MR JUSTICE COULSON

Approved Judgment

Ruttle Plant Hire v. SSEFRA

Neutral Citation Number: [2008] EWHC 730 (TCC)

Case No: HT-06-22

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

St Dunstan's House

133-137 Fetter Lane

London EC4A 1HD

Date: 20 March 2008

Before:

MR. JUSTICE COULSON

- -

Between:

RUTTLE PLANT HIRE LIMITED **Cla**

- and -

THE SECRETARY OF STATE FOR ENVIRONMENT, FOOD AND RURAL AFFAIRS **Defe**

--No: 3--

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MR ANDREW SPINK QC and **MR ROBERT-JAN TEMMINK** (instructed by **Yates Barnes**) appeared on behalf of the **Claimant.**

MR JONATHAN ACTON DAVIS QC, MS KASSIE SMITH a nd **MS FIONA BANKS** (instructed by **Eversheds LLP**) appeared on behalf of the **Defendant**

Hearing Dates: 3, 4, 5, 10, and 11 March 2008

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Judgment

THE HONOURABLE MR. JUSTICE COULSON:

This is the Judgment in respect of the second round of preliminary issues in this case. It is, I think, Judgment Number 3 in the sequence.

CONTENTS :

A. INTRODUCTION

1. Classical Swine Fever ("CSF") is a highly contagious viral disease of pigs. On 8th August 2000, an outbreak of CSF was confirmed in East Anglia. Large numbers of pigs had to be slaughtered, both at the 16 farms where CSF was confirmed, and at a further 55 farms where it was suspected that the disease might have spread. All of these farms were subjected to a vigorous preliminary and secondary cleansing and disinfection process. By early 2001 the outbreak of CSF had been dealt with. Almost immediately, there was then a nationwide outbreak of foot and mouth decease ("FMD") where a number of the same cleansing and disinfection techniques had to be employed.

2. The defendant, whom I shall call DEFRA throughout this Judgment, was the government department responsible for dealing with these outbreaks. They are the successors in title to MAFF, the Ministry of Agriculture Fisheries and Food. In August 2001 DEFRA engaged the claimant, whom I shall call Ruttle, to provide plant, materials and labour to control the CSF outbreak and carry out the cleansing and disinfection process. Subsequently, DEFRA engaged Ruttle to provide the same services, albeit on a much larger scale, in respect of the FMD outbreak in 2001.

3. The preliminary issues with which this Judgment is concerned all relate to the CSF contract. However, on Ruttle's case, the FMD contract is of some considerable relevance and they rely on some of the rates for plant agreed under the FMD contract in their claims under the CSF contract. That is a point to which I return in greater detail in **section E** below.

4. Between August 2000 and early 2001, Ruttle made claims for interim payments under the CSF contract relying on the rates which had been set out in their faxes to DEFRA of August 2000. These were known as the first tranche of invoices. Later in 2001, there was a second tranche of invoices relating to work carried out from about February 2001 onwards. The total sum invoiced in these first two tranches of invoices was about £6.5 million. Of that, DEFRA paid about £4 million, so at that point the disputed sum was about £2.5 million.

5. In December 2004/January 2005 Ruttle embarked on a major re-invoicing exercise in respect of the CSF contract, echoing an approach first made in the second tranche of invoices referred to above. In these re-invoices, Ruttle maintained that their rates, as set out in the August 2000 faxes, had never been agreed and that, instead, they were entitled to be paid at the same rates which had subsequently been accepted in respect of the FMD contract. This necessitated a change in the rate for just about every item of plant, as well as changes to other rates too. These claims, known as the Revision A

invoices, increased the balance allegedly due to Ruttle to about £6 million. No further sums were paid by DEFRA. In January 2006, Ruttle commenced these proceedings.

6. At a hearing in December 2006 various preliminary issues were debated between the parties, including whether the August 2000 rates were the contract rates (DEFRA's case) or whether the appropriate rates were the FMD rates (Ruttle's case). These issues amounted to what Jackson J called "a formidable examination paper". In a judgment dated 19th December 2006 ([**2006] EWHC 3426 TCC**), handed down at the conclusion of the hearing, Jackson J provided answers to each of the issues and, amongst other things, found that DEFRA were correct to say that the appropriate rates were those in the August 2000 faxes. The learned judge expressly anticipated:

"... that the parties will now be in a position to close off the accounts on the CSF contract without further assistance from the Court ... it is unlikely in practice that any further trial will be required ...".

7. It quickly became apparent to Jackson J that this optimism was misplaced. Delays and disagreements between the parties meant that his judgment, delivered so promptly, was not finalized or the subject of an order of the court, until April 2007. Thereafter, Ruttle applied to amend their claims consequentially upon the judgment. Somewhat surprisingly, although they had lost a number of preliminary issues, Ruttle's amended claims, set out in a final account delivered in May 2007, came to the much higher sum of £16 million odd, including some newly pleaded claims for interest. In July 2007 (**[2007] EWHC 1773 TCC**), Jackson J granted permission to Ruttle to make those amendments, a decision which was subsequently upheld by the Court of Appeal (**[2007] EWCA (Civ) 1267** .

8. It is clear that by July 2007 Jackson J had become uncharacteristically frustrated with the parties' conduct of this litigation. In his judgment dealing with the amendments, he said:

"11. Having given judgment promptly at the end of the trial, I hoped and expected that the parties would respond by dealing with ancillary matters swiftly and efficiently. That expectation was not fulfilled. Over three months elapsed before the parties returned to Court to argue about outstanding costs issues. No less than five months elapsed before the claimant applied to make amendments, which are said to be consequential on the Preliminary Issues judgment.

12. The Technology and Construction Court endeavours to provide an efficient service to the business community, in particular by the prompt delivery of judgments. That process is not assisted if the parties or their lawyers then delay for months on end before dealing with consequential matters. ...

51. At the end of the hearing last December, I requested the lawyers to co-operate in drawing up an order to give effect to the Court's judgment. That process took over three months, which is not acceptable. ...

52. Finally, I turn to the future conduct of this litigation. It will not be appropriate for this Court to try any further preliminary or generic issues. All outstanding issues between the parties must be determined in a single trial. I think that the best way forward is for this Court to give directions for the future conduct of the litigation at a Case Management Conference in the near future. The arrangements for that Case Management Conference should be made promptly."

9. One of the important next steps envisaged by both parties was the service by DEFRA of a Scott Schedule setting out their response to the final account. Apparently there were significant difficulties with this document when it was served, which was large and bulky. Although I have only seen extracts from this Scott Schedule, I am told that it is very difficult to work out from that document what

DEFRA's case is on an invoice-by-invoice basis. In late 2007, partly as a result of the difficulties created by the Scott Schedule, the parties sought an order for the hearing of further preliminary issues and, by an order dated 11th December 2007, Ramsey J acceded to that request. He ordered that there be a trial of further preliminary issues; those are the issues with which this Judgment is concerned.

10. As a result of the comprehensive judgment of Jackson J, to which I have already referred, it is unnecessary for me to set out in any detail the background to the CSF contract or the key events that occurred during its operation. However, I do set out in **section B** below the contract documents, and Jackson J's specific findings as to those documents and the terms of the contract which they contain, many of which are directly relevant to the preliminary issues with which I have to deal. As previously noted, at **section C** below, I identify the preliminary issues with which I am concerned. At **section D** below, I make some general observations arising out of the criticisms made by each side of the manner in which the other has made or addressed these claims. I also make some general findings on the oral evidence adduced by each party. Then at **sections E, F and G** below I set out my analysis of, and answers to, each of the preliminary issues that remain in dispute.

11. For completeness I should also note that, since the commencement of these proceedings, DEFRA have made one further interim payment to Ruttle. That was in the sum of £2,535,379.73 and was paid recently, on 19th February 2008. Accordingly, on the face of the pleadings, a sum in excess of £13 million is in dispute between the parties, which is a much higher sum than when these proceedings commenced. I was told that possibly as much as £5 million of that is made up of the interest claims.

B. THE CSF CONTRACT

B.1 The Contract Documents

12. By the time of the CSF outbreak in August 2000, DEFRA and Ruttle had a long-standing commercial relationship relating to the emergency provision of plant, materials and labour by Ruttle. That relationship is evidenced by a letter from Ruttle to DEFRA dated 11th August 2000 which gave DEFRA a summary of the applicable plant rates over the preceding year.

13.
On 15th August 2000, immediately following the CSF outbreak, there was a meeting at DEFRA's offices in Bury St. Edmonds between Mr Carrol of Ruttle and Mr. Christie and Mr. Hurn of DEFRA. This is dealt with at paragraph 26 of the judgment of Jackson J. Before, during or after that meeting, a letter was typed up on DEFRA notepaper setting out the terms on which Ruttle would provide labour, materials and plant. This letter was signed by both parties. It indicated a labour rate of £14.35 an hour, with £35 per night subsistence when applicable. It indicated that a foreman would be charged at similar rates, but with subsistence at £40 per night. It set out various provisions as to overtime, with a premium rate of £3.50 per actual hour worked. The letter also dealt with hire rates and stated that the relevant hire rates would be “as CPA conditions to be notified". Mileage rates were also referred by way of the CPA conditions.

14.
This was known as the MAFF letter. At paragraph 278 of his judgment, Jackson J said that the letter recorded the labour rates which had been agreed on 15th August. He went on to find that, although the parties had not at this point agreed specific plant hire rates, they had agreed in principle that FCEC daywork rates would be charged. He concluded at paragraphs 279 to 280 that the parties had agreed:

"... that the rates to be notified would be the contractual rates unless MAFF raised any objection within a reasonable time after notification. Neither party expected any objection to be raised because those rates would be derived from the FCEC schedules."

15. In addition, there was a second letter dated 15th August, typed out on Ruttle notepaper this time, and again signed by both parties. This set out additional agreed terms governing third party liability and insurance. It was dealt with at paragraph 29 of the judgment of Jackson J. It is unnecessary for me to set out the terms of the letter. It was known as the Ruttle letter.

There was a third document relevant to the meeting on 15th August 2000. DEFRA had a detailed manual setting out how to deal with any outbreaks of animal diseases which might occur. It was and is called "Veterinary Instruction Procedures Emergency Rules", and was generally referred to as "VIPER". At paragraph 32 of his judgment Jackson J held that extracts from VIPER were handed over to Mr. Christie of Ruttle on 15th August. Those extracts included a passage entitled ‘Contractors' Charges’, which read as follows:

"Where a local contractor is employed, his services should be secured at the most economical rate. Contractors' charges are usually based on the cost of actual wages paid (including bonuses and time allowed for travelling but excluding subsistence and fares), together with an ‘on cost’ which is intended to cover national insurances and graduated pensions, third party and employers' liability and insurances, holiday and sick pay, training levy, redundancy payments, contributions, site supervision, hand tools and other small gear, protective clothing and office overheads and profits.

Charges for the hire of plant are normally based upon fixed inclusive rates, per hour or per day or per week. These charges do not attract the overheads payable on labour charges but they do attract a percentage charge for fuel and maintenance. Hire rates for most items of plant likely to be needed are set out in the Day Works Schedules of the Federation of Civil Engineering Contractors [FCEC].

Where materials are supplied by the contractor, he should charge these at cost price plus a small addition not exceeding 12.5% for overheads. Many contractors have undertaken work in the past and based their charges on the Day Works Schedules of the Federation of Civil Engineering Contractors. There is no objection to DVM concluding arrangements with local contractors who will carry out the work on the basis of these Schedules. However, the rates quoted in the Schedules must be taken as maximum rates the Ministry is prepared to pay. In many cases a small local firm should be able to carry out the work at rates lower than those laid down by the Federation since their overheads, degree of supervision and general service may be something less than that provided by the major contractors."

17. On 21st August Mr. O'Connor, Ruttle's commercial director, faxed DEFRA with a list of plant rates "for plant usage on the farms currently being worked on and any future premises instructed". The rates themselves were described in these terms at paragraph 36 of the judgment of Jackson J:

"36. The second page of this fax was headed 'Plant rates excluding drivers and/or operators'. On the lefthand side of this page there is a description of various items of plant. In the middle column of this page there is a rate set out either per hour or per day for each item of plant and on the right-hand side there is a column headed 'Reference'. The references given are to various sections of the FCEC schedules in order to show how the rate is derived. In one case there is a reference to a star rate. That is intended to be a reasonable rate fixed having regard to other rates set out in the FCEC schedules. In two instances there is reference to pro rata and then an item in FCEC. That is a rate which is put forward by way of extrapolation from the rates shown in the FCEC schedules."

18. At paragraph 281 of his judgment, Jackson J held that, by this fax, Mr. O'Connor was notifying DEFRA of FCEC rates. At paragraph 282 the learned judge made the following finding of fact:

"282. After receiving the 21st August plant list, Mr Hurn of MAFF compared it with the rates submitted by another contractor, BQP. Mr Hurn noted that the rates were very similar. He therefore concluded that those rates were in accordance with standard industry practice and were acceptable. In those circumstances Mr Hurn did not find it necessary to seek approval of those rates from anyone more senior. Neither Mr Hurn nor anyone else at MAFF indicated any objection to those rates either within a reasonable time or at all. Instead, MAFF continued to use plant supplied by Ruttle and to call off further plant as and when they needed it."

19. On 31st August Mr. O'Connor faxed DEFRA again, enclosing a first interim application for payment. He attached a schedule of plant rates which he said was "referenced to the FCEC schedule where applicable for interim purposes only." The second page of that fax was described at paragraph 38 of his judgment by Jackson J in the following terms:

"38. The second page of this fax again contains a list of plant types. This includes both the plant types listed previously and some further plant types which had not been mentioned in the earlier fax. In respect of each plant type a rate is shown and again in respect of each rate there is also given a reference to the FCEC schedules, where applicable, and in some instances either a star rate or a pro rata rate is shown. Towards the right-hand side of this schedule there is a column headed 'Deduct 35%' and to the right of that there is a column headed 'Proposed rate'. The entries in the column headed 'Proposed rate' are all 65% of the figures shown in the column which is headed 'Rate'. I shall refer to the second page of Mr O'Connor's fax dated 31st August as 'the 31st August plant list'."

20. It is important to note, as the learned judge had just pointed out, that the application for payment in both the first invoice (and all of the subsequent invoices) in the first tranche was claimed at 65% of the full rate. That is an important element of the dispute between the parties as to interest, which I deal with in **section G** below. The rates themselves referred to on the second page of that fax were described by Jackson J as being "derived from the FCEC schedules in the same way as before": see paragraph 284 of his judgment.

21. There were two other contract documents. One was the 1990 schedule of FCEC daywork rates updated in June 1992 which is where the rates to which I have already referred can be found. The other was the CPA conditions of hire referred to in the fax of 15th August 2000 (paragraph 13 above).

22. For the purposes of this second round of preliminary issues I consider that the following CPA conditions are relevant.

" **23. Commencement and termination of hire (Transport of Plant):**

(a) The hire period shall commence from the time when the plant leaves Owner's depot or place where last employed and shall continue until the plant is received back at the Owner's named depot or equal, but an allowance shall be made of not more than one day's hire charge each way for travelling time. If the plant be used on day of travelling full hire rates shall be paid for the period of use on that day. If more than one day be properly and unavoidably occupied in transporting the plant a hire charge at idle time rates shall be payable for such extra time, provided that where plant is hired for a total period of less than one week, the full hire rate shall be paid from the date of dispatch to the date of return to the Owner's named depot or equal.

(b) An allowance of not more than one day's travelling time shall be allowed when the plant is travelling to a site other than that specified in the Contract provided that:

(i) consent to such transfer has been given by the Owner under clause 16, and

(ii) the plant is moved by means other than that under its own power, and

(iii) the plant shall have been on the site specified in the Contract or on any other site to which consent to transfer has been given under clause 16 for a period of at least 14 days.

24. Notice of Termination of Contract

Where the period of hire is indeterminate or having been defined becomes indeterminate the Contract shall be determinable by seven days' notice in writing given by either party to the other (except in cases where the plant has been lost or damaged). In the event of the Hirer desiring to terminate the Contract and failing to give such notice, hire for the period of the seven days' notice shall be chargeable at the idle time rates in lieu. Notice given by the Hirer to the Owner's driver or operator shall not be deemed to constitute compliance with the provisions of this Clause.

25. Idle Time

When plant works for any time during a guaranteed minimum period, then the whole of that guaranteed minimum period should be charged as working time. If the plant is idle for the whole of a guaranteed minimum period the charge shall be two thirds of the hire rate. In any case no period less than one day should be reckoned as idle time. Where an "All-in" rate is charged, idle time is charged on the machine element only. A full rate will be charged for the operator.

31.
Transport

The Hirer shall pay the cost of and, if required by the Owner, arrange transport of the plant from the Owner's depot or equal to the site and return to named depot or equal on completion of the hire period.”

23. For the reasons which I have summarized above, Jackson J concluded that there was a binding agreement between the parties in the terms of the August faxes and that the agreed plant rates were those set out in those faxes of 21st and 31st August 2000. This was a conclusion contrary to Ruttle's pleaded case, which was to the effect that none of those rates had been agreed, and had been or should be superseded by the rates which were subsequently agreed in respect of the FMD contract.

B.2 The Other Findings of Jackson J

24. I have summarized above the contents of the contract documents and a number of the relevant findings of fact made by Jackson J in respect of those documents. Other relevant findings in the judgment of Jackson J are summarized below.

B.2.1 Clause 24

25. Jackson J was asked to consider the meaning of clause 24 of the CPA conditions (original issue 7). The issue arose because Ruttle were arguing that clause 24 provided a procedure, not only for terminating the entire contract, but also for terminating the hire of individual pieces of plant. DEFRA maintained the clause was relevant only to termination. In addition, at some point during the hearing,

Jackson J was asked to decide what would be reasonable notice for terminating the hire of individual pieces of plant.

26. The learned judge decided the basic issue in favour of DEFRA, and concluded that clause 24 did not provide a procedure for terminating the hire of individual pieces of plant in the case of a continuing contract: see paragraphs 302 and 303 of his judgment. As to what notice DEFRA was required to give in order to take individual pieces of plant off hire, he concluded that there was an implied term that DEFRA would give reasonable notice of off-hire: see paragraph 306 of his judgment. Thereafter, at paragraphs 307 to 308, he concluded that reasonable notice for terminating the hire of any individual piece of plant was seven days.

27. In consequence of this finding, Ruttle revisited their invoices and added a seven day off-hire claim in respect of every piece of plant used on the CSF contract. That claim was then included for the first time in their final account, presented in May 2007. It appears that, by that claim, Ruttle have sought to make repeated seven day off-hire charges in respect of the same piece of plant, whenever it returned to their main base, in Chorley in Lancashire, or was no longer the subject of a hire charge invoice. It is that new claim which gives rise to a number of the issues between the parties which I deal with in **section F** below.

B.2.2 Plant Not in Use

28. One of the issues which Jackson J had to resolve was whether Ruttle were entitled to charge DEFRA for plant in particular situations where the plant was on hire, but not being used. Those situations were addressed in Part 15 of his judgment and in particular at paragraph 330 thereof. They boiled down to three defined situations: (1) where plant was unused on site at an infected premises pending demobilization; (2) where plant had been removed from an infected premises and stored at another location pending demobilization and (3) where Ruttle had been instructed by DEFRA to remove the plant from site as recorded in DEFRA's records.

29. Ruttle claimed an entitlement to be paid the full rate in each of those situations unless and until DEFRA had given a seven day notice that the plant in question was coming off-hire. DEFRA argued that in those three situations Ruttle were not entitled to receive hire charges. Perhaps unsurprisingly, the learned judge determined that issue in favour of Ruttle. His conclusions are set out at paragraph 333 and 334 of his judgment.

30. At paragraphs 338 to 340 of his judgment, Jackson J then went on to address the three scenarios that I have briefly outlined above. At paragraph 340 he concluded that whenever the plant was on hire, even if it was not being used, and even if there was no labour there to use it, it was available for use by DEFRA, and therefore the full hire charge rate was payable.

B2.3 The 35%

31. As I have already noted, Ruttle had claimed in the first tranche of invoices at 65% at the August 2000 rates. Jackson J described that decision as "an oddity" in paragraph 287 of his judgment since, even if originally a decision to invoice at 65% could be justified because the rates had not formally been agreed at the outset, it was difficult to see why that procedure had been maintained. However, the learned judge held that this did not mean that the rates had not been agreed at the full rates set out in the August 2000 faxes.

32. Somewhat ironically, given the disputes as they have now been formulated before me, it was Ruttle who were relying on the failure to invoice at 35% as demonstrating that no rates had been

agreed at all, and it was DEFRA who were arguing that the invoicing at a discounted rate was done for cash flow purposes only. At all events that was a dispute which Jackson J decided in favour of DEFRA: see paragraph 287 of his judgment.

B.2.4 Star Rates

33. The final ruling of Jackson J which is directly relevant to the issues which I must decide concerned star rates. In this case that expression has been used to identify rates for particular items of plant which were not the subject of the faxes of August 2000 and which have not yet been agreed. There are a maximum now of eight such rates and I deal with each individually in **section E** below.

34. Having concluded that the FMD rates were not applicable, and that the rates in the August faxes were binding, Jackson J then invited the parties to address the question as to how rates were to be identified for pieces of plant which were not identified in those faxes.

35. That specific issue arose as a consequence of the original preliminary issues and had to be dealt with at the hearing before Jackson J in April 2007. By way of the order of the court, the learned judge formulated the agreed resolution of that issue in these terms:

"Where an item of plant does not feature in the lists of plant rates notified by the Claimant to the Defendant on either 21st or 31st August and does not have a rate specified in the FCEC 1992 schedules, then in those circumstances a reasonable rate should be agreed between the parties for that item of plant based upon industry custom and practice."

36. It should be noted that, in consequence of this, DEFRA have sought to calculate a reasonable rate by reference to market rates, together with percentage uplifts for overheads, profit and the like. Ruttle have not done such an exercise. Instead, they maintain that the rates which they have always claimed for these items remain the appropriate rates in all the circumstances. Since those are the rates which were subsequently used in the FMD contract, Ruttle's claim now has this slightly curious result: having lost the general argument as to the applicability of the FMD rates before Jackson J, they maintain before me an entitlement to exactly the same rates, albeit on a different basis.

C. THE PRELIMINARY ISSUES

C.1 Overview

37. I set out below each of the second round of preliminary issues. Where the parties have now agreed an answer to an issue I set out that answer. Where the answer is not agreed, I set out in very short order the nature of the dispute and the particular points made by each side.

38. It will be seen from this analysis that preliminary issues which remain in dispute can be broadly divided into three categories: the dispute about the identification of star rates (Issue 3) which I deal with at **section D** below; a variety of disputes about off-hire periods and charges (Issues 4, 5, 6, 9, 10 and 11) which I deal with in **section E** below; and issues as to interest (Issues 14, 15, 16 and 17, although only Issue 14 remains in substantial dispute) which I deal with in **section F** below.

C.2 The Preliminary Issues

Issue 1

39.
Issue 1 is in the following terms:

"1. In the absence of Labour, Plant and Materials Record Sheets provided to the Defendant by the Claimant, what alternative information is an adequate form of substantiating evidence in relation to charges made by the Claimant for labour, plant and materials? In the event of Labour, Plant and Materials Record Sheets not being available, where the Defendant can prove that there is contradictory or inconsistent alternative information available which would be an adequate form of substantiating evidence in relation to charges made by the Claimant for labour, plant and materials, how is that information to be treated?"

40.
The parties have agreed that each invoice has to be checked by reference to its supporting documentation. In the absence of Ruttle's Labour, Plant and Materials Record Sheets, the following categories of documentation have been agreed as being relevant for the purposes of substantiation:

(a) working foremen's logs;

(b) individual time sheets for labour and plant;

(c) manuscript diary sheets;

(d) job requests;

(e) materials invoices;

(f) original invoices for the provision of labour and plant with calculation sheets and time sheets;

(g) the claimant's plant list and tracking books;

(h) labour agency timesheets and invoices;

(i) files containing invoices received by the claimant from third parties for materials;

(j) petty cash receipts for materials and in relation to subsistence;

(k) hotel receipts/invoices for accommodation charges;

(l) petty cash receipts for subsistence;

(m) copy invoices and other receipts for accommodation and an accommodation record book; and

(n) DEFRA's own records, which it was contractually required to maintain and keep, and any other non-contractual documentation in the possession of DEFRA which supports the claimant's claims for payment.

Issue 2

41. Issue 2 is in the following terms:

"2. Was it a term of the contract between the parties that the Claimant would only charge the Defendant for subsistence where it could provide substantiating evidence? If so, what constitutes substantiating evidence in these circumstances?"

42. DEFRA’s position is that, save for issues of duplication to be determined in the upcoming valuation process, and specific issues of fact, such as the possibility that the accommodation booked does not show an overnight stay for a particular individual for which a claim is made, they accept that a Ruttle worker, or a worker sourced through Willow Construction, both being companies based in the north of

England, will generally have required accommodation. For their part, Ruttle accept that even where a worker sourced through Kelley Hunt, a firm based in East Anglia, did require accommodation, no subsistence claim would be made for such a worker and appropriate credit would be given where such charges had been made.

Issue 3

43. Issue 3 is in the following terms:

"3. Where items of plant not contained within the 'Schedule of Day Works carried out incidental to Contract Work' produced by FCEC dated 22nd January 1990 ('the FCEC schedule') and the parties have been unable to agree plant hire rates, what are the appropriate plant rates to be used for the Claimant to charge the Defendant?"

44. Ruttle seeks to be paid for the disputed items of plant at the rates for which they were subsequently paid under the FMD contract, the argument being that such rates are directly analogous and would therefore be the appropriate rates directed by industry custom and practice. By the close of the hearing a new issue had arisen as to whether or not the claimed rates had been invoiced and paid under the CSF contract itself, and must therefore be reasonable as a result. DEFRA put forward rates calculated by Mr. Rees and verified by their expert, Mr. Pontin, valued generally by reference to market rates, with an uplift for overheads and profit.

Issue 4

45. Issue 4 is in the following terms:

"4. Are those documents attached and listed at Schedule 1 sufficient to constitute notice to off-hire the particular items of plant mentioned in such documents so as to comply with the implied contractual term requiring the Defendant to give the Claimant seven days' notice to off-hire that item of plant?"

Schedule 1 consists of 16 documents emanating from DEFRA and falling into two types: licences for movement and job request forms.

46. Ruttle say that the documents in Schedule 1 did not and cannot amount to a contractual notice of off-hire. DEFRA contend that in all the circumstances those documents do constitute such notice. Although the issue is limited to the 16 documents in Schedule 1, it has been confirmed to me that there are no other documents said (by either party) to constitute notices of off-hire. Accordingly, if those notices do not constitute notice then, possibly save for an argument in relation to Issue 10(1), dealt with below, there were never any notices of off-hire supplied by DEFRA.

Issue 5

47. Issue 5 is in the following terms:

"5. As a matter of substantiation, where the Defendant cannot verify the off-hire charge for plant by reference to a plant identity number, what alternative form of evidence, if any, is required to establish the Claimant's right to recover the plant off-hire charge claimed."

48. DEFRA say that Ruttle must provide plant identity numbers for each item of plant or, failing that, evidence from their records which demonstrates precisely what item of plant is the subject of each specific claim. Ruttle say that this is ultimately a matter for the detailed valuation meetings which will, at some stage, take place between the parties. They urge me not to provide too prescriptive an answer to this issue.

Issue 6

49. Issue 6 is in the following terms:

"6. During the seven day notice period required to off-hire each item of plant, at what rate is the Claimant entitled to charge the Defendant?"

50. It seems to me that this is a pure point of construction of the terms of the contract as a whole. Ruttle claim that they are entitled to be paid at the full rate for the seven day period of off-hire. DEFRA contend that the appropriate rate is two-thirds of the full rate (the idle time rate) by reference to the express terms of the CPA conditions.

Issue 7

51. Issue 7 is in the following terms:

"7. Is the Claimant entitled to charge the Defendant for a seven day notice period when items of plant hired to the Defendant pursuant to the CSF contract were moved directly from a farm affected by CSF to a farm affected by the FMD outbreak?"

52. This issue arose out of a particular head of deduction raised by DEFRA. By their solicitor’s letter of 11th February 2008, DEFRA announced that they no longer pursued that head of deduction. This is therefore no longer an issue between the parties.

Issue 8

53. Issue 8 is in the following terms:

"8. Is the claimant entitled to claim through this re-re-amended charge in respect of:

(a) items of plant not previously charged in either the original invoices or A invoices for certain weeks;

(b) additional hours for items of plant already invoiced;

(c) additional days for items of plant already invoiced for specific days; and

(d) additional days for items of plant over the Christmas/New Year holiday period?"

54. The parties have agreed that these issues no longer require determination by the court. To the extent that they arise between the parties at all, it is agreed that they are matters for discussion at the valuation meetings to be held by the parties' representatives.

Issue 9

55. Issue 9 is in the following terms:

"Were the vehicles used to transport plant, labour and materials to site hired by the Defendant for the purposes of the contract?"

56.
This issue is in a slightly misleading form, because the dispute is actually concerned with whether the off-hire claim can apply to the transport as well as the plant itself. Ruttle contend that the vehicles used to transport plant, labour and materials to site were themselves hired plant and that, therefore, the seven day off-hire period applied to each vehicle so used. DEFRA contend that, pursuant to conditions 23 and 24 of the CPA, these vehicles were not hired plant and were certainly not hired in

the same way and on the same basis as the individual items of plant themselves. DEFRA therefore say that these vehicles do not attract any charge for an off-hire period.

Issue 10

57. Issue 10 is in the following terms:

"(1) In the event that the Defendant can establish that an item of plant was hired 'to do a specific task for a specific period', does the implied term that the Defendant should give seven days' notice to off-hire items of plant apply to such a hiring?

(2) If so, what constitutes hire to do a specific task for a specific period and what evidence does the Defendant have to provide in order to substantiate in the case of any individual items of plant: (a) that it was so hired and (b) what the predetermined period of hire was agreed by the parties to be?"

58. DEFRA argue that, where certain items of plant were hired for a particular purpose and for a particular period, Ruttle knew that the plant would automatically come off-hire when that purpose was completed or that period had expired, and that in such circumstances no seven day off-hire charge could be made. Ruttle say that, unless the hire of the plant had been expressly limited to purpose, time and period, the seven day off-hire charge could and should be made. They also maintain that, in any event, there were in fact never any such instructions of the sort now relied on by DEFRA.

Issue 11

59. Issue 11 is in the following terms:

“(1) In the event that the Defendant can establish that the Claimant chose to replace an item of plant with the same type of plant the following week, is the Claimant entitled to charge the Defendant a seven day off-hire charge?

(2) If the answer to issue 11(1) is ‘yes’, what substantiating evidence does the Defendant have to provide in relation to each such item of plant in order to establish the facts necessary thereby to disentitle the Claimant to recover the seven day off-hire charge made for that item of plant?"

60. The parties are now agreed that, if Ruttle chose to substitute one item of plant for another, or if the original piece of plant broke down and had to be replaced by another piece of plant, no off-hire charge could be made. There is little of substance remaining in this issue, but I address it generally in **section F** below.

Issue 12

61. Issue 12 is in the following terms:

"12. When is the due date for payment of the seven day off-hire charges?"

62. The parties have agreed that the due date for the payment of the seven day off-hire charges is 10th May 2007.

Issue 13

63. Issue 13 is in the following terms:

"13. If it be the case that the Claimant had a contractual obligation to provide the Defendant with substantiating evidence that working foremen were in fact working (as the Defendant maintains was

accepted by the claimant's solicitor by its letter dated 26th May 2005 -- see paragraph 39(c) of the amended defence and counterclaim) what constitutes substantiating evidence in these circumstances?"

64. The parties have agreed that this issue no longer requires determination by the court. DEFRA have said that, save for errors, duplication and other matters to be discussed at the valuation meetings, this head of deduction is no longer pursued.

Issue 14

65. Issue 14 identifies a number of disputes between the parties in respect of interest and in particular Ruttle's claim under the **Late Payments of Commercial Debts (Interest) Act 1998** or, as an alternative, section 35A of the **Supreme Court Act 1981.**

66. There are a wide range of disputes between the parties as to interest. Some of those disputes have only become apparent after the drafting and agreement of the preliminary issues. It is not possible to summarize these various disputes shortly; suffice to say that they range over pleading points, applicable statutory provisions, notices of claims, commencement dates of applicable periods and applicable rates of interest. To the extent that the court can resolve these points at this stage, they are dealt with in **section G** below.

Issue 15

67. Issue 15 is in the following terms:

"On what basis should interest under **The Late Payment of Commercial Debts (Interest) Act 1998** or, if applicable, section 35A of the **Supreme Court Act 1981,** be calculated? In particular should interest be calculated on an invoice-by-invoice basis or on a cumulative basis? If the latter, should this be calculated on a daily or monthly basis?"

68. The parties have agreed that interest should be calculated on an invoice-by-invoice basis.

Issue 16

69. Issue 16 is in the following terms:

"In the event that the Defendant can establish that it has by mistake paid too much in relation to any one invoice can the Defendant claim interest on the amount of the over-payment? If so, does interest run from the point of mistaken payment and what rate of interest should be applied?"

70. This issue no longer arises for determination. DEFRA have agreed to forego a claim for interest on the amount of any over-payment of a particular invoice, on the proviso that Ruttle is not entitled to claim any interest in relation to that amount which has been over-paid. That would appear to deal with that issue.

Issue 17

71. Issue 17 is in the following terms:

In relation to the interest claimed by the Claimant in respect of seven day off-hire charges should this be applied to the amount due which is exclusive of VAT since no VAT invoice has been issued?"

72. The parties have agreed that the interest claimed by Ruttle in respect of seven day off-hire charges should be applied to the amount due which is exclusive of VAT. That was helpfully set out in Ruttle's solicitors' letter of 22nd February 2008. That is therefore the agreed answer to Issue 17.

D. GENERAL OBSERVATIONS

D1. Overview

73. Before analysing the issues in detail it is, I think, necessary for me to set out some general observations on the disputes between the parties, by reference both to the documents and to the evidence. I do this principally because each party made strong criticisms of the other for their approach to this claim and sought to link those criticisms to the particular issues which I must determine, including (but not limited to) the issues relating to interest. It is therefore necessary for me to indicate at least generally my views on these wide-ranging criticisms.

D.2 The Time Taken To Get This Far

74. There can, I think, be no doubt that this claim has taken too long to reach its present condition. The work that is the subject matter of this claim was largely completed by Ruttle within about six months of August 2000, and all the ancillary works were finished by the early summer of 2001; yet, seven years later, the parties are still a very long way apart, still arguing about preliminary issues, and with the prospect of a final trial or other binding dispute resolution mechanism still some way off. Objectively, I do not believe that it can be disputed that that is too long a period for the presentation and resolution of a final account on a plant hire contract such as this.

75. There are doubtless a number of reasons for those delays. I am only aware of some of them. Furthermore, at least one of those reasons, namely the subsequent outbreak of FMD in 2001, which meant that, for 18 months or more, both sides quite reasonably failed to give the finalization of the CSF account any priority at all, cannot possibly amount to a criticism of either side. However, with hindsight, it seems unfortunate that Ruttle did not submit a final account in December 2004/January 2005, choosing instead to re-vamp the interim invoices. Furthermore, in the light of Jackson J's subsequent ruling, it can be seen that a considerable amount of time was lost as a result of Ruttle's mistaken decision to utilize the FMD rates in that re-vamping exercise. I can also see no obvious reason why the final account was not submitted until May 2007.

D.3 Valuation Meetings

76. In their closing submissions, Ruttle blamed DEFRA for the absence of round-table valuation meetings between the quantum teams on both sides. The suggestion is that DEFRA were deliberately obstructive in failing to agree to such meetings and that, had such meetings gone ahead, much of the account could have been agreed, and this preliminary issue hearing would not have been necessary. In response, DEFRA point to correspondence which they say, on a proper analysis, demonstrates that it was Ruttle who failed to agree to such meetings. In this connection, I was taken through a large amount of inter-solicitor correspondence relating, in particular, to two specific periods of time: the first being the period during 2005, after the revision of the invoices but before the commencement of proceedings; and the second relating to the period in 2007 before and after the judgment of Jackson J had been finalised and at the time of the production of the final account.

77. Perhaps unsurprisingly, my conclusion is that neither side was as proactive as they might have been in seeking to resolve some or all of these disputes by what I consider to be the obvious mechanism, namely, detailed ‘without prejudice’ meetings between the respective valuation teams. I

consider that many (if not most) of the disputes in this case concern rates and/or a limited number of issues of fact, rather than major matters of principle, and so were crying out for constructive co-operation between the parties. In this way, agreement could have been reached on straightforward matters such as rates, quantities of plant used and so on. This is not a case where there are now major issues of contract interpretation between the parties, nor are there any real disputes of law. Therefore, I do regard it as a matter of regret that there was not a greater effort by both sides to promote and participate in a much greater number of valuation meetings.

78. In the submissions made before me it was Ruttle's case, as I have indicated, that DEFRA positively obstructed the convening of such meetings. I do not consider that that specific submission has been made out on the face of the correspondence. Indeed, it is not unfair to say that, certainly in the correspondence that I have seen, Ruttle adopted a relatively hostile attitude towards the prospect of such meetings. I reject the suggestion that Ruttle has been driven to try these preliminary issues because of a refusal by DEFRA to participate in round-table valuation meetings. However, for the reasons that I have already given, that is not to say that DEFRA themselves have been always pushing for such meetings throughout the run-up to this hearing. As I have already indicated, I consider that both parties could be said to be at fault in relation to this aspect of the case.

D.4 The Burden of Proof

79. The finding that both sides failed to cooperate as they should have done in relation to valuation meetings is also relevant to another issue that surfaced during the closing submissions, namely the so-called burden of proof debate. This time it was a criticism by DEFRA that Ruttle's whole attitude was to the effect that, since they had provided their invoices and substantiation to DEFRA, it was therefore for DEFRA to indicate how and why those invoices and that substantiation were inadequate. There is no doubt that, in the inter-solicitor correspondence to which I have already referred, this stance was repeatedly taken by Ruttle's solicitors.

80. Up to a point, I consider that such an attitude on the part of Ruttle cannot be criticized too harshly. After all, the subject matter of this claim is not particularly complex. Ruttle were asked to supply plant, materials and labour and did so, albeit on an emergency and very ad hoc basis. They then invoiced for the plant, materials and labour which they had supplied, which invoices were backed up with time sheets, records and other material. In such circumstances I consider that, prima facie, it was for DEFRA to go through the invoices and substantiation and identify those matters on which they required further information or which they disputed. On the evidence it seems to me that DEFRA were often slow to do this, and compounded that problem by identifying generic grounds for complaint, some of which were not based on any factual evidence, rather than approaching the claim on an invoice-by-invoice basis.

81. However, that general observation can only go so far. It seems to me that, certainly in relation to the new claims of May 2007 (for example, the off-hire charge claim), DEFRA were entitled to a better-formulated and more carefully considered claim document than the one they received. For the reasons set out in greater detail in **section F** below, the Ruttle claim in respect of off-hire charges was not given the consideration when it was prepared that it should have been, and as a result it contained obvious errors. It seems to me that as Mr. O'Connor, Ruttle's commercial director, very fairly accepted, more work should have been done on that claim, which was, after all, almost seven years late when it was sent out to DEFRA. In those circumstances, therefore, I consider that Ruttle's overall attitude to their claims was unhelpful, and exacerbated the differences between the parties rather

than narrowed them. As I have indicated, much of that was accepted by Mr. O'Connor: see the passage in his evidence which I set out in paragraph 140 below.

82. For all these reasons I should say that I have a certain amount of sympathy for the conclusion reached by Jackson J last year, that no further preliminary issues should be ordered and that these parties should be required to compromise or fight out all the issues between them at one final trial. I am, and remain, concerned that, although my answers to this second round of preliminary issues will provide some assistance, many of the disputes between the parties are, in truth, fact-specific or matters for the valuation teams and, in particular, their respective quantity surveyors. Many of the matters in issue could and, I believe, should have been the subject of detailed discussion and agreement between the experts following disclosure of all relevant documentation. It is difficult not to suspect that both parties have belatedly realized the truth of that observation, which is why they are now seeking to blame each other for the delays and the state of the case.

D.5 Singular Features of Ruttle's Claims

83. In addition to those general matters, I consider that there are a number of singular features of Ruttle's claims as presented in their May 2007 final account about which I should comment in general, because they relate to the three specific areas of the preliminary issues which I have to determine.

84. First, in respect of star rates (**section E** below), I have already made the point that Ruttle are seeking to recover at the rates used in the FMD contract, which are the very rates which, albeit for different reasons, Jackson J said they could not recover. Ruttle have not made any attempt to justify the rates themselves by reference to how they were calculated at the time, or by a back-calculation now to demonstrate their reasonableness. I consider that there is at least a real possibility that this was a deliberate decision taken by Ruttle for commercial reasons.

85. Secondly, in respect of the off hire charges (**section F** below), as I pointed out during argument, the whole of Ruttle's case is essentially based on a fiction. As Ruttle well know, aside from the few documents that were identified in Schedule 1, there were never any notices of off-hire from DEFRA at the time, just as there were never any off hire charges levied by Ruttle in 2000 or 2001. The plant was simply used and then returned to Ruttle. The off-hire claim was first indicated by way of an amended Reply by reference to clause 24 of the CPA which, as I have said, was a proposition that failed before Jackson J. Now there is a claim for the seven day off-hire period in respect of every piece of plant which was not used continuously. That claim was put together by Mr. Simpson of Ruttle, who was working for Mr. O'Connor, and it has been demonstrated that a number of errors have been made in the formulation of that claim.

86. Thirdly, Ruttle are seeking to advance penal claims for interest at 8% over base, sometimes by reference to underlying claims which were not themselves made at the time, and going back over the lengthy period since this contract was first made in August 2000 (**section G** below). Many of those interest claims were only made when the final account was provided in May last year, and they make no allowance for, or acknowledgment of, the time that it has taken to reach this stage.

D.6 The Evidence

D.6.1 Ruttle's Factual Evidence

87. The only witness of fact called by Ruttle for the second round of preliminary issues was Mr. O'Connor, the commercial director. It was Mr. O'Connor who had put together the rates in the faxes of

August 2000. It was also Mr. O'Connor who had proposed the other star rates in the invoices. However, Mr. O'Connor was quite unable to say how those star rates had been calculated. He made no attempt to justify them as being, as least objectively, reasonable. It is also worth noting at this point that Mr. O'Connor did not seek in his witness statement, or in his oral evidence, to justify the specific star rates which are now in dispute on the ground that those specific star rates had been invoiced and/or paid under the CSF contract. However, by the time of the closing submissions, that had become Ruttle's primary case.

88. Mr. O'Connor was also responsible for the off-hire charges claim, although, as I have indicated, he delegated the task of preparation of that claim to Mr. Simpson. He accepted, as I have also indicated, that he had not checked that claim with any proper care. He was unable to deal with the details of the claim because he had not put it together himself.

D.6.2 DEFRA's Factual Evidence

89. DEFRA called a number of factual witnesses, including Messrs. Hurn and Potter, who dealt with the CSF outbreak on the ground. In addition there was a statement covering similar ground from Mr. Williams which was not the subject of cross-examination. Those witnesses gave general evidence about the way in which the contract work was performed, in respect of which there is and has never been any criticism of Ruttle whatsoever. Their evidence was perhaps of marginal relevance to these preliminary issues, save in respect of those issues concerned with the factual circumstances in which plant was or might have been off-hired. As we shall see in more detail under **section F.2** below, the evidence of these gentlemen was enough on its own to demonstrate that the documents relied on by DEFRA as notices of off-hire (Schedule 1), were, in truth, no such thing.

90. Mr. de Kock was not required to give oral evidence. He set out a number of different matters in his witness statement. One of the topics he dealt with concerned the differences between the CSF contract and the FMD contract. I deal with that point at **section E.2** below.

91. The other witness called by DEFRA was Mr. Rees, a consultant working with DEFRA to evaluate Ruttle's claims. He put together some of the alternative star rates for which DEFRA contend under Issue 3. It appeared from his evidence in cross-examination that this was not an exercise that he undertook until very recently. That evidence rather supported my view that, along with Ruttle, DEFRA have not always acted with the promptness that I would have expected in dealing with the detail of these claims.

D6.3 Expert Evidence

92. Both parties called expert evidence in relation to the star rates (Issue 3). Mr. Elliott, the claimant's expert, justified the star rates claimed solely on the grounds that they were the rates that were then used in the subsequent FMD contract. For reasons which are explored in greater detail in **sections E. 2 to E.4** below, I do not accept that very narrow premise. Mr. Elliott did not offer any other assistance to the court on the question of rates. He did not, for example, do a back-calculation to see whether or not the rates claimed could be said to be objectively reasonable.

93. Mr. Pontin, DEFRA's expert, was asked to consider whether Mr. Rees's rates were appropriate, and undertook a good deal of work and research himself on that topic. His original views were set out in the expert's joint statement, but he modified his views thereafter, and his altered conclusions were set out in a supplementary report produced during the hearing. It was unfortunate that this information was not provided until late on. However, for the reasons which I set out in greater detail

below, I consider that Mr. Pontin was at least endeavouring to identify what might be regarded as a reasonable rate which, save for his reference to the FMD contract, was an exercise that Mr. Elliott had conspicuously failed to undertake.

E. STAR RATES: ISSUE 3

E.1 Overview

94. There is a stark difference between the parties in respect of this issue. Ruttle seek to recover particular rates, some of which were charged and paid under the first tranche of invoices under the CSF contract, and all of which were subsequently incorporated into the FMD contract. As already noted they have not provided evidence to show how the rates were calculated at the time and no evidence to demonstrate by back-calculation that the rates were objectively reasonable. DEFRA contended that the reasonable rates for these items of plant were those which were calculated by Mr. Rees, as supported by their expert, Mr. Pontin. In addition, in Mr. Pontin's most recent exercise in his supplementary report of 3rd March, he concluded that some at least of the Ruttle rates can be described as reasonable.

95. I propose to deal with this issue by looking at the argument advanced by Ruttle in respect of the FMD contract (**section E2** below); the use of the rates under the CSF contract (**section E3** below); the wider considerations of reasonableness (**section E4** below); and finally by reference to the individual items of plant in use (**section E5** below).

E.2 The FMD Contract

96. My task is to give effect to Jackson J's ruling that there was an implied term of the CSF contract that the rates in question would be reasonable, based on industry custom and practice. The relevant time for the assessment must be August 2000, at the time when the CSF contract was made, a point made by Mr. Spink QC in his cross-examination, albeit on another topic. It was Ruttle's primary case in their written opening that, because the rates were used in the subsequent FMD contract, such usage demonstrated the reasonableness of the rates, and the necessary industry custom and practice. For the reasons set out below, I consider that the mere fact that the rates were used in a subsequent and different contract is of some, but very little, weight in assessing their reasonableness in respect of the CSF contract.

97. First there was no FMD contract in August 2000. The subsequent use of the rates of the FMD contract is therefore of little relevance to the assessment of the appropriate rates in August 2000. Secondly, the FMD contract was a different contract affecting the farming industry nationwide and involving a different scheme and scale of plant and labour. There were both similarities and differences with CSF which make the use of the rates in one contract of little assistance on the other.

98. Amongst the similarities between the contracts were: (a) they related to uncertain work that had to be carried out as a matter of great urgency; (b) they involved similar cleansing and disinfection techniques; (c) they therefore involved many similar types of plant.

99. Amongst the differences between the contracts were: (a) the CSF outbreak was confined to east Anglia, whilst the FMD outbreak was on an unprecedented scale and was nationwide; (b) the CSF outbreak involved 71 farms, whilst the FMD outbreak involved over 2000 farms; (c) the estimated costs of CSF have been put at £17 million, although it now seems plain to me that that figure cannot make allowance for the increases in Ruttle's claim. The estimated costs of FMD have been put at over £3 billion.

100. Accordingly, I consider that Mr. de Kock is right to say in his statement at paragraph 16 that the industry custom and practice for CSF was not comparable in size, scale, complexity and value to that for FMD.

101. Thirdly, and on a related point, I am not persuaded that the existence of one subsequent contract in respect of FMD creates the sort of "industry, custom and practice" which Ruttle advocated. On this point Mr. Elliott accepted that there was no industry for this type of one-off cleansing process:

"(Q) It is common ground I think that cleaning of premises following contamination by Swine Fever is not considered to be an industry?

(A) I would agree with that, yes.

(Q) Therefore in relation to that there is no industry custom and practice?

(A) Not for cleaning contaminated premises. I believe that is why the order asked us to consider what industry would be appropriate.

(Q) Yes, let us take it in stages. In relation to the cleaning of premises or in contamination by Classical Swine Fever, that is not considered to be an industry, therefore there is no custom and practice.

(A) Yes, I would not disagree with that.

(Q) Similarly in relation to the cleaning of premises following contamination by foot and mouth, again that is not considered to be an industry, do you agree?

(A) Yes, I would…"

Although Mr. Elliott said that there was a practice, by reference to the VIPER document, to which I have previously made reference, it seems to me that, as was demonstrated in his cross-examination, that document just took the reader back to the FCEC schedules. Those obviously do not contain these star rates, which is why they are disputed in the first place. In addition, I consider that Mr. Elliott has based his approach on a comparison with standard forms of ICE and JCT contracts, which are in reality very different to the FCEC and CPA contract conditions with which I am concerned.

102. For these reasons, I consider that the use of these rates in the subsequent FMD contract, whilst perhaps not entirely irrelevant on the question of reasonableness, is not of any great significance. In reaching that conclusion I therefore attach little weight to the short evidence put forward by Mr. Elliott, whose entire approach was to contend that the use of the rates on the subsequent FMD contract meant that this alone demonstrated their reasonableness.

E.3 The Rates Applied For/Paid Under the CSF Contract

103. Although it was not a matter to which Ruttle made more than a passing reference in opening, by the time of their closing submissions they were emphasizing the significance of the fact that, on their case, the disputed star rates were originally the subject of their first tranche of invoices under the CSF contract itself, and were indeed been paid at that time by DEFRA. This was not a point advocated or advanced by either Mr. O'Connor or by Mr. Elliott, and its late emphasis by Ruttle gave rise to a further dispute, after the conclusion of the oral hearing, about whether all the disputed rates had in fact been charged and paid in late 2000/early 2001.

104. I deal in **section E5** below with the individual disputes about whether a particular rate was or was not invoiced by Ruttle and/or paid by DEFRA in 2000-2001, but to the extent that the rate now

claimed was unequivocally invoiced and paid during that period I consider that, self-evidently, this must be relevant to reasonableness. If X pays Y £10 an hour which Y had claimed at the time for an item of plant then, even if much later X says that only £3 was reasonable, the fact of the claim for, and payment of, the £10 must be a relevant factor for the court when considering the reasonableness of the £10 rate.

105. On the other hand, it is not and cannot be suggested by Ruttle that the mere fact that the rates were invoiced and paid precludes DEFRA from arguing that the rates are, in truth, unreasonable. Such an argument would be untenable on the unusual facts of this case. Both parties have at different times, and for different reasons, sought to advance rates that were different to the rates invoiced in the first tranche of invoices and paid thereafter, and it would be wrong now to suggest that in some way either side were stuck with the rates claimed or paid seven and a half years ago.

106. In addition, it is clear beyond doubt that all the claims and all the payments were made on account. That is Ruttle's pleaded case in their re-re-amended statement of case; that was Mr. O'Connor's evidence in his witness statement provided in respect of the first round of preliminary issues before Jackson J; and that was what was expressly agreed between the parties in December 2000 (see Ruttle's letter of 6th December 2000), albeit that, at that point, the disputes between the parties were different to the disputes which now exist. Accordingly, the fact that a particular rate was claimed and paid in 2000-2001 is relevant to reasonableness but does not, as a matter of law, preclude either side from advocating a different rate as being reasonable.

E.4 The Wider Considerations of Reasonableness

107. The real question posed by Ruttle's case in closing is whether the fact that the rate was paid at the time, and utilized subsequently in the FMD contract, is sufficient on its own to demonstrate reasonableness. I do not believe that generally that would be sufficient. There may be all sorts of reasons why a rate might be invoiced and paid on account at the time of emergency works. It will not always be the case that such a rate is, on analysis, reasonable.

108. I consider that, generally, something more is required than mere usage. There should be evidence to demonstrate how the rate was arrived at or a back calculation, ideally provided by an independent expert, to demonstrate by reference to published daywork rates, hire rates, trade literature and the like, that the rate claimed is reasonable. As Mr. Pontin said in cross-examination, “if there is no analogous or pro rata rate you have to look at a fair rate and the custom and practice is that, in looking at a fair rate, one would look at a cost plus margin."

109. This conclusion, of course, creates something of a problem for Ruttle, because they provided no evidence to explain how any of the claimed rates were calculated at the time, or how and why it could now be said that those rates were objectively reasonable. I should note that it appears that Ruttle have been careful to redact from their disclosed documents any information that would give a clue as to what the plant might actually have been costing them. Whilst internal rates might well be of marginal relevance, it is clear that at least some of these items of plant were provided by sub-suppliers. In such circumstances, the actual cost to Ruttle of such plant seems to me to be of direct relevance to the issue of reasonableness. As to the absence of a back calculation, this was a matter which I took up with Mr. Elliott because it seemed to me that it was important. At the end of his cross-examination I asked him whether he had done any separate exercise to check that the rates claimed were reasonable. He confirmed that he had not. He said that he had only looked at the FMD contract "and identified a rate there".

110. I consider that this was surprising. I would have thought that a valuation expert would have provided such evidence, if for no other reason than to assist the court, by confirming that the historic rate could be objectively justified. In these circumstances, therefore, this was a significant omission, the more so because it means that the only evidence I have as to reasonableness (other than historic usage) comes from Mr. Rees and, in particular, Mr. Pontin.

111. Mr. Rees sought evidence of market rates for plant hire from published sources, and then allowed uplifts for overheads and profit. In the joint statement Mr. Pontin checked the calculations by reference to a similar methodology.

112. Clearly criticisms can be made of Mr. Rees's approach and, therefore, the approach adopted by Mr. Pontin in the joint expert statement. In particular, it could be said that the rates provided by this method did not (or at least might not) reflect the daywork nature of the rates in the FCEC schedules which were, after all, the agreed benchmark. Such daywork rates will often be considerably higher than a rate calculated solely by reference to market rate or cost, even with proper allowances for overheads and profit.

113. Mr. Pontin expressly accepted that possibility. Accordingly in his supplementary statement, dated 3rd March and produced during the hearing, he undertook an exercise which compared the FCEC rates to a series of known market rates that he had identified. FCEC rates were, on average, 133% of the market rates that he had found. He then used the 133% differential to check Mr. Rees's original calculations to see if the rates that he proposed properly reflected the FCEC dayworks uplift.

114. I consider that, in carrying out this further exercise, Mr. Pontin was endeavouring to assist the court in arriving at reasonable rates in a way which Mr. Elliott failed to do. Mr. Pontin cannot be criticized because he modified his views during the hearing; indeed, in appropriate circumstances, that is what an expert should do in order to ensure that his or her evidence is of the greatest assistance to the court. Neither can he be criticized because the 133% differential is inevitably a rough and ready calculation. Mr. Pontin's evidence made plain that he was doing his best in the absence of relevant material disclosed by Ruttle, and that in those circumstances this was the best available methodology available to him. I expressly accept that analysis.

115. For all those reasons, therefore, I have reached the following conclusions as to the reasonableness of the disputed rates generally:

(a) Where the star rate claimed was not clearly invoiced and paid under the CSF contract in 2000/2001, the only evidence to support the reasonableness of the rate was its subsequent use in the FMD contract. If a different rate has been calculated as being reasonable by Mr. Pontin, then I consider that Mr. Pontin's rate should be preferred because, in my judgment, that rate has been calculated in accordance with appropriate principles.

(b) Where the star rate was invoiced and paid in 2000/2001 under the CSF contract, then that will be a factor in demonstrating reasonableness. If Mr. Pontin has reached a conclusion based on a comparable figure then, even if Mr. Pontin's figure was a little lower than the rate claimed, I would conclude that, in the round, the rate originally invoiced and paid was reasonable and that Mr. Pontin's exercise had broadly demonstrated the reasonableness of that rate. If, on the other hand, Mr. Pontin calculated a significantly lower rate than the rate originally invoiced and paid then I would conclude that I should accept Mr. Pontin's rate, again because I consider that it has been calculated in accordance with appropriate principles.

E.5 The Individual Items of Plant

E.5.1 Caged Tank

116. Ruttle seek a rate in respect of this tank of £2.40 per hour. For the reasons explained in his statement, Mr. Rees has calculated a figure of £1.49 per day. Mr. Pontin has explained how and why he considers that the rate of £1.49 per day is reasonable. There is plainly a major difference between the parties on this rate.

117. The evidence as to precisely what rate Ruttle invoiced originally is muddled partly, as I have said, because this specific point was not picked up until part way through the hearing, so the relevant invoices were not the subject of any proper analysis. I have received written submissions after the hearing dealing with these documents. I have concluded that there is sufficient evidence to demonstrate that Ruttle did not originally seek the rate of £2.40 per hour, at least not consistently. At least two of their original invoices, 81824 and 80636, both received by DEFRA in December 2000, apparently sought a rate of £1.56 per day. Those invoices were 65% of the full rate, and if 35% is added to £1.56, a rate of £2.40 per day is produced. Thus it appears that, in relation to those two invoices, there was an intention to claim £2.40 per day and that figure subsequently became £2.40 per hour. It is now suggested by Ruttle that this was an error.

118. There are other invoices with different rates and those rates are higher. In my judgment, all of the different invoices and rates referred to me from the first tranche of invoices merely demonstrate that no real weight can be attached to the rates invoiced in 2000 for the caged tank. The evidence therefore shows that this was not an item where Ruttle can point unequivocally and consistently to rates of claim and payment to demonstrate reasonableness. On the contrary, my analysis of the history set out above makes it clear that, at least potentially, the rate is unreasonable on the face of the invoices, because it was claimed per day and then became an hourly rate, without explanation.

119. Accordingly, I conclude that the only reliable evidence as to reasonableness is the detailed calculation done by Mr. Rees which is, on this item, supported by Mr. Pontin. I have explained why I prefer Mr. Pontin's analysis. In those circumstances I conclude on the evidence before me that a reasonable rate for the caged tank was £1.49 per day.

E5.2 The Air Building

120. It appears that the air building was originally invoiced and paid at £75 per day. That is the rate which later found its way into the FMD contract. Mr. Rees has done a calculation which produces a figure of £31.13 per week. At paragraphs 2.4.30 to 2.4.39 of the expert's joint statement, Mr. Pontin has considered the rates and done a considerable amount of research with suppliers of such buildings. On his calculations, he has concluded that the rate of £31.13 per week is generous to Ruttle.

121. There is patently a huge difference between the respective rates contended for. In such circumstances, notwithstanding that the £75 per day was invoiced and paid originally, I do not accept that the rate is reasonable. In accordance with the principles and approach noted at paragraph 115 above, I consider that a reasonable rate must be the rate identified by Mr. Rees and supported by Mr. Pontin at £31.13 per week. In the absence of any attempt to support or justify the rate of £75 per day, other than its historic usage, I do not consider that it will be appropriate to value Ruttle’s claim at that rate.

122. I should add two further points on this particular rate, one relating to the item itself and one of more general application. Mr. Pontin observed during his oral evidence that this was such a one-off

item that Ruttle would have been obliged to obtain the air building from a sub-supplier. They would not have such a building in their own inventory. As a result, Mr. Pontin said, there must be records of what the supply of this building actually cost Ruttle. No such records have been provided. I consider that, on the basis of Mr. Pontin's evidence, it is not unfair to infer that again these records have not been disclosed because they would identify a rate that was less, probably considerably less, than the £75 a day claimed.

123. The point of wider application can be discerned from one of Mr. Pontin's answers in cross-examination about his approach. Although it related to this specific rate, it seems to me that it is of wider application and it is a passage of evidence which I expressly accept. He said:

"The question that has been put to me is effectively which star rate I prefer. To see which star rate I prefer I am going to have to look and see if I can find the evidence that backs it up and the methodology that was actually used in the circumstances. That was not provided. Alternatively I will have a look and see if I can pro rata. I could not do that. Alternatively, I look in the market to see if I can find someone else who hires a similar building; and I was not even able to be told what the building looked like. In the absence of all that, I think it is perfectly fair, it is what quantity surveyors do, you will go out and try and find a rate and you will work it back and see whether the rate being proposed is fair and reasonable. That was the task that was set to me."

E.5.3 Hard Standing

124. It is agreed that no rate is applicable to the hard standing because it is not plant. When cross-examined, Mr. O'Connor agreed that it had been recovered elsewhere, but that can be checked during the valuation assessment to which I have already referred. It is therefore unnecessary for me to consider this item further.

E.5.4 Herras Fencing

125. The dispute between the parties is modest. Ruttle proposed a rate of £3.50 per week per panel and Mr. Rees proposed a rate of £3.17 per week per panel. It appears that £3.50 per week per panel was both invoiced and paid at the time. Because of the small difference I would be inclined, in accordance with the principles noted in paragraph 115 above, to find that the appropriate rate was the £3.50 claimed by Ruttle. In addition, although Mr. Pontin originally concluded that he preferred Mr. Rees's rate, his subsequent work on the FCEC differential led him to conclude that Ruttle's rate was to be preferred. That is a further reason why I adopt the rate of £3.50 per panel per week.

E5.5 Plasterer's Lights

126. Ruttle claimed a rate of £2.45 per hour. Mr. Rees proposed a rate of £1.38 per hour. There is, therefore, some difference between the parties, although it is not of the order of the difference in respect of the caged tank or the air building. Moreover, it appears that the £2.45 per hour was the rate at which this plant was both invoiced and paid under the CSF contract. In addition, I again note that, although Mr. Pontin originally said that he preferred Mr. Rees's calculation, his further work on the FCEC differential during the hearing led him to conclude that Ruttle's claimed rate was reasonable. For the same reasons as noted in paragraph 125 above, I consider that the appropriate rate for the plaster's lights is the claimed rate of £2.45 per hour.

E.5.6 Lighting Tower

127. Ruttle claim a rate of £1.79 per hour. Mr. Rees calculated a rate of £1.23 per hour. The difference is therefore relatively modest. The £1.79 was the rate at which this plant was originally invoiced and paid. In addition, not only did Mr. Pontin say originally that he preferred Mr. Rees's rate, he remained of that view when giving oral evidence. He explained that, even adding 133% to the market rate that he had been able to obtain, it still resulted in a figure of £0.88 per hour which was lower than that proposed by Mr. Rees.

128. In those circumstances, whilst the difference is relatively modest and the claimed rate was that which was originally invoiced and paid, I consider that, because the evidence shows that the rate calculated by Mr. Rees at £1.23 per hour was generous to Ruttle, the appropriate rate in respect of the lighting tower ought to be that rate of £1.23 per hour.

E5.7 Halogen Link Light

129. There is a considerable difference between the parties relating to the rate for this item of plant. Ruttle claim a rate of £3.60 per hour; Mr. Rees calculates a rate of £0.23 per hour.

130. Again, although the position is muddled, there is some evidence that the link lights were not originally invoiced and paid at the rate Ruttle now claim. The evidence suggests that the rate claimed in the original invoice dated 30th October 2000 was £1.45 per hour. Although that was subsequently increased to £3.60 per hour in invoices of January 2001 and March 2002, I consider that that increase merely demonstrated that Ruttle themselves were not clear precisely what they should charge for this item of plant. Again, in the subsequent submissions that I received, it was suggested that the original claim at £1.45 per hour was an error. In all those circumstances, I do not think that any real weight can be given to the historical invoices/payments.

131. I do not consider that, on the evidence, it is possible to find that £3.60 per hour is a reasonable charge. The fact that it appears in later invoices, and was then the rate used in the FMD contract, does not of itself demonstrate reasonableness for the reasons that I have given, and when set against the calculation done by Mr. Rees, which produces a figure of just £0.23 per hour, I consider that it shows that the rate of £3.60 is unreasonable.

132. However, the matter does not end there. Mr. Pontin has done a more reliable calculation in his supplementary report of 3rd March. That demonstrates that a reasonable rate would be £0.42 per hour. Having said that, in my judgment, Mr. Pontin has adopted a fair and reasonable approach to the question of figures, particularly in respect of the FCEC differential, it does not seem to me that it would be appropriate to ignore the fact that he has produced a rate which is almost twice that of Mr. Rees, even if it is far below the amount claimed by Ruttle.

133. For those reasons, therefore, in respect of the halogen link light, I consider that a reasonable rate would be the rate of £0.42 per hour, being the rate calculated by Mr. Pontin and identified in the document D2 produced during the hearing.

E.6 Conclusions

134. For the reasons set out above, the appropriate star rates remaining in dispute are those identified in **section E.5** above. That is the answer to Issue 3.

F. OFF-HIRE CHARGES

F.1 Overview

135. Before addressing the individual issues in respect of the off-hire claims it is, I think, important to consider what Ruttle are claiming and why.

136. When Jackson J came to address the first round of preliminary issues there was no fully pleaded claim for off-hire charges. At that point, there was simply an intimation that a claim would be made for off-hire charges, by reference to clause 24. That claim failed: Jackson J held that there was an implied term that DEFRA would give notice of off-hire and that the relevant notice period was seven days.

137. Contrary to the submission of Mr. Spink QC, I do not consider that Jackson J made any finding as to the appropriate rate to be paid during that seven day period. Although I have set out some of his findings in Part 15 of his judgment, I have emphasized that those findings were all concerned with plant which was on-hire and thus available to DEFRA should they require to use it, which is a very different sort of claim to the present claim, which presupposes that the plant was off-hire, and therefore no longer available to DEFRA.

138. The first question is whether DEFRA ever gave any notices to off-hire the plant. That is dealt with in greater detail in **section F.2** below but, for the reasons noted there, I reject DEFRA's case that they gave any such notices. Furthermore, such a finding is entirely consistent with the basic assumption behind Ruttle's claim, because that claim presupposes that no such notices were ever given.

139. We know that this was the basis of Ruttle’s claim because, amongst other things, it was confirmed by Mr. O'Connor during his cross-examination. He said that, following the judgment of Jackson J, Ruttle:

"... went back and went through the invoices and tracked the items of plant and where it came to an end it was not invoiced any more, we added the seven days".

In addition Mr. O'Connor confirmed that, if plant had been taken on and off hire during the period of the outbreak, the seven day off-hire charge would have been levied each time the item of plant was off-hired, even if the period of off-hire had been for a short time, such as a week.

140. Accordingly, Ruttle's claim now is a somewhat formulaic exercise, where a seven day hire charge has been added in respect of each piece of plant that was no longer invoiced as being on-hire. For the reasons previously outlined, I am not satisfied that the claim has been fully checked or carefully prepared. On that point I should refer to Mr. O'Connor's evidence on one specific example that was put to him:

"(Q) So what happened is, because the PIN number was missing from the second invoice we looked at, you have claimed a seven day off-hire at the end of the week beginning 27th August, although the piece of plant carried on working in the succeeding week.

(A) That would appear to be the case, yes.

(Q) And you are not entitled to do that, are you?

(A) No.

(Q) So a credit will be given for that.

(Judge) On whom does the burden lie? Is it for the defendant to go through all of this detail to demonstrate that the claim is incorrect?

(A) No. I think we probably should have checked it a bit more carefully before it was submitted. I have to admit that.

(Judge) Because my understanding is, on your evidence, nobody checked it,

(A) No, no.

(Q) You gave it to Mr. Simpson and said ‘over to you’ and Mr. Simpson sent it off.

(A) Yes. It was probably remiss of me not to have checked it. I must apologize for that."

F.2 Notices of Off-Hire (Issue 4)

141. I accept Mr. Spink QC's submission that, in order to trigger the seven day off-hire period, the notice had to be in writing. It had to be sent from DEFRA to Ruttle, and it had to be a clear and unambiguous notice of off-hire of a particular piece of plant. Despite the fact that there were thousands of pieces of plant in use on the CSF contract, DEFRA have only been able to come up with 16 documents which they say qualified as notices at all. That of itself demonstrates that notices of off-hire were not, as a rule, provided by DEFRA to Ruttle.

142. The documents relied on by DEFRA fall into two categories: the job request form ("JRF") and the licences for movement ("LFM"). As to the JRF, Mr. Hurn described them as being instructions to Ruttle which covered anything that might be needed to be done. It was clear that they were not notices of off-hire because it was unclear from the JRF where the plant was going to and what it was being asked to go on to do. Mr. Hurn accepted that, in the absence of clear words, such instructions did not amount to notices of off-hire.

143. As to the LFM, Mr. Hurn said that they were to identify the plant that was permitted to move off an affected farm. Again, it seems to me clear that the LFM was not (and could not be) a notice of off-hire, because the plant would leave one farm but might go straight to another and, therefore, remain on hire. Mr. Hurn also accepted that these documents were not instructions to Ruttle at all.

144. On that evidence alone, therefore, it seems to me that the documents relied on by DEFRA in their pleadings were not notices of off-hire. When the items of plant were directed to go back to the headquarters of Ruttle, or to their sub- suppliers, it may be that the piece of plant in question was being off-hired, but it does not follow from the documents that that was always what was going to happen. Therefore I accept Ruttle's case that there were no valid notices of off-hire.

145. For these reasons, I consider that the answer to Issue 4 is No. The documents attached and listed at Schedule 1 were not sufficient to constitute notice to off-hire the particular items of plant mentioned in such documents, so as to comply with the implied contractual term.

F.3. Plant Identity Numbers (Issue 5)

146. It seems clear that this issue arises because the Ruttle claim for off-hire charges was not carefully analyzed before it was presented, and has therefore included claims for items of plant which were wrongly assumed to have been off-hired, but which were in fact continuing to be hired by DEFRA. The question of the plant identity numbers has therefore arisen as a result of the problems that the parties have had in seeking to identify particular items of plant and tracing their usage through the contract. The definitive resolution of this problem would, of course, involve the provision of plant identity numbers in respect of each item of plant, so that that item of plant could be so traced.

147. The absence of a comprehensive record of plant identity numbers has meant that the claim for off-hire charges, presented in the manner outlined by Mr. O'Connor, has been demonstrated to contain identification errors. An example was taken in respect of cherry-pickers. Although the claim for off-hire charges assumed that there were as many as ten different cherry-pickers on the contract, it may well be that far fewer than that, and possibly only three in total, were in use, and that therefore the claim for off-hire charges has been considerably overstated. Such errors may not have been made if plant identity numbers had been available for each item of plant.

148. For those reasons, it seems to me that, where these problems have been identified, Ruttle have to provide to DEFRA, in respect of each item of plant for which an off-hire charge is made, details of the identity of that specific item of plant. Those details should be provided by reference to any of the contemporaneous records available to Ruttle: it seems to me that Mr. Spink QC is right to say that I should not be too prescriptive about what documents would constitute good evidence of identity and what would not. It seems to me that what is required is any record that helps to identify a particular piece of plant. Once that further information has been provided to DEFRA, then they must check it against their own records to see if such records can make good any of the remaining gaps in the evidence.

149. Accordingly, the answer to Issue 5 is that, in the first instance, where problems of identification have arisen, Ruttle must provide all further evidence (in the form of any contemporaneous documentation) which establishes, through the identification of individual items of plant, the right to recover a plant off-hire charge for any given item of plant. Thereafter, once they have received such re-vamped information, DEFRA will then be obliged to check it against their own contemporaneous records to see if the remaining gaps can be filled.

150. This, of course, is the sort of exercise which I had in mind when I concluded that the valuation process has lagged behind the litigation. It seems to me that this is the sort of pure valuation issue which can only be sensibly addressed and resolved by the parties' valuation teams. I accept that the matter has not been assisted by the stance adopted by Ruttle, which I have concluded was unhelpful: see paragraph 81 above. I hope that now this issue (and indeed a number of the others that have been raised by these preliminary issues) can be resolved promptly between the parties.

F.4 Rate Payable During Off-Hire (Issue 6)

151. As noted above, Ruttle's original claim for off-hire charges was put by reference to clause 24. The relevant part of the clause provided that:

" "... In the event of the Hirer desiring to terminate the Contract and failing to give such notice, hire for the period of the seven days' notice shall be chargeable at the idle time rates in lieu " (Emphasis added).

Although Mr. Spink QC told me that this clause had been relied on only in respect of the seven days, and not the two-thirds idle time rate, there is no mention of that distinction in the judgment of Jackson J. At all events, the issue before me now is whether Ruttle are entitled to be paid for this seven day period at the full plant rate, which is their case, or at the idle time two-thirds rate, which is DEFRA's case.

152. In my judgment, in order to answer this question, it is first necessary to examine what happened at the time, and what this claim is really about. As I have said, Jackson J held that there was an implied term of the contract that DEFRA would give Ruttle seven day's notice of off-hire. For the

reasons set out in **section F.2** above, I have concluded that DEFRA were in breach of that term because there was no such notice. The claim that is made now is a paper exercise in which an automatic claim for seven day's further hire has been added in respect of every item of plant which was no longer the subject of a hire invoice. It could not be said that such a claim amounted to a claim for damages for breach, because damages would depend, amongst other things, on whether or not the plant that was off-hired in the absence of a notice was reused (by another of Ruttle's clients) within the seven days. It seems to me that the claim now made is somewhat artificial because it is based on twin assumptions (that (a) a notice was given; and (b) such notice was dated the day after the last day that the plant was used) which are contrary to the facts which I have found.

153. This analysis of the claim actually being made is important because it deals with what would otherwise have been a strong argument by Ruttle, to the effect that, if the notice was given seven days before the end of the hire period (in other words, whilst the plant was still being used), it would be quite wrong and unfair to reduce the rate to two-thirds. That was the idle time rate: if the seven day notice was given whilst the plant was being used, the idle time rate would not be applicable, because the plant would not have been idle. I am in no doubt that that argument is correct in principle.

154. However, this argument does not address the situation that arises on the facts which I have found. In this case, there has been no single notice of off-hire, and the claim therefore assumes notionally that notice was given immediately after the use of the plant had come to an end. Thus, contrary to Ruttle's argument of principle during their closing submissions, the claim actually advanced by Ruttle assumes that the plant was indeed idle for the entirety of the seven days, because it had been (notionally) off-hired the day it became idle.

155. In the circumstances that are the subject of the claim, the plant was taken back to Chorley in Lancashire, or to the sub-suppliers, and was subsequently available for rehire. Mr. O'Connor's evidence in relation to that was as follows:

"(Q) It is the case, is it not, that during the seven day off-hire period the plant did not remain on the farms, it was taken back to Chorley?

(A) Well, it would have been because the seven day hire came at the end of the invoicing.

(Q) So it went back to Chorley or where it had come from?

(A) Yes.

(Q) And it was thus available for rehire?

(A) Yes, but not necessarily. It depended on the state of it, whether it needed maintenance or whatever. You know, I cannot categorically say… it was there.

(Q) In some cases some of it probably was rehired?

(A) It could have been. I cannot say whether it was or not."

156. Should the full rate or the two-thirds' idle time rate be applied for the notional seven days' notice period? It seems to me that, on a proper construction of the contract as a whole, it must be the two-thirds' idle time rate. That is the only way in which the implied term, which is after all the cornerstone of the claim in the first place, can be consistent with clauses 24 and 25 of the CFA conditions. If idle time at two-thirds of the full rate is payable for the period when the notice of termination should have been given but was not (clause 24), so idle time at two-thirds of the full rate was payable for the

period when a notice of off-hire should have been given but was not. For the purposes of both that part of clause 24, and the Ruttle claim under the implied term, money is claimed in lieu of notice, and in both instances the plant was idle and no longer available to DEFRA. Thus the two-thirds idle time rate is applicable.

157. In addition I consider that it is important to note that the concept of idle time rates (two-thirds of the full rate) is a concept expressly identified in clause 25 of the CPA conditions, which deals with the situation where the plant was hired for a guaranteed minimum period but not used. In such circumstances the charge under the contract would be two-thirds of the hire rate. It seems to me that the contract was expressly seeking to differentiate between the circumstances when it would have been appropriate to charge at the full rate, and idle time, where it was appropriate to charge at two-thirds of the full rate. It is hard to imagine a more obvious example of idle time than the situation where the item of plant in question had been off-hired in fact, but where no notice of off-hire had been given. The plant was idle; it was no longer available to DEFRA. A charge was appropriate in lieu of notice, but it must be at two-thirds of the full rate to be consistent with the express terms of the contract.

158. Thus, on a proper construction of the contract as a whole, it seems to me that the parties were agreeing that, where plant was idle, it would be charged at two-thirds of the full rate. I conclude that this was in accordance with the contract, and that the seven day off-hire period in lieu of notice, which was only triggered because the plant was itself idle, would be paid for at idle time rates.

159. Thus, in answer to Issue 6, I conclude that:

(a) If notice of off-hire had been given when the plant was being used, the full rate would have been payable, because the plant was not idle during the seven days; but

(b) because Ruttle's whole claim is predicated on the (correct) assumption that no such notice was given at all, and only arises when the plant was in fact idle, the idle time rate is applicable; and

(c) accordingly, Ruttle's off-hire claim should be valued at two-thirds of the full rate for the seven day period.

F.5 Transportation (Issue 9)

160. Ruttle were obliged to transport plant, labour and materials to the various farms. DEFRA paid those transportation costs. As far as I can tell from the documents, there was never any significant dispute about the levying and paying of such transportation costs. In accordance with clause 31 of the CPA conditions, DEFRA's obligation to pay those costs was expressly provided for.

161. The only reason why this part of the contract is now back in the spotlight is because, pursuant to their final account of May 2007, Ruttle are seeking (for the first time) to claim off-hire charges in relation to that transportation. They now make a seven day off-hire claim in respect of each item of transportation. That claim has not been made before. DEFRA oppose the claim. One of their grounds is to differentiate between the hiring of the plant, materials and labour on the one hand, and the transportation costs of getting such plant, materials and labour to site, on the other.

162. Ruttle complained to me that this was the first time that DEFRA had ever sought to make this distinction. The obvious riposte to that is to point out that DEFRA never had any reason to make this distinction before, because Ruttle had never made a claim for off-hire charges in respect of transportation before. I therefore conclude that there is nothing in the purported criticism of DEFRA

that their distinction between plant and transportation costs had not been raised until after the production of the final account. Neither can there be any question of estoppel, in circumstances where there was no common assumption beyond the agreement between the parties that DEFRA would and did pay Ruttle for the transportation costs under condition 31.

163. DEFRA have pointed out that this new claim is essentially fallacious because every time a low-loader or a mini-van was used, even if it was used just for a few hours on one day, the seven day off-hire period has then been charged at full rate. Although that topic was the subject of the cross-examination of Mr. O'Connor, Mr. Spink QC is right to say that the passage in question was dealing with a purely hypothetical example.

164. It seems to me that the points made on behalf of DEFRA by Mr. Acton-Davis QC, when cross-examining Mr. O'Connor by reference to these and other examples, serve to demonstrate further what might be called the automatic or repetitive nature of the Ruttle off-hire claim. Whilst I consider that the fact that the claim produces what might be, on their face, surprising anomalies is of some relevance to the issue as to the validity of the claim, it is not, of itself, sufficient reason to reject the claim outright.

165. In my judgment, however, the off-hire claim in respect of transportation costs is fundamentally flawed for an entirely separate reason. Contrary to Ruttle's submissions, it seems to me to be clear beyond argument that the CPA conditions draw an important distinction between the hire of plant, materials and labour and the costs of their transportation. Conditions 18 to 22 inclusive of the CPA are all concerned with the hire of plant and the rates to be applied. Transportation is dealt with briefly, and in one stand-alone clause, namely clause 31. Furthermore, I note that condition 23(a), which deals with commencement and termination of the hire periods, again draws a distinction between the hire period for the plant (which commences when the plant is transported) and the transportation itself. There is no reference there to the hiring of transportation as if it were plant.

166. Therefore, it seems to me that, on a proper construction of the relevant clauses of the CPA, there is a clear distinction between the hire of plant, materials and labour and the transportation of such plant, materials and labour to site. What is more, that distinction is in accordance with reality: DEFRA knew what plant they required and could order it specifically; only Ruttle would know what particular transportation might be required to get that plant to the affected farm. Thus, DEFRA's obligation to pay in respect of the transport was clearly set out in the contract, but was limited to the actual use of the transportation, as per clause 31. There was no other express obligation in respect of transportation. There was certainly no express obligation to give off-hire notices, or to pay charges in lieu of such notice.

167. In my judgment, there could be no room for any implied term to that effect either. First, for the reasons which I have given, I consider that such a term would be contrary to the express terms of the CPA conditions, which limited DEFRA's obligations in respect of transportation costs to the obligations set out in clause 31. Secondly, I do not consider that any such term would ‘go without saying’, in accordance with the well-known test set out in **Liverpool City Council v. Irwin** [1977] AC 239. Indeed, I consider that it is impossible for Ruttle to argue that the contract was essentially unworkable without the term, in circumstances where they did not even assert the existence of such a term until six years after the contract had been completed. Thirdly, it would have been Ruttle who chose the particular transportation necessary, and it would be contrary to commonsense to make DEFRA pay off-hire charges in relation to particular low-loaders, lorries and the like that they did not knowingly choose.

168. For completeness I should address two other points that were raised on this issue:

(a) VIPER

Ruttle rely on the fact that the VIPER document did not differentiate between the hiring of plant and the hiring of transportation. That is correct, but I consider it to be irrelevant, given that the contract conditions themselves did draw that obvious distinction.

(b) Rates

Ruttle also rely on the fact that DEFRA agreed hire charges for the transportation. Again that seems to me to be right but irrelevant. Of course rates were agreed for the low loader, the cranes, the mini buses and the like, but those were all agreed and paid under clause 31, and not on the basis that these were items to which an off-hire charge could or would be appropriate.

169. Accordingly, for all these reasons it seems to me that there is no entitlement under this contract for an off-hire charge in lieu of notice in relation to the items of transportation. The answer to Issue 9 is that no charges for the seven day off-hire period can be levied in respect of transportation costs.

F.6 Plant Hired to Do a Specific Task For a Specific Period (Issue 10)

170. The parties are agreed that, if DEFRA can establish that the item of plant was hired "to do a specific task for a specific period", the seven day notice of off-hire would not apply. That in one sense is the answer to Issue 10(1).

171. However, Mr. Spink QC correctly pointed out that there was a danger of confusing theory and reality in this regard. First, he said that, in order for the seven day off-hire period not to apply, the instruction in respect of plant hire must be for a specific period. That must mean, he said, an instruction to hire for a period that is either a finite amount of time (a week, a fortnight and so on), or a period which ends on a specific date, i.e. 1st June. He argued that, in order to constitute the required notice, the instruction could not be any less specific than that.

172. I consider that that submission must be right. If the seven day period does not apply, it is because it is inherent in the original instruction that Ruttle would know when the plant hire period was going to end. They would not know that unless the instruction identified the period of hire specifically or the precise end date of the period of hire. I therefore accept Mr. Spink QC's submissions on that point.

173. It follows from that analysis that I also reject Mr. Acton Davis QC's argument, at paragraph 77 of his closing submissions, that "reasonable inferences" can be made from the documents to see if a particular instruction was for a specified task for a specified period. I reiterate that, unless there was a clear instruction to that effect, of the sort that I have just identified, the document will not suffice to avoid the seven day hire charge (at idle time rates). It seems to me, therefore, that it is as well to make that point plain to DEFRA now, so that at the valuation meetings, time is not wasted in going through the documents trying to infer that a particular instruction is capable of being construed in the way suggested by DEFRA. That must be obvious from the face of the instruction itself.

174. I also accept Mr. Spink QC's submissions that, on the evidence so far available, it seems most unlikely on the facts that any of these instructions were given by DEFRA to Ruttle. Of course I cannot reach a concluded view on that point, because the relevant documents have not all been made available to me. However, when I consider the generality of the documentation that I have seen, it is plain that both parties were working in difficult and uncertain conditions, where it was unclear

precisely what plant was needed, when and where, and everything had to be sorted out on a very ad hoc basis. In such circumstances, I am bound to say that it seems to me most unlikely that instructions of the sort envisaged by this issue were ever given by DEFRA. Certainly no such instructions have been identified in any of the documents before me.

175. Accordingly, whilst the answer to Issue 10(1) is No, the implied term would not apply, it seems to me unlikely that such a finding will be of any significance to the wider disputes between the parties. That of itself raises a related concern on my part. It does seem to me that some of the matters raised by DEFRA in response to the Ruttle claims rely more on theory or principle than matters rooted in the actual events on site. It is for that reason that I consider that DEFRA need to concentrate much more acutely on those matters which can plainly be identified by reference to the factual events on site, and the clear contents of the relevant documents, and to move away from the theoretical and the speculative.

176. As to the specific question raised by Issue 10(2), I have made it plain that what matters is the "specific period" and that that has to be measured, either by a finite duration, or a period which ended with a specific date. Nothing less than that will do.

F.7 Substituted Plant (Issue 11)

177. The answer to Issue 11(l) as a matter of principle is that, where DEFRA can establish that Ruttle chose to replace an item of plant with the same type of plant the following week, Ruttle would not be entitled to make the seven day off hire charge. Similarly, if an item of plant had broken down or required to be replaced for operational reasons by Ruttle, then the seven day off-hire charge would not apply.

178. It seems to me that this point has arisen on the Ruttle claim as a result of the careless way in which the off-hire claim has been put together, and the absence of a proper checking mechanism. If a seven day off-hire charge has been automatically levied in respect of any piece of plant that was no longer being invoiced as being on-hire, then it is easy to see why this claim might well have been made in relation to items of plant which were in fact substituted by Ruttle for their own purposes. Again, therefore, it will be necessary for Ruttle to revisit those parts of this claim where this problem arises and sort out, by reference to their own contemporaneous documentation, whether items of plant were substituted for their own purposes. If those re-worked parts of the claim are then provided to DEFRA, they must check the detail against their own records. That, therefore, is the answer to Issue 11(2).

G. INTEREST

G.1 General

G.1.1 The 1998 Act

179. Ruttle's primary claim for interest is made pursuant to the **Late Payment of Commercial Debts (Interest) Act 1998** . The parties are agreed that this Act applies to this contract. The relevant provisions for the purposes of the issues before me are sections 4 and 5 which provide as follows:

"4. **Period for which statutory interest runs**

(1) Statutory interest runs in relation to a qualifying debt in accordance with this section (unless section 5 applies).

(2) Statutory interest starts to run on the day after the relevant day for the debt, at the rate prevailing under section 6 at the end of the relevant day.

(3) Where the supplier and the purchaser agree a date for payment of the debt (that is, the day on which the debt is to be created by the contract), that is the relevant day unless the debt relates to an obligation to make an advance payment.

A date so agreed may be a fixed one or may depend on the happening of an event or the failure of an event to happen.

(4) Where the debt relates to an obligation to make an advance payment, the relevant day is the day on which the debt is treated by section 11 as having been created.

(5) In any other case, the relevant day is the last day of the period of 30 days beginning with —

(a) the day on which the obligation of the supplier to which the debt relates is performed; or

(b) the day on which the purchaser has notice of the amount of the debt or (where that amount is unascertained) the sum which the supplier claims is the amount of the debt,

whichever is the later."

The relevant interest rate is presently 8% over base, and that demonstrates the penal nature of this legislation, which is designed to prevent large organizations withholding money from smaller ones.

"5. **Remission of statutory interest**

(1) This section applies where, by reason of any conduct of the supplier, the interests of justice require that statutory interest should be remitted in whole or part in respect of a period for which it would otherwise run in relation to a qualifying debt.

(2) If the interests of justice require that the supplier should receive no statutory interest for a period, statutory interest shall not run for that period.

(3) If the interests of justice require that the supplier should receive statutory interest at a reduced rate for a period, statutory interest shall run at such rate as meets the justice of the case for that period.

(4) Remission of statutory interest under this section may be required —

(a) by reason of conduct at any time (whether before or after the time at which the debt is created); and

(b) for the whole period for which statutory interest would otherwise run or for one or more parts of that period.

(5) In this section 'conduct' includes any act or omission."

180. The 1998 Act was the UK's response to the **European Commission's recommendation of 12th May 1995** on payment periods in commercial transactions. At article 3 of that recommendation, the following was recorded:

"Article 3

Compensation for late payment

Conditions should be created whereby the creditor can be suitably compensated for damages incurred through late payment by the debtor. To this end, Member States are requested to:

(a) recognize the right of creditors to interest on arrears as soon as the contractual or statutory period has been exceeded;

(b) set a rate of interest for late payments, otherwise applicable in the absence of specific provisions in the contract, at a level which is sufficiently dissuasive for bad payers;

(c) recognize, in addition to the right to interest on arrears, a right to other compensation for damage incurred by the creditor through late payment. This compensation should cover, in particular, the legal and administrative costs of recovery."

181. In June 2000 there was an **EC directive** (**200/35/EC**) which, at Article 3, provided as follows:

"Article 3

Interest in case of late payment

1. Member States shall ensure that:

(a) interest in accordance with point (d) shall become payable from the day following the date or the end of the period for payment fixed in the contract;

(b) if the date or period for payment is not fixed in the contract, interest shall become payable automatically without the necessity of a reminder:

(i) 30 days following the date of receipt by the debtor of the invoice or an equivalent request for payment; or

(ii) if the date of the receipt of the invoice or the equivalent request for payment is uncertain, 30 days after the date of receipt of the goods or services; or

(iii) if the debtor receives the invoice or the equivalent request for payment earlier than the goods or the services, 30 days after the receipt of the goods or services ...".

182. As a consequence of the EC directive of June 2000 it was DEFRA's case that the reference in section 4(5)(b) of the 1998 Act to "notice of ... the sum which the supplier claims is the amount of the debt" must be construed by reference to the directive's words "invoice or the equivalent request for payment". This was, I think, an attempt to restrict the possibly wider words in section 4(5)(b).

183. I accept that European Commission directives can, in certain circumstances, be used to construe UK legislation: see, for example, **Marleasing SA v . La Commercial Internacional de Alimentacion SA** [1990] ECR 1-4135 ECJ and **Lister v. Forth Dry Dock** [1990] AC 546 HL. But I do not think that it would be legitimate to construe the 1998 Act by reference to a directive which came into force two years later. If the 1998 Act provides greater protection than that suggested by the directive, then that does not mean that the 1998 Act is inconsistent with the directive, and does not mean that it should be construed in a different way to the way it would otherwise have been construed in the absence of the directive. I therefore accept Mr. Spink QC's submissions on that point of law.

184. However, I am doubtful as to whether this finding makes a significant difference to the dispute between the parties on the operation of section 4(5)(b) of the 1998 Act. It seems to me that what matters under section 4(5) is when it can be said that the purchaser has notice, either of the fixed

amount of the debt (because it has been ascertained) or, where the sum has not been ascertained, of the sum claimed to be the debt by the supplier.

185. The difference between ascertained and unascertained sums was dealt with by the Court of Appeal, in the context of construction adjudication, in **Rupert Morgan Building Services (LLC) Ltd v Jervis** [2004] 1 WLR 1867. In his judgment, Jacob LJ contrasts two different contractual types: those where there is a mechanism by which the sum due is ascertained pursuant to that mechanism, such as, for example, the certificate issued by an architect or engineer; and those contracts where there is no such mechanism and where the supplier or contractor is entitled to claim that which it considers to be due. In the latter case there must be a claim for the sum said to be due.

186. I conclude that, under section 4(5)(b), what matters is notice. Notice of the debt or the claim can be given before the work has been carried out, in which case the relevant period does not start until 30 days after the contractual obligation is performed: see section 4(5)(a). Whichever subclause applies, whichever produces the later date, notice of "the amount of the debt or the sum which the supplier claims is the amount of the debt" is always required.

187. There was, inherent in Mr. Spink QC's submissions, a suggestion that if a paying party knows at the outset, before the work is carried out, what the contract terms provide as to valuation and payment, then that is sufficient notice for the purposes of the 1998 Act, regardless of the amount of the sums actually claimed by the contractor or supplier by way of interim payment during the contract itself. Thus, on his case, if an employer or purchaser knows at the outset that a supplier is entitled to £100 for the item of work in question, but only in fact receives an invoice for £65, the interest is said to run from 30 days after the invoice, not only on the £65 but also on the unclaimed £35 as well.

188. I am bound to say that I reject that submission as being commercially unworkable and contrary to common sense. More importantly, it seems to me that it is contrary to section 4 of the 1998 Act which, for entirely understandable reasons, emphasizes the importance of notifying the paying party of the amount that the supplier claims the paying party must pay. No authority was provided in support of Ruttle’s construction of the 1998 Act which, if right, would have a major impact on most commercial contracts.

G.1.2 The 1981 Act

189. Ruttle allege that if, for any reason, they are not entitled to interest under the 1998 Act for a particular period or in respect of a particular claim, they should be allowed to claim pursuant to section 35A of the **Supreme Court Act 1981** .

190. Section 35A provides as follows:

"35A (1) Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgement is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgement, for all or any part of the period between the date when the cause of action arose and —

(a) in the case of any sum paid before judgement, the date of the payment; and

(b) in the case of the sum for which judgement is given, the date of the judgement …

(3) Subject to rules of court, where —

(a) there are proceedings (whenever instituted) before the High Court for the recovery of a debt; and

(b) the defendant pays the whole debt to the plaintiff (otherwise than in the pursuance of a judgement in the proceedings),

the defendant shall be liable to pay the plaintiff simple interest at such rate as the court thinks fit or as rules of court may provide on all or any part of the debt for all or any part of the period between the date when the cause of action arose and the date of the payment.

(4) Interest in respect of a debt shall not be awarded under this section for a period during which, for whatever reason, interest on the debt already runs ...

(6) Interest under this section may be calculated at different rates in respect of different periods."

191. By operation of section 35A(4), interest cannot run under the 1981 Act if, for example, interest is already running under the 1998 Act. Therefore if, conversely, interest is not running under the 1998 Act for whatever reason, I consider that an interest claim could be made in principle under the 1981 Act, provided of course that the other triggering factors for such a claim under the 1981 Act have been met. In addition, discretion under section 35A is arguably wider than under section 5 of the 1998 Act, because pursuant to the latter, the exercise of discretion is expressly qualified by reference to 'the interests of justice', although it is to be hoped that the exercise of discretion under section 35A, although not expressly limited by such words, is also exercised to ensure the interests of justice.

G.1.3 The Dispute s

192. There are a large number of potential disputes between the parties relating to interest. Some of those were still being ventilated on the last day of the hearing and have found further expression in the material provided thereafter. Some of the disputes were theoretical, and not obviously linked to the real issues between the parties. Others were covered by Issue 14. There were pleading points and arguments which, potentially at least, run counter to the judgment of Jackson J. In short the position on interest was something of a muddle.

193. In order to try and identify the particular issues which I consider the court should deal with at this stage, and the issues which I have concluded the court should not, I set out in the next section (**section G.2**) the clear issues that arise as to notice and my answers on those issues. In **section G.3** below I make one or two very general observations as to discretion, but for the reasons that I explain there, I reach no definitive conclusions on the issue of discretion.

G.2 Notice

G.2.1 The 35%

194. As noted above, Ruttle originally invoiced DEFRA at 65% of the rates set out in the August 2000 faxes. The missing 35% was not invoiced in the 2000 and 2001 period. The second tranche of invoices were calculated by reference to the FMD rates, as indeed were the Revision A invoice. Thus, it was only in the final account of May 2007 that Ruttle made a claim for 100% of the August 2000 rates. Notwithstanding that, Ruttle now claim interest under the 1998 Act on the unclaimed and uninvoiced 35%, from the time of the first tranche of invoices in 2000/2001. In the alternative, they seek interest on the same basis from the second tranche of invoices, and in the further alternative from the date of the Revision A invoices.

195. Ruttle's argument is that DEFRA knew at the time of the earlier invoices that they were being invoiced at 65% of the relevant rates and that DEFRA had notice from the outset, before any work was done, that Ruttle were entitled not only to the sums that they claimed by way of their interim invoices, but the additional 35% as well. As discussed during argument, that claim has the bizarre effect that, although Ruttle accept that they were not entitled to the 35% itself at the time of the first tranche of invoices, because it was not claimed or sought, they allege now that they are entitled to interest on the missing 35% from the time of those same invoices. In my judgment that claim fails for a variety of reasons.

196. First, there is no express finding by Jackson J that, at the time of the first tranche of invoices, DEFRA were aware that they were only being asked to pay 65% of the rates that had been agreed. It certainly seems right that DEFRA were aware that the rates being claimed were for interim purposes (whatever that meant) but it is unclear as to the precise level of knowledge that the individuals of DEFRA had concerning the link between the sums claimed and DEFRA's total liability.

197. Secondly, even assuming that DEFRA had that requisite knowledge at the outset, so they knew that at some point in the future there was going to be a claim for the remaining 35%, it seems to me that that does not mean that an invoice for the 65% was a notice, in accordance with section 4(5) of the 1998 Act, in respect of the missing 35%. Indeed, it seems plain to me that it was not and could not be such a notice. There was no debt, because there was no ascertainment by a third party of the sum due. There was a claim by the supplier of that which the supplier said was the debt. That was the 65%. If the amount invoiced was then paid in full (and on the evidence the early invoices were paid in full), then I believe that it is quite wrong to suggest that, unbeknownst to DEFRA, they were racking up a liability to pay Ruttle interest on the unclaimed and uninvoiced 35%.

198. Thirdly, I reject the claim in principle for the reasons that I have already outlined in the previous section of this Judgment. The whole point about notice, and the reason why it is emphasized in section 4(5) of the 1998 Act, is because the penal nature of the interest provisions are designed to apply to a party who knows, because he has been notified, that he must pay a certain sum of money and fails to do so. If he does not know, because he has not been notified, that he has to pay a certain sum of money, the provisions do not bite. The knowledge of what is due is governed by what is claimed by the supplier. Here, what was claimed was 65% of the relevant rates. That was therefore what was due. I therefore conclude that interest on the unclaimed 35% did not begin to run under the 1988 Act at the time of the first tranche of invoices.

199. In my judgment, interest did not begin to run at that time under the 1981 Act either, because no cause of action had arisen in respect of the unclaimed 35%. There could only be a cause of action for unpaid monies if the sum in question had been claimed and not paid. It had not been claimed, and Ruttle do not now assert that they had a cause of action in respect of the 35% at that time. Therefore, there was nothing to which interest under the 1981 Act could attach.

200. For the avoidance of doubt, I should also say, whether it is in respect of the interests of justice under section 5 of the 1998 Act, or the arguably wider discretion under section 35A of the 1981 Act, that I have no hesitation in concluding that it would be contrary to the interests of justice, and a wholly illegitimate exercise of the court's discretion, to award Ruttle interest from 2000/2001 on the 35% that they deliberately chose not to claim. Thus, even if I was wrong about when notice was given for the purposes of either Act, I would still exercise my discretion against awarding interest on the unpaid 35% from the date of the first tranche of invoices.

201. The next question is: when was notice of the 35% given, so as to trigger the interest provisions of the 1998 Act? It seems to me that interest would be due on the remaining 35% as and when that remaining 35% was claimed or was the subject of a notice of the sum claimed by Ruttle. When was that? It seems me that it is impossible to say that that was at the time of the second tranche of invoices, because by then the remaining claims were being put on the erroneous basis of the rates in the FMD contract. In any event, the second tranche of invoices only dealt with a small part of the CSF work, namely that part which had not been the subject of the invoices in the first tranche. Neither could it be said that the 35% was claimed in the Revision A invoices of late 2004, because those too were based wholly on the FMD rates. As far as I am aware, the first time that the missing 35% from the August 2000 rates was claimed by Ruttle was in their final account of May 2007, following Jackson J's decision that they were not entitled to claim on the basis of the FMD rates. On that basis, interest on the remaining 35% would run from May of last year. I note that the parties have agreed that interest on other claims introduced at that time, such as the off-hire charges, would indeed run from May 2007.

202. Ruttle say that, in relation to the second tranche of invoices and the Revision A invoices, they were claiming at rates that were higher than the August 2000 rates and that, therefore, those invoices must be sufficient notice under the relevant statutes. It seems to me that the fundamental problem with that assertion is that, although the rates were indeed generally higher than the August 2000 rates, they were the wrong rates: they were simply not the rates to which Ruttle were entitled to be paid. In those circumstances I consider that it would be an unjust result if it could be said that liability to pay interest was triggered by way of an invoice, in respect of which the substantive claim was (and has subsequently been found to be) erroneous.

203. Furthermore, looking at the matter in the round, it seems to me that allowing interest on the 35% from the time that that 35% was first unequivocally claimed is an appropriate and fair result. The intervening years between the completion of the works and the provision of the final account were largely spent by Ruttle in pursuing the unsuccessful case on the FMD rates. It would therefore be wrong, I think, to ignore all of that and to award Ruttle interest as if, somehow, their claims had been correctly formulated all along. Therefore, if I was wrong about notice, on the exercise of my discretion under either Act, I would again conclude that interest on the missing 35% should run from when it was first claimed, which was May last year.

204. Unhappily, there is a dispute between the parties as to whether this finding is open to me on the pleadings. On behalf of Ruttle, Mr. Spink QC alleges that, in their Scott Schedule, DEFRA admit that interest is due on the 35% from the time of the Revision A invoices. Mr. Acton-Davis QC on behalf of DEFRA disputes that. There was a good deal of post-hearing material on this point, which was when I saw extracts from the Scott Schedule (although still not the whole document) for the first time.

205. Doing my best with that late material I have reached the following conclusions:

(a) No clear or unequivocal admission of the sort alleged by Ruttle can be discerned from the documents that I have seen. The position is at best unclear. I note that in Mr. De Kock's statement there is no suggestion that the admission now alleged has been made. In fact he disputes it.

(b) Assuming that I am wrong, and that when looked at as a whole, the Scott Schedule is evidence of such an admission, I then note that the Scott Schedule was only served a few months ago. In the unusual circumstances of this case, some of which I have already identified, it seems to me that it would be inappropriate to bind DEFRA to any such admission given the other material before me. I

consider that to do so would be contrary to the overall justice of the case, and no reason has been identified to justify holding DEFRA to the alleged admission, which at best is only a few months old.

206. That, I think, leaves the question of the applicable rate. I am not persuaded that the penal base rate plus 8% allowed by the 1998 Act is appropriate or in the interests of justice in the present case. If there are unpaid sums, then plainly Ruttle are entitled to be compensated by way of interest. In view of all the circumstances of this case, which I have already outlined in this Judgment, I consider that the appropriate rate of interest would be the base rate plus 2%. I make it clear that, for the same reasons, this is the appropriate rate of interest to all the claims for interest advanced by Ruttle.

G.2.2 Under-Claims

208. The next specific dispute in respect of interest relates to under-claims. This is where Ruttle have made a claim for, say, ten hours' plant hire or labour, only to discover at a later date that in fact the records demonstrate that the plant or the man worked for twelve hours. From what date should interest run in respect of the claim for the additional two hours?

209. In my judgment the answer to that self-evidently is: 30 days after notice of the claim for the additional two hours plant or labour was first made. It seems to me that only when notice of such a claim is given can it be said that the provision under section 4(5)(b) of the 1998 Act is triggered. In addition, under the 1981 Act there will be no cause of action in respect of a claim for the missing two hours unless and until that claim had actually been made.

210. It was urged on me on behalf of Ruttle that the result would or could be different if the records showing the additional two hours had been supplied by Ruttle along with their original invoice claiming only ten hours. It was said that, in those circumstances, notice of the hours actually worked would have been provided, even if the claim was erroneous. I am bound to say that I reject that submission. It seems to me that, once again, it does not make commercial sense. If a party to a commercial contract claims X on the basis of ten hours then the other party is entitled to conclude that X is the claim that he is being asked to meet and to pay. It would be absurd to expect the payer to go through the supporting information to work out whether or not in fact he is being under-charged. Moreover, there may be numerous reasons why a man works twelve hours but is only the subject of a claim for ten hours. Those reasons would not always be apparent from a time-sheet, but could include re-work necessitated by errors first time round; longer than allowable meal breaks; or engagement on other tasks, such as repairing plant, which were not DEFRA's responsibility in any event. Thus, the mere fact that a time-sheet was for a period longer than the amount that was the subject of the original claim is in my judgment neither here nor there, and it certainly would not constitute notice that DEFRA were liable to pay for the twelve hours shown in the sheet, rather than the ten hours claimed in the invoice.

211. Thus, I consider that, whether under the 1998 Act or the 1981 Act, interest should run at 2% over base from 30 days after the claim for payment for the additional two hours was first made by Ruttle.

G.2.3 Labour Rate

212. This is a rather different problem. Originally Ruttle claimed for labour at a rate of £14.39. This was the rate set out in the 15th August 2000 letter signed by both parties. In addition, Ruttle claimed overtime, and there were major disputes between the parties about those overtime charges.

213. In May 2005 the parties agreed an all-inclusive labour rate of £17.70. This agreement was designed, amongst other things, to do away with the ongoing arguments about overtime. The question that now arises is whether Ruttle are entitled to claim interest on their claims for labour at that agreed rate of £17.70 from the time that the claims were first made (including, where relevant, the first tranche of invoices), or whether those claims should only be allowable from May 2005 onwards when the rate was in fact agreed?

214. It seems to me clear that Ruttle are entitled to claim interest as if their original labour rate (plus overtime) claims had been at the subsequently-agreed rate of £17.70. That is because Ruttle were already making a claim for £14.39 at the time, together with overtime. The parties have sensibly agreed an all-inclusive rate and the court should do all it can to encourage and promote such settlements. I might say that that is particularly important in the present case. In those circumstances, I consider that it would not be right for the court to penalise Ruttle for reaching that agreement. In addition I can see no prejudice whatsoever to DEFRA if the interest claimed is claimed by reference to the £17.70 agreed rate from the outset, rather than trying to calculate it by reference to the £14.39 plus the overtime. That would also be a very artificial exercise, because it would mean calculating interest on rates which are different to those which the parties have sensibly agreed. I consider that, in this case, notice of the claim has been given by Ruttle and at rates which they doubtless would still consider to be appropriate, but which they have sensibly resolved at an all-inclusive rate. For those reasons I consider that interest should run on the rate of £17.70 from the outset. Again the appropriate rate is 2% over base.

G.3. Discretion

215. I have dealt above with the three areas of clear dispute as to notice between the parties. Those disputes arose and were identified during the course of the hearing before me and were dealt with by both parties in their closing submissions. Whilst it might be right to say that those issues do not emerge obviously from the pleadings, it seems to me that no party is prejudiced and I hope the parties are assisted by my resolution of those issues. Greater difficulties, however, arise in relation to the arguments as to the court’s exercise of its wider discretion.

216. In their pleadings, as Mr. Spink QC rightly points out, DEFRA identify just one period, from 30th May 2004 to 11th February 2005, in which they alleged that interest should not run because Ruttle did nothing to progress the claims. That claim was expressly addressed by Jackson J in Part 17 of his judgment, and he rejected DEFRA's claim to that effect. He found that Ruttle were entitled to interest for that period. There is no other period pleaded by DEFRA where it is said that interest should not run. For those reasons I consider that Mr. Spink QC is right when he submits that, on the pleadings as they presently stand, it would be wholly inappropriate for this court to embark now on a detailed consideration of any submissions by DEFRA that any other periods, or any other specific claims for interest, should be discounted or disallowed in circumstances where such points have just not been pleaded.

217. I have set out in **section D** above my concerns about the time that these proceedings has taken to get this far. I have made plain that I simply do not have sufficient information to be able to embark on an exercise which identifies which party, if any, might be said to be responsible for particular periods of delay. Moreover, I consider that I could not legitimately embark on such an exercise unless it had been pleaded, and unless that amended pleading had been accepted by the court. Therefore, no matter what my general views are as to delay, it seems to me that it would be wholly inappropriate for me to make any findings as to the relevant periods in respect of which interest is now claimed by

Ruttle. As Mr. Spink QC has demonstrated, there is simply no dispute on the pleadings with which I could legitimately deal at this point.

218. Accordingly I have concluded, on the face of the pleadings and in the light of my acceptance of Mr. Spink QC's submission on this topic, that my answers in **section G.2** of this Judgment should constitute the totality of the findings that I ought to make on the disputed interest claims before me. I expressly decline to decide any other issues that were trailed in the closing submissions.

G.4 Answer to Preliminary Issue 14

219. Preliminary issue 14 does not now precisely accord with the disputes which have been ventilated. I hope that the preceding **sections G.1 to G.3** of this Judgment make clear what the court's conclusions are as to when interest on

(a) the 35%;

(b) the under-claims; and

(c) the labour rate

should start to run. I also make clear that, for the reasons I have given, the appropriate rate is 2% over base. There are no other issues on interest with which I ought to deal at this point.

220. Notwithstanding the various points that I have made about the current condition of this case, I should properly express my gratitude to the parties for their submissions on these preliminary issues. Although they possibly constituted less of a formidable examination paper than that provided to Jackson J, the issues which I have had to resolve were rendered more straightforward because the parties were able to agree a number of them at the outset. I now hope that the detailed valuation exercise, which both parties wish to undertake, can start in earnest, with the hope that this will lead to a resolution of these disputes without a further, lengthy, contested hearing in this court.