtain (and I find that he did obtain) the necessary authority from other, more senior personnel, to agree to these particular provisions.

31. On 6 June, Mr Ward wrote to Fitzpatrick, for the attention of Mr Carson. This was an extremely important letter, the relevant extracts of which are as follows:

> "Further to your e-mail dated 13 May 2002, please find following our comments on your revised Sub-contract Conditions. **We have only commented on those Conditions we still have concerns with- please assume that all other revisions and amendments are acceptable to Tyco**. (Emphasis supplied).
>
> Clause 3(4): Your version of clause 3(4) is unacceptable to Tyco in its present form. We would be prepared to accept the same terms as the Main Contract for Liquidated Damages on a pro-rata basis to the Sub-contract sums. The applicable formula (per clause 29(i) of the ITT) would therefore be:
>
> Daily amount of Liquidated Damages = Sub-Contract Sum times 15% divided by 365 days."

The parties agreed that this produced a figure of £1,562.83 per day. This figure was noted by Mr Robinson on his copy of the letter.

32. As to the proposed second schedule, Tyco said this: "In order to incorporate our drawings and the training offered, delete the first six words of item 4". The first six words of item 4 of the second schedule limited the incorporation of the Tyco tender to their rates and prices only (as per the review agenda document of 24 April). The proposed deletion of these words would have had the effect of incorporating the Tyco tender in full, even though there was no suggestion in the letter – or anywhere elsewhere - that this was what Tyco wanted. The letter also went on to make various other points about the milestone dates for payments and other matters of lesser significance.

33. On 19 June 2002, there was a meeting between Mr Robinson and Mr Ward, as foreshadowed by Mr Ward in his email of 29 May (paragraph 30 above). They went through all the matters outstanding, namely those which were noted as such in the letter of the 6 June. Mr Robinson's notes of that meeting show that the parties agreed to limit liquidated damages to £1,562.83 per day and agreed that the Tyco tender could be incorporated in full, provided that there was a rider that appendix 3 (ie the breakdown by reference to the Employer's Requirements) took precedence over the tender.

34. Mr Ward's notes of the meeting also reveal agreement on these and all the other matters in the letter, including a new breakdown of the milestone payments by reference to particular percentages. The breakdown of the percentage value of the milestone payments, as recorded in Mr Ward's manuscript notes, was subsequently adopted by the parties in practice. Tyco were thus paid in accordance with the schedule that was agreed at the meeting on 19 June 2002.

35. The following day, 20 June 2002, Mr Robinson sent Mr Ward a completed sub-contract form amended in accordance with their discussions. At the same time, he e-mailed Mr Davey of Fitzpatrick to say he had "finally gained agreement to terms and conditions for Tyco during a meeting yesterday."

36. The buying department of Fitzpatrick sent out a further round of documents on 25 June 2002. Following the close textual analysis undertaken by Tyco for the purposes of the preliminary issues, it has become apparent there are one or two (minor) differences between that version and the version sent out by Mr Robinson following the meeting on 19 June. I therefore disregard the version of 25 June for present purposes.

37. On the 1 July 2002, Mr Ward e-mailed Mr Robinson acknowledging receipt of the contract and making two points. The first was that the actual order value was £3,812,887. This is agreed between the parties and nothing now turns on it. The second point raised was as follows:

> "We have reviewed the revised wording relating to the TCS Tender and to be frank still feel further exposed than at the pre-tender agreement when 10% discount was offered to FCL for exclusivity to the TCS tender. At this time, we are in a position of offering to use our tender 10% discount, then FCL keeping the discount whilst omitting the precedence of our tender. My seniors are presently questioning what the discount was for, if not to use our tender exclusively, for its content".

38. This was raising, for the very first time, a suggested connection between the 10% discount, which Tyco had promised in January, and the precedence of the Tyco tender. However it was unclear what, if anything, Tyco proposed to do about that, a point made by Mr Robinson in his reply of 4 July. Having agreed that the price was £3,812,887, Mr Robinson went on to address the discount point:

> "Not entirely sure what your line is here! The 10% offer, as I understand, was for confirmation that if FCL was successful with the tender, Tyco would be guaranteed the works without any further competition or negotiation. In the interest of the partnering spirit that was intended by the deal, we also awarded further work i.e. over £500k for the Radio Rebroadcast to your in-house team in preference to the company named within our tender. FCL would not be able to make your Tender the priority document due to Employer's Requirements clause 1.1.5[ambiguities in tender proposals]".

39. Mr Ward did not take the matter further. Instead, on 19 July 2002, Tyco's General Manager acknowledged receipt of the sub-documentation and said that they would endeavour

to return the documentation when the relevant signatories returned from overseas business and vacations. On 27 August 2002, Mr Robinson chased Mr Ward for a signed copy of the sub-contract and also gave Mr Heyes of Tyco a written reminder that he needed to counter-sign the letter of 7 May 2002. Mr Robinson said that he had changed two points in the letter, namely the total sum of £5,812,887, and the figure for the Radio Re-Broadcast System of £512,152. He sent a further copy of the letter for Tyco to sign.

40. Tyco never signed the letter. Even at that early stage, it had become apparent that there were difficulties with the sub-contract, both in relation to the scope of Tyco's works, and in relation to the alleged delays in the completion of the design. The remainder of the (voluminous) correspondence is largely concerned with the parties setting out their respective cases, and is therefore of little relevance to these preliminary issues. However, it is extremely important to note that, although Mr Ward wrote a number of lengthy letters seeking to justify Tyco's contractual and commercial position over the next few months and indeed years, taking a wide variety of contractual points, at no time did he ever suggest that there was a first meeting on the 24 April between him and Mr Robinson at which a whole range of important contract terms were agreed.

E OBSERVATIONS ON THE DOCUMENTS

41. On the basis of the contemporaneous documents, summarised above, I consider that a clear picture emerges as to the making of the sub-contract and the relevant terms which were agreed.

42. The starting point was the main meeting on the 24 April where the parties reached a broad agreement on a wide variety of matters. That agreement was set out in the review agenda, which was signed by both parties. Of course, not everything was agreed at that point, as Mr Ward's express caveat, written on every page, makes plain. The parties expected that, following agreement of those outstanding matters (principally the detailed CECA sub-contract terms) there would be a completed sub-contract document which would then take precedence over the review agenda.

43. The review agenda recorded a good deal of detailed agreement as to the incorporation of the main contract, the general terms of the sub-contract, the details of the design work and so on. It also made plain that Tyco's tender would not be incorporated into the sub-contract itself, save for the rates and prices contained within it: see paragraph 19 above.

44. This basic agreement between the parties, reached on 24 April was then recorded in the letter of award dated 7 May 2002 (see paragraph 23 above). This recorded that basic agreement had been reached as to work scope (by reference to the individual headings in the Employer's Requirements); the price; and the programme, with the agreed design phase starting on 24 April and the period for completion being as per the clause 14 programme when it was agreed (as it was) by the Employer's Agent. The award letter also incorporated the main contract documents, both as they existed at the time of the tender, and the post-tender material as well. It was stated that the sub-contract would also include the review agenda, as had been anticipated.

45. The letter of award of 7 May 2002 made plain that, whilst agreement had been reached on a number of the basic provisions of the contract, some of the detailed terms remained outstanding. Those included the final version of the CECA form, which the letter said was "to be sent" to Tyco from Fitzpatrick's buying department. The only possible construction of those words, in the context of the factual background and the rest of the letter, is that the sub-contract form was *going to be sent in the future*, *once the terms had been agreed*. Accordingly the fourth bullet point reflected the fact that the precise terms and conditions remained to be agreed.

46. The reference in the fifth bullet point to "the other Special and Standard Terms and Conditions as reviewed on 24 April" is plainly a reference to the matters discussed at the main meeting. Again the letter clearly anticipated that these matters remained to be finalised. That is because the letter said that those terms and conditions would be "included in the sub-contract". That must be a reference to the sub-contract referred to in the preceding bullet point, which was the document "to be sent" to Tyco in the future, once agreement had been reached.

47. Accordingly, it seems to me that the parties in these proceedings are right to accept that a basic agreement had been reached between them on the 7 May 2002. There was agreement as to the parties, price, workscope and programme. There was also general agreement as to the incorporation of the main contract documents and the review agenda, and the incorporation of the CECA form. What remained outstanding were any particular amendments or additions to that form, and the appendixes and schedules that would be attached to it. It was that aspect of the sub-contract that remained outstanding as at 7 May 2002, to be discussed and agreed in the subsequent weeks.

48. On my analysis of the documents, set out in **Section D** above, that is exactly what then happened over the course of the next few weeks. Following the discussions on 24 April, Fitzpatrick wanted to make changes to the CECA form and attachments, and they made those changes and sent the amended version of the documentation to Tyco on 13 May. Tyco's initial view was that the parties were still apart on certain aspects of the documentation (see Mr Ward's e-mail of 17 May, set out at paragraph 28 above), but it is equally plain that Mr Robinson of Fitzpatrick thought that the version he had sent did indeed reflect the discussions on 24 April (see his e-mail of 21 May, set out at paragraph 29 above). However, on any view, it does not appear that, at that point, the parties considered that they were very far apart. In particular, Mr Robinson's e-mail of 21 May apologised if the revamped contract was not in accordance with the discussions and talked about finalising and approving the sub-contract; and Mr Ward's reply of the 29 May talked in precisely the same terms, and expressly stipulated that the forthcoming meeting (which eventually took place on the 19 June) would 'wrap up' the sub-contract and allow it to be signed.

49. In my judgment, the critical letter in this sequence is the one of 6 June (paragraphs 31-32 above). That letter makes plain that it was only those matters expressly identified in the body of the letter itself which remained in dispute and that "all other revisions and amendments are acceptable to Tyco": see the passage highlighted in bold in paragraph 31 above. On the face of the contemporaneous documents, it seems to me that this was a perfectly reasonable and logical next step in the on-going negotiations. I am bound to note that, in view of Tyco's new case, Mr Ward was obliged to say – and he did just that - that the first paragraph of his own letter (to the effect that everything was agreed except for the few matters raised in the letter itself) was wholly wrong, and was the complete opposite of what he meant to say. No explanation was provided as to how such a grave error came about, and I am bound to conclude that such a case was implausible in the extreme.

50. Moreover, I am also bound to record that, neither at the meeting on 19 June, nor in the subsequent correspondence for which he was responsible, did Mr Ward allege that his statement (to the effect that just about everything was agreed) was in any way incorrect or misleading. I simply cannot accept that Mr Ward, who was well-used to dealing with these sorts of commercial matters, could or would have stated in such unequivocal terms that all the other revisions and amendments were acceptable to Tyco when, in truth, they were not. I consider that Mr Ward's evidence on the letter of 6 June was driven by necessity; if the first paragraph is given its ordinary meaning, then the Tyco case advanced before me becomes all but impossible to sustain. For the reasons I have given, I consider that these words have to be given their ordinary meaning, and that there is no credibility in the subsequent suggestion that Mr Ward made such an all-pervasive error in his letter.

51. As to those matters identified in the letter of 6 June 2002 as being outstanding, it is plain from the separate sets of manuscript notes of the meeting on 19 June, prepared by both Mr Robinson and Mr Ward, that agreement was reached on each of those issues. Indeed, I do not understand it to be seriously suggested otherwise. At all events, evidence that the remaining matters identified in the letter of 6 June were discussed and agreed on 19 June can be found in:

> (a) Mr Robinson's two e-mails of the 20 June 2002, one sending the documents recording their agreement to Mr Ward, and the other recording internally that agreement had been reached;
>
> (b) The sending out, by Fitzpatrick's buying department, of a version of the sub-contract documents on 25 June 2002, again triggered by Mr Robinson's conclusion that he had reached agreement on all issues;
>
> (c) Mr Ward's e-mail of the 1 July 2002 which, other than making the (agreed) point that the sub-contract price was wrong, confined itself to a mild complaint that Tyco had not gained anything from the 10% discount. Importantly this e-mail does *not* say, or even suggest, that agreement had not been reached on the detailed terms of the sub-contract sent out by Mr Robinson to Mr Ward. Indeed, on the contrary, the e-mail strongly suggests that agreement had indeed been reached, but that Tyco were anxious to make plain to Fitzpatrick that they, Tyco, had been extremely accommodating in the matter of the 10% discount.
>
> (d) Mr Robinson's response of the 4 July, which made plain the basis of the 10% discount, and which was not the subject of a response from Tyco, much less any contradiction.

52. I attach considerable significance to the fact that, not only was there no reply from Mr Ward in answer to Mr Robinson's e-mail of 4 July, but there was also no other e-mail or letter from Mr Ward, or anyone else at Tyco in late June or July, indicating that, in some way, Mr Robinson was wrong and the sub-contract had not been agreed at the meeting on 19 June 2002. The only document is that of Mr Kelly of Tyco, dated the 19 July 2002, which indicated that the signing of the documents was simply a formality.

53. Accordingly, I conclude that the principal remaining area of negotiations, following the letter of award of 7 May, was the content of the CECA terms and the accompanying schedules and appendices. A revised version of the proposed terms was sent out by Fitzpatrick on 13 May and, save for the express exceptions noted in the letter of 6 June, those proposed terms were expressly accepted by the first paragraph of the Tyco letter of 6 June. On 19 June, there was a discussion, and an agreement reached, in relation to all the outstanding matters. A detailed contract had thus been agreed: indeed, on the face of the contemporaneous documents, it seems to me that no other conclusion is possible. The parties reached a basic agreement on 7 May and varied that basic agreement in the correspondence and discussions culminating in the meeting of the 19 June. The relevant terms of the sub-contract were those sent out by Mr Robinson on 20 June, because those were the terms that had been agreed.

54. It is convenient to deal here with a point taken by Mr Thomas QC to the effect that, because the parties were agreed that the sub-contract would eventually be signed and sealed as a deed, the discussions and agreement reached after the 7 May were, somehow, of no legal effect because there never was such a deed. I reject that submission, both as a matter of principle and as a matter of fact.

55. As a matter of principle, in accordance with the approach outlined in **Archital Luxfer,** the lack of formality in connection with a contract that has been both agreed and performed (as this one has), is irrelevant, unless it can be shown that, as a matter of fact, the parties did not intend to create legal relations other than by, in this case, the execution of a deed. It is clear that the parties had no such intention. The parties are agreed that there was a binding sub-contract agreed between them as at the 7 May 2002, so they are already agreed that they intended to create legal relations in the absence of a formal deed. Given such an agreement, if the parties also agreed to make variations and/or additions to the basic agreement of the 7 May (which I find that they did), then again, the fact that those variations/additions were not in a formal document does not prevent the sub-contract, as varied, from coming into being and having legal effect.

56. It is of course the case that the parties intended that the sub-contract would be reduced to a formal deed. As often happens in the construction industry, no such formal document was ever agreed because, within a few weeks of the detailed agreement recorded above, there were already significant disputes between the parties. I find that those disputes meant that Tyco had a clear commercial interest in not signing the deed. But the absence of a deed does not prevent the existence of the basic contract of the 7 May (a proposition which Tyco accept), and cannot in law prevent the variation of that basic agreement as a result of the discussions and agreement on 19 June.

57. Mr Thomas QC also took a related point that there was no binding agreement after 7 May because neither Mr Robinson nor Mr Ward had the authority to bind their respective companies during their discussions. That proposition was not made out on the facts. On the contrary, it was explained that both men were given the authority to negotiate the terms of this sub-contract, unless particular issues were expressly identified as being matters which had to be referred to more senior personnel. That was therefore the basis on which the terms of the sub-contract were negotiated. By 19 June, both the written and oral evidence made clear that Mr Robinson had the authority to reach the agreement that he did on that date. On the documents, so too did Mr Ward: see, by way of example, the clear terms of his e-mail of 29 May 2002, and my analysis of the particular authority vested in him at paragraph 30 above.

58. Accordingly, I reject the suggestion that the absence of a completed deed prevented the agreed and binding variations to the basic sub-contract agreed on 7 May from taking effect or having contractual force. I also reject the suggestion that, in some way, neither Mr Robinson nor Mr Ward had the authority to reach the subsequent agreement on the 19 June. On the contrary, I find on the facts that they both had the necessary authority to conclude the agreement that was reached.

F THE ORAL EVIDENCE

F-1 Fitzpatrick's Factual Evidence

59. Fitzpatrick's factual evidence was provided in witness statement form by Mr Nash, the Commercial Manager; Mr Carson, the Project Manager; Mr Davey, the Director of Procurement; and two statements from Mr Robinson, Fitzpatrick's Managing Surveyor. Each of these four men gave oral evidence. I mean no disrespect to them when I say that, in summary; their evidence was entirely in accordance with my interpretation of the contemporaneous documentation, set out in **Section E** above.

60. Obviously the most important of these witnesses was Mr Robinson. I consider that he gave detailed and careful evidence, particularly in his answers in cross-examination. I formed a very positive impression of him. I consider that he was honest and clear. He was patently a witness of truth. He denied absolutely, as did all of the other Fitzpatrick witnesses, that there was (or could have been) a separate meeting in advance of the main meeting on 24 April at

which the version of the CECA document, sent out by Tyco the afternoon before, was discussed in detail. Indeed, Mr Robinson explained that the detailed discussion alleged by Mr Ward could simply not have happened because, as at 24 April, he had not even opened the relevant e-mail from Tyco enclosing the terms proposed by Mr Pearson. In addition, there was evidence, which I accept, that Mr Robinson did not actually open the e-mail enclosing that version of the sub-contract until 13 May. That, of course, was also consistent with the fact that it was later on 13 May that he replied to Tyco on the question of the proposed sub-contract amendments.

61. I should also make mention of Mr Giles, a witness called on behalf of Tyco, who was present at the offices at Poplar High Street for a part of the morning of the 24 April. His evidence was consistent with Mr Ward attending one meeting, due to start sometime later than 10am. His evidence, therefore, was entirely consistent with the evidence of the Fitzpatrick witnesses.

F-2 The Evidence of Mr Ward

62. I am afraid that I did not find Mr Ward to be a satisfactory witness. I considered that, at times during his cross-examination, he was deliberately evasive. Moreover, on a number of occasions, his answers were explicable only on the basis that they advanced Tyco's new case, rather than because they were in accordance with what he knew had happened. For example, it was originally Mr Ward's case, as set out in his witness statement, that he did not reach agreement with Mr Robinson on 24 April, either as to the precedence of the Tyco tender, or on the percentage limit in clause 3(4); and yet, during his cross-examination, he appeared to suggest, on more than one occasion, that he had somehow reached agreement on both matters at the alleged 'first meeting'. I consider that this was because his oral evidence was, at least at times, conditioned by the necessities of Tyco's new case.

63. There was a wider problem affecting the credibility of Mr Ward's oral evidence. As previously noted, it was entirely reliant upon the alleged first meeting on 24 April. However, such a case was not made at any time prior to the amendments to the defence in December 2007. This is an extraordinary omission, given that this was a contract where, within weeks of the agreement of the terms, the parties were arguing about its terms, and indeed whether or not there was a binding sub-contract at all. Mr Ward himself wrote lengthy letters in which he advocated various positions on behalf of Tyco. Many of the points taken in those letters were, on any view, bad ones. Yet at no time during any of that correspondence did Mr Ward ever refer to the existence of the first meeting on 24 April, and the allegedly detailed agreement he had reached on that occasion with Mr Robinson, which is now crucial to Tyco's new case.

64. Still further, I consider that the credibility of Mr Ward's oral evidence now was significantly undermined by the fact that Tyco originally argued that there was no sub-contract between the parties at all. This was always a very difficult position to sustain, because of the exchange of correspondence on 7 May, but up to and beyond the commencement of these proceedings, that was Mr Ward's stance and that was Tyco's case. I consider that, in consequence, there is force in the suggestion made by Mr Livesey QC that, once Tyco accepted the inevitable, that there was a sub-contract between the parties, they have, to some extent, thrashed around trying to find a case which was consistent with the letter of the 7 May but which denied that the sub-contract was in the terms alleged by Fitzpatrick. I am confident that that is the explanation for the new case, and the oral evidence of Mr Ward.

65. For all those reasons, therefore, I am not inclined to accept the evidence of Mr Ward unless that evidence is either corroborated by the contemporaneous documentation, or by Mr Robinson or one of the other Fitzpatrick witnesses. Where there is an important difference of

recollection about what was said, and the documents do not help, I inevitably prefer the evidence of Mr Robinson.

G ANALYSIS OF TYCO'S NEW CASE

G-1 Introduction

66. It is Tyco's case that, at a meeting on 24 April attended only by Mr Ward and Mr Robinson, the parties reached agreement on a variety of the CECA terms. It is, I think, accepted that, even on this case, agreement was not reached either as to the precedence issue (the Tyco tender submission versus the Employer's Requirements) or the percentage limit in clause 3(4). Tyco contend that this agreement was what was referred to in the fourth and fifth bullet points of the award letter of the 7 May, namely the reference to the CECA form and the special standard terms and conditions "as reviewed by P Ward and I Robinson on 24 April 2002". It is also suggested that, by writing this letter in these terms, Fitzpatrick were accepting Mr Ward's proposals in relation to both precedence and the percentage limit in clause 3(4), despite the absence of any such agreement at the meeting on 24 April. Accordingly, on Tyco's new case, a detailed sub-contract was agreed on 7 May and everything that happened thereafter was irrelevant in law. It seems to me that, on a proper analysis of this case, it falls apart for a variety of reasons.

G-2 Supporting Evidence

67. The first difficulty with Tyco's new case is that it is unsupported by any credible evidence. I have already set out, in **Section F-2** above, my conclusions as to the lack of credibility inherent in Mr Ward's oral evidence. I should also make the point that, although other Tyco witnesses could have been called to support the new case (if it were right), none were, and the only other Tyco witness, Mr Giles, gave evidence that supported Fitzpatrick's version of events.

68. Just as important, however, is the absence of any reference to the first meeting of the 24 April, or the agreements allegedly reached on that occasion, in any subsequent document. Let us suppose, for a moment, that my firm impression of Mr Ward and the other oral evidence was wrong, and that there had indeed been a first meeting, and detailed agreement reached, on the 24 April. In such circumstances, the first thing that would have happened would have been a written confirmation, provided by Tyco to Fitzpatrick, of Fitzpatrick's agreement to so many of their proposed terms. There was no such confirmation. As I have already indicated, the only agreed record of a meeting on the 24 April is the review agenda, which contains a variety of matters which are wholly contrary to the new case which Tyco now seek to advance.

69. Further, adopting the same assumptions, what would Tyco's response have been to the letter of the 7 May in such circumstances? Tyco would immediately have replied to that letter, saying that there was no reference to the detailed agreement that had been reached as to the CECA form at the first meeting on 24 April, and would doubtless have taken the trouble to enclose the revised form in the terms which Mr Ward said had been agreed with Mr Robinson. Instead, the acceptance of the letter of award by Tyco was without any qualification whatsoever (see paragraph 25 above). Furthermore, if there had been such an agreement reached on the 24 April then, during the later e-mails and discussions of May and June 2002, one would have expected to see references to such a meeting and agreement liberally sprinkled throughout the exchanges. If there had been such an agreement, then Mr Ward would have become puzzled or angry at the attempts by Fitzpatrick to go back on what they had agreed at the first meeting on 24 April (by proposing different terms), and would have said so. Judging by the trenchant terms used by Mr Ward in his later correspondence, he would have been unafraid of making such a position crystal clear to Fitzpatrick. But in fact, there is no mention whatsoever in this correspondence either of the first meeting on 24 April

or, more importantly, the alleged agreements reached at that meeting. Instead, in May and June, Mr Ward negotiated the term of the sub-contract with Mr Robinson as if no such terms had already been agreed; the only possible conclusion is that this was because no such terms had already been agreed, because no such first meeting had ever taken place.

70. In essence, I consider that the contents of all the contemporaneous documents after the 24 April are contrary to, or at least inconsistent with, the notion that detailed agreement was reached on that date. Take for example the review agenda: on its face, that document is wholly inconsistent with the matters now alleged by Tyco as having been agreed and/or raised for subsequent agreement at the first meeting. For example, the review agenda made plain that only the rates and prices from the Tyco tender will be relevant, which is completely different to what Mr Ward said he discussed and agreed with Mr Robinson. Another example is the reference to the liquidated damages in the full sum of £6,335.62 per day, which is again wholly contrary to what Mr Ward said he and Mr Robinson had discussed.

71. Later, at the time of the letter of 7 May and thereafter, the documents proceeded on the basis that there was a narrowing of the points in issue, and those remaining matters were being debated and resolved. Not only was there no reference to any prior agreement, but the matters subsequently agreed were wholly inconsistent with the agreements which Mr Ward said he had reached at the first meeting. In short, there is no reliable evidence which supports the existence of a prior agreement; everything, including the contemporaneous documentation, is consistent with there having been no such agreement.

G-3 Tyco's Interpretation of the Letter of Award

72. Furthermore, I consider that Tyco's interpretation of the letter of award of 7 May is artificial, and also requires the court to make modifications and deletions to the words used. That is not an appropriate approach to contract interpretation.

73. The first bullet point makes plain that the work had to be carried out in accordance with the Employer's Requirements. No other interpretation of the words used is possible. Tyco argue that the work did not have to be carried out in accordance with the Employer's Requirements if the Tyco tender included for work which was non-compliant. I reject that argument in its entirety, given that there was no mention whatsoever of the Tyco tender in the letter of the 7 May 2002, let alone a suggestion that it might take precedence over the Employer's Requirements.

74. In addition, Tyco seek to rely on the fourth and fifth bullet points in the letter, and the reference to the matters reviewed on 24 April, to suggest that this was a reference to the first meeting, and thus a reference to the CECA form which, they say, was discussed by Mr Ward and Mr Robinson on that occasion. I reject that case for a number of reasons. First, as I have already found, there was no such meeting. Secondly, even as a matter of construction, I cannot accept that such a submission is right. I have already made the point that the CECA form was "to be sent", and that that must relate to something happening in the future, once the terms and conditions had been agreed. It cannot refer to something which had *already* been agreed. Furthermore, at the fifth bullet point, the reference to the special and standard terms and conditions is not a reference to terms and conditions which had been agreed, but terms and conditions which had been "reviewed", which was entirely consistent with the document that was entitled 'review agenda', and wholly contrary to Mr Ward's case that the terms had already been agreed. Furthermore, if there were any doubt about it, the special standard terms and conditions were going to be included in the formal sub-contract, which must be a reference back to the preceding bullet point, namely the document which was to be sent in the future. It was emphatically *not* something that was already in existence.

75. Ultimately, it comes to this: there is no reference in the letter of 7 May to the CECA sub-contract form having been discussed or agreed. Indeed, there was no such agreed amended

form in existence because, even on Mr Ward's case, he had just made manuscript alterations to one version of the form, which he had then retained: Mr Robinson did not have a copy of the alleged 'agreements' of 24 April. It simply stretches credibility too far to conclude that the parties were prepared to agree a major commercial contract on the basis of a detailed series of amendments to a standard form of sub-contract which had not, at that point, been sent from one party to another, but was merely reflected in Mr Ward's manuscript notes on his version of the CECA form, that had originally been sent to him by Mr Pearson.

G-4 The Matters Not Agreed

76. It is also important to note that, on Mr Ward's own evidence, two of the matters which are now seen as vital in this litigation, namely the alleged precedence of Tyco's tender over the Employer's Requirements, and the alleged percentage limit in clause 3(4), were expressly not agreed on 24 April. Mr Ward's statement concedes that, on both points, agreement had not been reached at that point. Therefore Mr Thomas QC is driven to argue that, in some way, bullet points four and five in the letter of award must be taken as an acceptance by Fitzpatrick of the alleged proposals made by Mr Ward at the alleged first meeting on 24 April. I consider that such a submission is unsustainable.

77. First, that is simply not what the letter says. If Tyco are right, and there were matters which had been raised at the first meeting on 24 April and not accepted by Fitzpatrick at that date, then those matters remained outstanding on 7 May, it being agreed that there were no discussions or meetings in between. There was nothing in the letter to say that those suggestions had somehow been accepted; on the contrary, the letter indicated that those were matters which remained to be agreed so that, once they were, the sub-contract conditions could be sent out recording all of the matters subsequently agreed between the parties.

78. Moreover, such a submission ignores what happened after the letter of 7 May 2002. Again, let us assume Mr Ward is right and the question of the Employer's Requirements taking precedence over the Tyco tender had not been agreed on 24 April. There was no reference to that matter at all in the letter of 7 May so, on the face of it, it remained outstanding. It was not something expressly raised by Tyco in their letter of 6 June. However, because they said that they wanted to incorporate their drawings and the training offered, Tyco did propose removing the words which limited the incorporation to "the rates and prices only" of the Tyco tender. As a matter of drafting, that proposed change meant that, if the precedence of the Employer's Requirements was to be maintained, an express rider had to be added to the effect that the Employer's Requirements took precedence over the tender. The evidence was unequivocal: this very rider was expressly agreed on 19 June. The parties' respective manuscript notes make that plain. Furthermore, after the amended documents were sent out on 20 June, with that provision clearly stated, Mr Ward never suggested that it had not been, or was not, agreed.

79. Accordingly, even if Mr Ward was right and the question of precedence was not agreed on 24 April, it is equally plain on the face of the contemporaneous documents (many of which he wrote) that it was subsequently agreed. There can therefore be no basis whatsoever for endeavouring to imply in the letter of award some sort of blanket acceptance of proposals which, even on Tyco's case, remained outstanding as at 7 May and were subsequently agreed – in very different form – in June.

G-5. Subsequent Correspondence/Meetings

80. The point made above about the precedence issue illustrates a wider difficulty with Tyco's new case. All that happened after the 7 May 2002 reveals, for the reasons which I have already given, a series of contract negotiations leading to the agreement on 19 June. The difficulty from Tyco's perspective with that analysis is that the agreement that was reached was contrary to the position they now want to adopt. Accordingly, they are driven, not only to

say (paragraphs 49-50 above) that important statements in their letters were completely erroneous, but that, effectively, everything that happened after 7 May was irrelevant. It is Tyco's case that there was a contract on 7 May 2002, to be interpreted in the convoluted way which I have described, such that everything that happened after 7 May was therefore irrelevant.

81. I consider that this interpretation is contrary to commercial commonsense. I have already indicated that, although there was a basic agreement on 7 May, many detailed matters remain to be agreed. I consider that that is what happened. There is no reason, in fact or in law, for the court to ignore those clear agreements and instead to rule that, in some way, everything after the 7 May is irrelevant from a contractual view point. Again I am bound to conclude that this submission had more to do with the necessity of Tyco's new case than any consideration of ordinary commercial negotiations. I reject the submission that, because there was a basic agreement on 7 May, the discussion and clear agreement on other matters thereafter is somehow irrelevant. On the contrary, for the reasons which I have given, it seems to me to hold the key to this case.

G-6. Summary

82. For all these various reasons, I consider that, on analysis, Tyco's new case is unsustainable. It is made by reference to one witness only, whose oral evidence is not only uncorroborated but, in my judgment, lacking credibility. It is contradicted by and/or wholly inconsistent with the contemporaneous documentation. It relies on an interpretation of the letter of award which is artificial and convoluted, and requires deletions and modifications to the words used. It suggests Fitzpatrick's acceptance of Tyco proposals to which no reference is made in the letter of 7 May and which, subsequently, were agreed in a completely different form. And it operates on the basis that the agreements clearly reached after the 7 May were somehow irrelevant. For all those reasons, I reject Tyco's new case on the form of the sub-contract.

H Answers to the Preliminary issues

H1: Issue 1

83. *Are the material terms of the Sub-Contract entered into by Fitzpatrick and Tyco on or about the 7 May 2002 those set out in paragraph 3 of the Particulars of Claim, or those set out in section 3 of the draft Amended Defence?*

84. Generally, I find that the material terms of the sub-contract are those set out in paragraph 3 of the Particulars of Claim. I make plain that the agreement of 7 May was a basic agreement only and that that was varied by the agreement reached between the parties on 19 June. The relevant sub-contract documents are those which were sent out by Mr Robinson on 20 June 2002.

H2: Issue 2

85. *Was the Sub-Contract varied alternatively first entered into on or about the 19 June 2002 as contended for by Fitzpatrick at paragraph 3.6 of the Particulars of Claim?*

86. The answer is that the sub-contract was varied by agreement on the 19 June 2002 for the reasons set out above.

H3: Issue 3a

87. *In particular:*

> *(a) which version of the CECA Form is incorporated into the Sub-Contract, either as part of the original contract based on the letter of offer of 7 May 2002 or by way of variation?*

88. The CECA form was the one sent out by Mr Robinson on 20 June 2002, because that reflected the final agreement he had reached the previous day with Mr Ward.

H4: Issue 3b

89. *Was it a term of the contract that Tyco's Quality Submission was to take precedence over the Employer's Requirements?*

90. The answer to this issue is plainly No. All of the documents emanating from Fitzpatrick, starting with the tender enquiry, made clear that the Employer's Requirements were the most important sub-contract document of all. This was reiterated in the letter of 7 May. Thereafter, the documents sent out on 13 May 2002 by Fitzpatrick to Tyco again made plain that the Employer's Requirements took precedence. No suggestion to the contrary was raised in Tyco's letter of 6 June. Indeed, the question of the Tyco tender only arose by a side-wind, as a result of the reference to the deletion of the words 'rates and prices only'. The manuscript notes prepared by both Mr Robinson and Mr Ward are plain that on 19 June the parties agreed that, for the avoidance of doubt, the Employer's Requirements would take precedence over everything else. There was no dissent from that agreement.

H5: Issue 3c

91. *Was Tyco obliged to produce 100% or only 65% design of all relevant packages in time for the Design Freeze on 6 August 2002?*

92. At the commencement of the hearing, Tyco accepted that they could not argue for 65%. In their closing submissions they suggested that their obligation was not necessarily to produce 100% by the set date because that percentage was not expressly referred to in the sub-contract. It was unclear what percentage, if any, they contended for. However, the contract made plain that, by the 6 August 2002, there had to be a complete submission of the design, which would suggest that, in the absence of any other contention, the right answer is 100%.

H6: Issue 3d

93. *Is Tyco's liability under the Sub-Contract in respect of Fitzpatrick's own liability under the Main Contract for liquidated damages subject to a cap of 10%, or 25%?*

94. The answer to this is 25%. That is what was agreed on 19 June and recorded in the documents sent out by Mr Robinson the following day, on the 20 June. There was no response from Tyco to suggest that that limit had not been agreed at 25%; indeed, a figure of £1,562.83 for liquidated damages (being 25% of the sum stated in the main contract) was expressly agreed.

I. Issue 3e: The Proper Interpretation of Clause 3(4)

I-1. Introduction

95. At the end of the main hearing of the preliminary issues on 19 March 2008, a potentially critical dispute emerged clearly between the parties for the first time. Tyco contended that, if (as I have) I concluded that there was a sub-contract between the parties which incorporated the form of contract sent out by Fitzpatrick on 20 June 2002, clause 3(4) of that contract operated so as to limit their total liability to Fitzpatrick for any claims for breach or non-performance (excluding liquidated damages) to 25% of the sub-contract value. This was said to be a critical point, given that Fitzpatrick claim many millions of pounds in damages as a result of what they contend was Tyco's poor performance of and failure to complete the sub-contract works. It was this discrete point which gave rise to the need for the further hearing on 22 April 2008. I have already provided to the parties my written answer to this dispute, dated 16 May 2008. My reasons for that answer are set out below.

96. I propose to set out the terms of clause 3(4) and outline in brief the arguments that have been advanced. Having identified some of the other sub-contract terms which I consider to be relevant to this issue, I then go on to deal with the factual background to the agreement of the particular words in clause 3(4), before setting out my conclusions as to its proper construction. I should reiterate my thanks to leading counsel for the succinct nature of their submissions on this potentially important point.

I-2 Clause 3(4)

97. Clause 3 of the CECA form of sub–contract is concerned with the sub- contractor's knowledge and obligations in respect of the main contract. Clause 3(2) obliges the sub-contractor to carry out, complete and maintain the sub-contract works so that no act or omission on his part will render the main contractor in breach of the main contract. It requires him to assume and perform the liabilities of the main contractor under the main contract, insofar as they relate to the sub-contract works. Clause 3(3) then sets out the wide-ranging indemnity provided by the sub-contractor to the main contractor in respect of every liability which the main contractor may have incurred "to any other person whatsoever".

98. Clause 3(4) in its un-amended form read as follows:

> "The Sub-Contractor hereby acknowledges that any breach by him of the Sub-Contract may result in the Contractor's committing breaches of and becoming liable in damages under the Main Contract and other contracts made by him in connection with the Main Works and may occasion further loss or expense to the Contractor in connection with the Main Works and all such damages loss and expense are hereby agreed to be within the contemplation of the parties as being probable results of any such breach by the Sub-Contractor".

99. It is plain that clause 3(4), in those terms, was designed to prevent the sub-contactor from arguing that a breach by him of the sub-contract (which gave rise to a liability on the part of the Main Contractor to a third party) was a loss which arose under the second limb of **Hadley v Baxendale,** and was not therefore within the contemplation of the parties at the time of entering into the sub-contract. In other words, clause 3(4), in its un-amended form, was designed to *widen* the sub-contractor's liability under the sub-contract, at least to ensure that the sub-contractor could not endeavour to limit that liability by relying on the argument that a particular head of loss claimed by the main contractor was outside the contemplation of the parties at the time that the contract was made. It was, therefore, a clause which dealt with one particular type of claim that might be made against the sub-contractor, and it was a provision in favour of the main contractor. It was the complete opposite of a provision seeking to limit or cap the sub-contractor's liability to the main contractor; much less a clause providing a blanket exclusion or limitation of the sub-contractor's liability for all claims that might be made against him.

100. It is also important to identify what was covered by clause 3(4) in its un-amended form. I consider that clause 3(4) is addressing liabilities incurred by the main contractor "under the Main Contract and other contracts made by him in connection with the Main Works". In other words, the clause is dealing with the main contractor's liability to a third party (whether the employer or another sub-contractor) and is designed to prevent the sub-contractor from arguing (under the second limb of **Hadley v Baxendale**) that it has no liability for losses under such a head. The reference to "further loss or expense to the Contractor" must mean 'further – or additional - to the liability in damages under the main contract and other sub-contracts made by the main contractor'. In other words, it was intended to cover the situation where the main contractor incurred a loss of his own which was parasitical or consequential upon the liability he incurred to the third party. Moreover, the words 'loss or expense' will, in the context of a construction or engineering contract such as this, naturally mean a delay-related loss, rather than anything else. I note that this part of the clause does not refer to damages.

101. In the present case, I have found that the contract incorporated a version of clause 3(4) which was amended by the parties. The amendment, however, comprised the addition of 4 ½ lines to the existing clause 3(4). Accordingly, the clause as agreed incorporated the words set out in paragraph 98 above, but then changed the final full stop to a comma and went on:

> "…….. up to a maximum of 25% of the Sub-Contract Value (exclusive of such figures contemplated). For the avoidance of doubt, the liquidated damages sum contained in the Main Contract, i.e. £6,335.62 per day will be replaced by £1,562.83 per day in the event that any calculation requires the inclusion of a liquidated damages amount."

I-3 The Respective Positions of The Parties

102. The parties are agreed that, if Tyco's breach of the sub-contract caused delay to the main contract, then Tyco would be liable for 25% of the amount stated in the main contract by way of liquidated damages of £6,335.62 per day. In other words, Tyco would only be liable to reimburse Fitzpatrick £1,562.83 per day in the event that they caused the delay to the Main Contract. For the avoidance of doubt, I accept Tyco's submission that the words "exclusive of such figures contemplated" is a reference to those liquidated damages figures. Thus there are two possible caps in the amended version of clause 3(4): the agreed cap of £1,562.83 on the liquidated damages that Fitzpatrick could claim (being 25% of the amount in the main contract); and the cap of 25% on "such damages, loss or expense…" What do those words encompass?

103. This is the principal remaining dispute between the parties. Tyco maintain that, if they were in breach of the sub-contract, so that their work was done badly and required extensive remedial work, they were only liable to pay Fitzpatrick a total of 25% of the sub-contract value. In other words, Tyco argue that the 25% was a complete cap on their liabilities under this sub-contract (howsoever arising) and that clause 3(4) was not limited to Fitzpatrick's third party liabilities. Fitzpatrick, on the other hand, say that clause 3(4) was designed to (and did only) relate to their liabilities to the employer and to the other sub-contractors. They maintain that the cap is irrelevant to Fitzpatrick's own claims for damages under the sub-contract as a result of Tyco's poor performance. In the alternative, Fitzpatrick say that, if the cap does extend to their own claims for damages for breach against Tyco, it only caps their claims under the second limb of **Hadley v Baxendale** and does not affect their claims for direct loss and damage pursuant to the first limb of **Hadley v Baxendale**.

I-4 Other Terms of the Standard Form

104. There are other terms of the sub-contract which are, in my judgment, relevant to this dispute. I have already referred to clauses 3(1)-3(3), which do not refer to any

purported cap.

105. Clause 6 was concerned with commencement and completion. Pursuant to clause 6(1), Tyco were obliged to commence the carrying out of the sub-contract works within 10 days of receipt of Fitzpatrick's written instructions to do so, and were obliged to proceed thereafter with due diligence and without any delay. There was an obligation to complete and for the works satisfactorily to pass any performance test or other final test prescribed in the final contract. Clause 6(2) contained relatively typical extension of time provisions. The parties made one small modification to the standard form at clause 6(2) but it is irrelevant for present purposes; other than that, the clause was as per the standard form.

106. Clause 7 obliged Tyco to comply "with all the instructions and decisions of the Employer's Representative and his assistants….irrespective of whether such instructions and decisions were validly given under the main contract." Clause 7(2) gave Fitzpatrick like powers to give instructions and decisions to Tyco and Tyco were again obliged to comply with them. There were no modifications to the standard form.

107. Clause 13 dealt with 'Outstanding Work and Defects'. Clause 13(1) obliged Tyco, if they completed the sub-contract works prior to the main contract works, to maintain this sub-contract work in the condition required by the main contract to the satisfaction of the Employer's Representative. They were expressly obliged to make good every defect and imperfection therein until substantial completion of the main works. Clause 13(2) obliged Tyco to maintain the sub-contract works after completion of the main works and to make good defects and imperfections in the same way as Fitzpatrick were liable to make good under the main contract. Again, the parties made no changes whatsoever to the standard wording of clause 13.

108. Clause 15 was concerned with payment. There were detailed provisions as to the valuation of the sub-contract work and Fitzpatrick's obligation to include within its main contract applications for payment the 'valid statement' provided by the sub-contractor, Tyco in relation to its own works. Clause 15(3)(b) provided that, subject to clauses 3 (4), and 10(3) and 17(3) Fitzpatrick were entitled to withhold or defer payment of all or part of any sums otherwise due in various circumstances listed in the clause. The standard form wording was not modified by the parties.

109. Clause 17 was concerned with Tyco's default and contained, at Clauses 17 (1) and (2), detailed provisions concerning determination. Clause 17 (3) was different. That provided:

> "The Contractor [Fitzpatrick] may in lieu of giving notice of determination under this Clause take part only of the Sub-Contract Works out of the hands of the Sub-Contractor [Tyco] and may by himself, his servants or agents carry out complete and maintain such part and in such event the Contractor may recover his reasonable costs of so doing from the Sub-Contractor, or deduct such cost from monies otherwise becoming due to the Sub-Contractor."

110. As with the other provisions which I have set out, Clause 17(3) was not the subject of any special amendments by the parties. In other words, all of these critical provisions of the CECA form were un-amended in any material respect when the contract was agreed in June 2002.

I-5 Factual Background

111. On any consideration of the factual background to the negotiations, there can be no doubt that the matter to which both sides ascribed importance in the context of clause 3(4) was the question of liquidated damages. It is true that, at the outset, Tyco sought an overall cap on liability in their tender. This can be seen, for example, at Volume B, Version 1

(30/11/01), page 6 of 25, which talks about a limit on liability not exceeding the sub-contract price. But it could not be said that this point was drawn plainly to Fitzpatrick's attention at that time, or featured prominently in the subsequent discussions and correspondence. Thus, the possibility of a cap was a point which, if it was to be expressly negotiated and agreed, had to arise specifically in discussions or correspondence. When it did, I am in no doubt that it arose in the context of the discussions about liquidated damages.

112. In support of my conclusion that, in the relevant period, the parties considered the amendment to clause 3(4) exclusively in the context of liquidated damages, I refer to the following:

(a) Contemporaneous Documents

Although Mr Pearson suggested it in his proposal of 23 April (paragraph 17 above), it is plain that, on any view, no cap of any sort had been agreed by the time of the letter of 7th May 2002. Thereafter, the documents focus exclusively on the issue of liquidated damages: see, for example, the first two paragraphs of the letter from Tyco of 6th June 2002, which are headed 'Clause 3(4)' and talk of nothing else but liquidated damages.

(b) Witness Statements

Paragraphs 46.5 and 75-79 of Mr Robinson's first statement, and paragraph 8 of his supplemental statement (all of which I accept, for the reasons given above) make clear that there was never any discussion about a cap on general damages, and that the discussions focussed on a possible cap on liquidated damages only. Mr Ward accepted at paragraph 103 of his statement that the clause 3(4) cap (which he maintained covered general damages) was not agreed on 24 April, and he was unable to say that it was ever discussed or agreed subsequently.

(c) Oral Evidence

Although Tyco refer to two passages of the oral evidence which, they say, supports the case that the cap discussions were about matters other than liquidated damages, the reference to Mr Robinson's passing use of the expression 'unliquidated damages' (repeated directly from the question he was asked) is of little weight; the clear impression I formed was that he meant to refer to liquidated damages, as per his statement and the contemporaneous documents. I note that the expression 'unliquidated damages' was not otherwise used in the correspondence or in the oral evidence. And Mr Ward's brief oral evidence on the topic simply made clear that he was repeating points that had been made to him by Mr Pearson, without fully understanding the terms he was using.

113. At one point during his oral submissions on 22 April, Mr Livesey QC, on behalf of Fitzpatrick, accepted that, despite the factual evidence, he could not say that clause 3(4) was limited to liquidated damages. However, towards the end of his submissions on that day, that was precisely the submission that he made.

114. In my judgment, although I have found that the clear focus of the discussions between the parties was on liquidated damages, I do not think that it would be right to construe clause 3(4) as relating only to liquidated damages. That is not what the words say: they are plainly intended to go wider than that, otherwise there would just be a reference to the £1,562.83. However, I do conclude that, because that was their focus, it indicates that both parties were looking at clause 3(4) as a clause which was concerned with Fitzpatrick's liabilities to others incurred as a result of Tyco's breach: in particular, Fitzpatrick's liability to pay liquidated damages to TFL under the main contract. There is nothing in any of the written material to

suggest that, in April or May, let alone June 2002, Tyco wanted or were making plain that they required the cap to apply, not only to Fitzpatrick's liabilities to the third parties, but also to such direct losses as Fitzpatrick themselves would suffer as a result of Tyco's breaches of the sub-contract. Had they done so, Mr Ward would have made that plain both in his letter of 6 June, and in the meeting that followed on 19 June. He did neither.

I-6 Primary Construction

115. In my judgment, for the reasons set out above, there are three important points for me to keep in mind when construing this home-made amendment to the CECA standard form. The first is the factual background, summarised above, and the failure on the part of Tyco in May and June 2002 to mention any requirement on their part for a general cap on all claims that might be made against them. The second is that, for the reasons which I have already outlined, clause 3(4) of the un-amended CECA form is concerned, not with damages generally, but with certain types of third party claims only, and whether such damages were "within the contemplation of the parties…"Any cap added to the clause by the parties has to be construed accordingly. Thirdly, given that Tyco now argue that this was a complete or blanket cap, it means that they see it as an exclusion or limitation of liability clause of the widest possible application. Thus, it is necessary to have regard to the well-known rule of construction that, in order for such an argument to succeed, the exclusion/limitation provision in question must be clear, and that any ambiguity or lack of clarity in the words used must be resolved against Tyco: see, for a recent example of this approach, the speech of Lord Bingham in **Dairy Containers Ltd v Tasman Orient Line CV** [2005] 1 WLR 215.

116. I have concluded that Clause 3(4), as amended by agreement between the parties, was seeking to impose a cap of 25% on any liabilities incurred by Fitzpatrick under the main contract and other sub-contracts made by Fitzpatrick, where such liabilities arose as a result of Tyco's breaches of the sub-contract, and where Fitzpatrick sought to pass on such liabilities to Tyco. In other words, I agree with Fitzpatrick's primary construction that the clause is concerned with third party liabilities, and not Tyco's ordinary liability to reimburse Fitzpatrick for the direct losses which Fitzpatrick themselves suffered as a result of Tyco's breaches of the sub-contract.

117. I reach that conclusion for a variety of reasons. First, for the reasons set out at paragraphs 98-100 above, I have concluded that clause 3(4), in its un-amended form, was concerned solely with Fitzpatrick's liabilities to third parties. The clause was originally designed to allow Fitzpatrick to make unfettered claims in such circumstances against Tyco. The amendments plainly limit the quantum of such claims to 25% of the sub-contract value. But the quantum cap does not alter the first part of the clause and does not mean that, in some way, that original limitation on the application of the clause was somehow removed. The agreement of a quantum cap for particular claims cannot affect, much less widen, the claims that the clause was designed to cover. The effect of the clause, as amended, was to impose a specific cap in relation to liquidated damages, which the parties expressly spelled out, and a 25% cap on claims made against Fitzpatrick by the employer or by another sub-contractor and passed on by Fitzpatrick to Tyco on the basis that they had suffered this particular loss and damage as a result of something which could be traced back to a breach of the sub-contract by Tyco.

118. The clause is concerned with the situation where, because of Tyco's breach, Fitzpatrick have become "liable in damages under the main contract and other contracts made by him in connection with the main works". It seems to me that those words are clear. I reject the contention that in some way the use of the words "further loss or expense to the contractor" somehow widens this provision out, to cover all damages claims which Fitzpatrick might want to make, whether arising through a third party liability or out of Fitzpatrick's own costs

and losses. That is not what the words provide for. Again, it should be noted that these words come from the original clause, and not the parties' subsequent amendments.

119. In any event, the reference to "further loss or expense" must mean "further" to Fitzpatrick's liability to the third party in damages under the main contract or under other sub-contracts. It is covering loss and expense which is parasitical or consequential upon the liability incurred by Fitzpatrick to a third party: see paragraph 100 above. In other words, if the occurrence of an event means that Fitzpatrick are liable to another sub-contractor in consequence of Tyco's breach, and their liability to that sub-contractor is £1m, then Tyco would be liable for that amount up to the cap. Tyco would also be liable for any further loss or expense caused to Fitzpatrick as a consequence of, say, any delay in sorting out that problem, because that would be "further loss or expense" in connection with the main works. The cap would apply to such loss and expense as well. But those words do not extend the cap beyond that situation. They do not, for example, extend the cap to Fitzpatrick's claims for damages arising as a result of rectifying defective works or completing unfinished works, because such claims were wholly outside the ambit of clause 3(4).

120. I am entirely satisfied that the cap at clause 3(4) was not intended to, and could not, limit Tyco's responsibility to carry out the sub-contract works in accordance with the sub-contract documents, or their direct liability to Fitzpatrick in damages if they did not do so. There is nothing in clause 3(4) which suggests that Tyco's basic liability to Fitzpatrick (which has nothing to do with any third party claim against Fitzpatrick) had been limited in this way. Moreover, such a conclusion is entirely in accordance with the evidence: after 7 May, Tyco never even sought the wide-ranging limitation of liability provision for which they now contend.

121. If I am wrong in my construction of Clause 3(4), then I would be driven to conclude that the words of the amendment are ambiguous, and that the attempt to use a provision, which originally sought to *widen* the sub-contactor's liability for certain types of claim, to try and *limit* the sub-contractor's liability for all and any claims made against him, has resulted in confusion and an absence of clarity. On that basis too, bearing in mind the approach which the court must adopt to unclear exclusion or limitation clauses as set out in paragraph 115 above, it would be necessary for me to decide this construction dispute against Tyco. The words of clause 3(4) are too unclear to allow it to operate to exclude Tyco's potential liability for millions of pounds, arising out of their alleged failure to do the sub-contract works properly or at all. Again, such a conclusion is entirely in accordance with the factual background, and in particular Tyco's failure even to mention in June 2002 that that was what they wanted to achieve.

122. Finally, in support of my conclusions at paragraphs 120 and/or paragraph 121 above, I should say that, in my view, the construction for which Tyco contend would be wholly incompatible with the other provisions of the CECA form which the parties have agreed. It is therefore not an interpretation which I should adopt. Pursuant to Clause 6, Tyco agreed to commence and complete the sub-contract works. That was an ongoing primary obligation. It would render the sub-contract unworkable if Tyco could argue that they were entitled to refuse to carry out any works at all, or do a small amount of slap-dash work, and then sit back, on the basis that their liability could never be more than 25% of the sub-contract value. Similarly, Tyco were obliged to comply with all instructions from or decisions by the employer's representatives and Fitzpatrick. If Tyco did some of the work in an exceedingly deficient manner, and refused to do the rest, they would be required to rectify that position. Their failure to do so would put them in breach of clause 7. Again there is nothing in clause 7 which would indicate that, in some way, their liability under clause 7 was limited to just 25% of the sub-contract value.

123. Similarly, clause 13 obliged Tyco not only to achieve substantial completion but to carry out outstanding work and rectify defects. Any failure to do so would be a breach of clause 13. Again, there is nothing in the words of clause 13 which suggests that Tyco could argue that they were not in breach of clause 13 because, for example, they had already been paid 75% of the sub-contract value and so could walk away from the remainder of the job with impunity. It would make a nonsense of these careful provisions if the reality was that Tyco did not have to comply with these obligations or, if they did, only in a way calculated to recover 75% of the sub-contract value.

124. A different problem would arise under clause 15 if Tyco are right and their liability to Fitzpatrick could never be more than 25% of the sub-contract value. How would that be achieved under this valuation provision? Pursuant to clause 15, Tyco's entitlement to regular valuations and payment was dependant upon performance and the value of the works properly completed. There is nothing in these provisions which would allow for a valuation with a maximum deduction of 25% of the sub-contract value, regardless of the quality of the work actually performed by Tyco. I am sure that the words of clause 3(4), seen in the context of the rest of the sub-contract, simply do not permit such an impractical construction of clause 15.

125. In many ways, the most important provision of the sub-contract that supports Fitzpatrick's construction of clause 3(4) is clause 17(3), which I understand was actually used by Fitzpatrick when they became dissatisfied with Tyco's performance. That allowed Fitzpatrick to take some of the sub-contract work away and to recover their reasonable costs of so doing from Tyco. If, in accordance with clause 17(3), Fitzpatrick took away work that cost them, say, 40% of the sub-contract value, to have that part of the work carried out by others, then they would be entitled, subject to the proviso of reasonableness, to recover those costs from Tyco under clause 17(3). I consider that there is nothing in clause 17(3) which limits that right. On Tyco's construction, the clause 3(4) cap would have to apply to clause 17(3), so that, in the example I have given, if all the remaining work was done by Tyco, they would be entitled to be paid 75% of the value of the sub-contract, even though 40% had been taken away from them. In my judgment, there is nothing within the clause which would support such a construction. I expressly reject the submission that clause 17(3) has to be read as if it were subject to the alleged cap in clause 3(4); there is nothing in the contract which makes that a mandatory or even sensible requirement.

I-7 Non-Feasance/Misfeasance

126. To be fair to Mr Thomas QC, he appreciated the difficulties with his interpretation of clause 3(4). Accordingly, during his oral submissions on the 22 April, he sought, for the first time, to draw a distinction between non-feasance and misfeasance that, he maintained, kept alive his construction. He agreed that the 25% cap could not apply in cases where there was non-feasance on the part of Tyco and that, if they had not carried out an element of the sub-contract works *at all*, then there was a failure of consideration and they were not entitled to be paid for that work. He said the cap would not apply to such unperformed works. However, he maintained that, where Tyco had done the work, even if they had done it badly, then that was a case of misfeasance, and was therefore caught by the general cap for which he contended in clause 3(4).

127. In many ways, this argument highlighted the uncommercial and impractical consequences of Tyco's argument as to the proper interpretation of clause 3(4). The distinction relied on finds no expression in clause 3(4). Furthermore, on a complex project like this, it will often be impossible to differentiate sensibly between incomplete and defective work. It would be unworkable to suggest, in relation to one significant part of the sub-contract works worth, say, £1 million that, if Tyco had not carried out any part of it, that was misfeasance, so that the cap did not apply; but that if Tyco had carried out one week's

worth of slap-dash work on that element of the work, then the complaints must be allegations of misfeasance, in respect of which the cap would apply. Furthermore, how would the sub-contract works be broken down in such a situation? How would it be possible to say that one element of the works had not been done at all, without first defining and agreeing the precise boundaries of each element of the sub-contract works?

128. I consider that it would be wholly impracticable for work of this kind to be divided up in the way suggested by Mr Thomas QC. I am in no doubt at all that such divisions never occurred to Mr Robinson and Mr Ward when they were negotiating these provisions. There can be no clear or proper way of differentiating between claims arising out of work badly carried out (which would be the subject of the cap) and work left incomplete (which would not be the subject of the cap). In the absence of any words within the clause itself, I reject any construction of clause 3(4) that makes it necessary. Therefore I consider that the examples noted above, where Tyco might choose to sit back and do little or nothing in relation to large elements of the sub-contract work, knowing that their maximum liability was 25% of the sub-contract value, are not an unfair way of testing the practical difficulties inherent in Tyco's submissions on the proper operation of clause 3(4).

129. For all these reasons, I prefer Fitzpatrick's submissions on the issue of construction. The cap of 25% did not apply to their direct claims for damages against Tyco, or their claims to be reimbursed their reasonable costs under clause 17(3). The cap would not affect, for instance, the claims identified at paragraphs 1.8.1 and 1.8.2 of Fitzpatrick's Submissions of 20 March 2008.

I-8 Fitzpatrick's Alternative Argument

130. As an alternative argument, Mr Livesey QC maintained that, if the cap in clause 3(4) did apply to Fitzpatrick's claims for their own losses, as opposed to being limited to claims by third parties and associated loss and expense, then it would only apply to claims made by Fitzpatrick for their own losses under the second limb of **Hadley and Baxendale**. In other words, he argued that the cap in clause 3(4) could not, on any view, extend to claims for direct loss under the first limb of **Hadley and Baxendale.**

131. It is of course unnecessary for me to give a view on this point since I have concluded that clause 3(4) did not impose a cap upon Fitzpatrick's own claims against Tyco for losses that they themselves had suffered. However, it seems to me that it would be helpful if I expressed a view on the alternative argument.

132. If I am wrong to accept Fitzpatrick's primary case, so that the cap in clause 3(4) does apply to Fitzpatrick's own claims for their losses as well as their liabilities to third parties, then I am in no doubt that the cap would apply only to those claims made under the second limb of **Hadley and Baxendale.**

133. The reason for that conclusion is because, for the reasons that I have given, clause 3(4) was, in its un-amended form, concerned with possible arguments under the second limb of **Hadley and Baxendale.** If I am wrong to find that it was confined to third party claims, there is nothing in the words utilised in the amended form which would cause me to conclude that the cap on Fitzpatrick's own claims went beyond those brought under the second limb.

134. Accordingly, if I am wrong as to my primary conclusion, I am in no doubt that the cap would only apply to Fitzpatrick's own claims under the second limb of **Hadley and Baxendale.** I note that, in Mr Thomas's clear submissions, he conceded that, if I was against his primary case (which I am) he accepted that the cap would indeed be limited to claims under the second limb of **Hadley v Baxendale.** Accordingly, even on this alternative interpretation, Fitzpatrick's claims for the costs that they themselves incurred in

completing/rectifying the sub-contract works, being claims for direct losses under the first limb, would not be capped.

I-9 Conclusions as to Clause 3(4)

135. For the reasons set out above, and as indicated to the parties on 16 May, I conclude that the cap in clause 3(4):

a) Is not limited to claims for liquidated damages;

b) Applies to all claims against Tyco in which Fitzpatrick seek to pass on their liability for damages to the employer under the main contract or to any other sub-contractor under any other sub-contract, where such liability has been caused by Tyco's breach of this sub-contract (i.e. third party claims);

c) Applies to any loss and expense incurred by Fitzpatrick which is 'further' to such third party claims (ie where the loss and expense is parasitical or consequential upon the third party claims). 'Loss and expense' means loss suffered or expense incurred as a result of delay or disruption;

d) Does *not* apply to any claims by Fitzpatrick against Tyco for damages arising out of Tyco's failure to carry out and complete the sub-contract works properly or at all;

e) Does *not* apply to any claim by Fitzpatrick to be reimbursed their reasonable costs under clause 17(3) of the sub-contract.