

IN THE BRIGHTON COUNTY COURT

Claim No: CN024098 (consolidated  
with Claims CN024099 & CN024284)

AND IN THE MATTER OF AN ARBITRATION PURSUANT TO THE  
ARBITRATION ACT 1996 AND AN ARBITRATION AGREEMENT MADE ON  
17 JANUARY 2005

B E T W E E N :

CLEEVE MILL ESTATES LIMITED (Claim No: CN024099) (1)  
(suing as CLEEVE MILL ESTATE LIMITED in Claim No: CN024098)  
CME ASSOCIATES (a firm) (Claim No: CN024284) (2)

Claimants

-and-

TREVOR PARKER (1)  
ANTHONY KYBETT (2)  
JACKIE PAINTER (3)  
BRENDA HINTON (4)

Being sued in their own capacity and in the capacity of all other trustees of  
FISHERSGATE COMMUNITY ASSOCIATION

Defendants

PRELIMINARY AWARD

1. I intend that this Award should be as succinct as possible and in a form easily understood by the parties in person who, if matters can not be hereafter resolved by agreement, may have difficult decisions to take including whether or not to be separately advised or represented.
2. Such a lamentable state of affairs has become clear after reading more than 2000 pages of documents – albeit many were of limited relevance in a Preliminary Award – several of which referred to documents not included. I have refused to delay further to require them since, although they might answer obvious questions, I doubt whether they are directly relevant to the narrow issues now defined by Counsel. I refer to all documents by their page numbers in the seven files before me, save for those exhibited to Mr Attwill's Second Statement (Bundle 7), which I list as (E 26 etc).
3. I have statements from Duncan Attwill and the four named Defendants. None from Reg Jordan, Chairman of FCA at significant times. None from George Hemsley. I have also Peter Averillo. As an Arbitrator I do not have the full powers of a judge as to joinder of parties and, probably, consideration of costs' orders against non-parties. I do not know - nor desire to – the present state of the Association or of the building that is at the centre of this dispute. I shall endeavour to concentrate on the issues strictly for my decision.

4. Lacking full information on some matters, a necessary but brief history may be imperfect. I am asked to make this award only upon the documents, including the very helpful submissions of Counsel, to whom I am indebted. I draw the facts from such evidence that appears to be beyond argument, save where otherwise stated. Adur District Council (ADC) own the site in West Road, Fishersgate, where there was a Hall, an open rink or sports area and, possibly, other ancillary sheds or buildings. Prior to 1998, I have read of two organisations which, it seems, had Leases in some form that allowed them to use the Hall and/or grounds.
5. First, there was the Fishersgate Community Sports Club (FCSC), in which Peter Averillo was closely involved. He relates some experience with preparing accounts for FCSC and his acquaintance with the Accountant, Mr Standen, later to advise the Community Association (FCA). The Minutes of the Management Committee Meeting – perhaps the last – of FCSC on 30 September 1998 show it had some experience of fund-raising and keeping accounts.
6. By 1997 FCA existed. I have no copy of its Constitution. A brief internet search discloses the Association achieved Registration as a Charity in January 1992, having already a Constitution, which was amended in July 1996. Its officers are referred to in the documents as Trustees – typical of the criteria for Charity Commission Approval, but irrelevant to the present dispute. So, I believe, is the meaning, if any, of the expression “Holding Trustee” referred to in the FCA Minutes of 30 September 2002 (E 249) and in the statement of Jackie Painter. My only concern in this dispute is as to the legal nature, for purposes of binding itself contractually, of the Association and, similarly, the position of each of the named Defendants; which is by no means bound to be identical.
7. The FCA is an unincorporated association. Its officers (presuming it has any) and its members (the same) are bound by the ordinary rules of Agency and Contract Law. The requirements of the Charity Commissioners as to Constitution, as to Officers and their duties under Charity Law have no direct bearing on the issues before me. Mrs Hinton (statement p 624), gives a description of being a Trustee which, if correct, is sadly all too familiar. She seems to have been given no advice or warning as to the financial liabilities she might incur. Indeed, whilst most creditors of an unincorporated association seem content to seek remedies only against its officers, I wonder how often an affluent member learns about the Law of Agency to his or her cost. Contract law has little, if anything, to do with “behaving responsibly” as an officer of a Charity.
8. ADC were, in early 1997, closely involved in assisting FCA to improve its facilities and, thereby, help the community. Funding was available from various sources for such projects. S.E.E.D.A., the S.R.B., Lottery Fund, Sport England, Local Authorities and others. Funds were also available via the FCASC, who had a better position in relation to obtaining specifically sports oriented funding. Local Authorities were receiving Government Grants (including SRB).

9. ADC had a Community Development Officer, Mrs Margaret Wilson. I have no idea what, if any, role she played in the organising of FCA, its application for Charitable Registration, or otherwise. The documents clearly disclose, however, that she played a substantial part in both organising and carrying out the efforts of FCA to take advantage of the regeneration funding referred to. Clearly also, the Defendants' present solicitors were involved and consulted at various stages – certainly over the need for a new Lease for FCA in 1998. I have no detail otherwise. I have constantly to remember that the Defendants have, after the Court (before the Arbitration, I think) invited consideration of this issue, not joined ADC as parties, nor have I any evidence from them, nor disclosure of some documents which may exist, but which are not included in those before me.
10. As a fact, FCA seems to have existed as closely connected to the local C of E Parish, prior to 1997. Mrs Hinton was a Member, being Secretary, by some time in 1998. Mr Parker gives no dates in detail. Jackie Painter was a Trustee from as early as 1992 – before, I think, the time referred to by Mr Parker as the hand-over of the Hall by ADC at a peppercorn rent. George Hemsley, upon his retirement – ill health being cited – was said to have served “many years” (E 249). Mr Kybett (the spelling differs) has provided no statement. I found no reference to him in the FCA Minutes (which may well be incomplete) prior to his introduction and invitation to join the Association in March 2001 (E 141), as representing Football Interests.
11. There is also mention – and some documents – concerning meetings of the FCA – SRGB Group. Very likely the fund-raising group referred to by Mr Parker (635) – with the help of Mrs Wilson. And a Management Committee. And a Finance Committee. Knowledge of these in any detail seems at present unnecessary to the contractual issues.
12. As to these, the documents disclosed in Mr Attwill's Second Statement demonstrate the involvement of ADR at a stage when FCA, therefore, seem to exist but is not so far involved in the Planning to build a new Community Centre in the ground leased – on terms I have not seen – by FCASC and/or FCA. It may be that an overview – were I fully informed – of the efforts of ADC and Mrs Wilson and her colleagues to rejuvenate (sic) Fishersgate deserve nothing but admiration. All I have presently seen, however, is the history of their initiating a relationship out of which some local residents seemingly took on personal responsibility for the exercise of regeneration, without any evidence that they themselves had any certain prospect of being able to fund it, or possessed the management and other skills necessary to oversee it. Mr Platt, in his Report, uses quite severe language to criticise both the design and the circumstances of FCA being “led” to adopt it. I am not concerned in this Arbitration to consider such matters. For the first, there are experts; for the second, the issue is not raised before me.
13. Clearly, however, ADC had done a great deal before the present parties are involved together. Mrs Wilson was providing information to Mr Attwill (missing – see letter E 1) by mid-February 2007. He was responding as if ADC were the proposed clients. Interesting. His notes (preparatory ?) for the

Meeting of 4 April 1997 are in the same vein. As is the proposed “Confidentiality and Project Agreement” (E 4).

“ADUR intends to commission the design and construction of a community hall .....” Signed by Duncan Attwill and by Mr Latham, Chief Executive of ADC.

14. This Agreement (no longer a Draft) refers (E 5, para 6) to CME Associates Ltd (CME), if required, carrying out the duties of project manager for the PROJECT (defined as the commissioning etc, above) “on normal commercial terms and ensure the employment of a qualified independent quantity surveyor and/or civil engineer for the purpose of certification of all PROJECT works.”
15. It may save time later to consider certain terms. Since the Defendants will have no doubt had advice at different stages and will have noted my comments about Unincorporated Associations taking on big financial liabilities, they should understand that Members’ Clubs can become Companies Limited by Guarantee, being still acceptable as Charities, may build new premises without any of their Directors (who the Charity Commissioners prefer to call Trustees, which covers both Limited Companies and Unincorporated Associations) becoming personally liable for the cost. Company Registration costs £30 and, if you have a reasonably confident book-keeper and a Treasurer to keep you straight on policy, the requirements of both Company and Charitable Law as to the accounts will cost not too much annually.
16. If you get an Architect to design your building, you can sue him if the design is bad. Get a builder to build it. Get the Architect, or a good Quantity Surveyor to supervise the building and to sign Certificates if and when each stage of the work is done and they will act for you if the builder complains, as well as ensuring that you are not asked to pay more than you should.
17. ADC, having signed up (on the face of it) to put up the new building, seemed to have become involved, along with FCA, by February 1998 in setting up the FCA/SRB Group, in local publicity and in support gathering, in introducing FCA to Cleeve Mill Associates Ltd (now Estates) and in having elected a Chairman of SRB Group (Minutes, 2 February 1998 – E 7). I have no documents – I believe – to show how FCA itself became “connected up” to CME. The SRB Group Minutes show that several people attending were also Trustees of FCA – I recognise Mr Hemsley, Mrs Hinton – and Mrs Wilson, of course.
18. When and how FCA agreed to take on the role of ADC, with CME, is uncertain. Or how they planned to fund the exercise before seemingly agreeing to go ahead. Again, issues that may prove irrelevant to those before me.
19. Mr Attwill does not help either, on the “connecting link”. All I have, I believe, is the document of 31 March 1998 itself – PROJECT MANAGEMENT AGREEMENT – signed by Duncan Attwill for CME and for “Fishersgate C.A.” by someone. I return to that later.

20. The history of the construction is not relevant to this short résumé. If it is later, I shall examine it. Funding was obtained for most of the works as they progressed, but much of it in a manner that led to interruptions and delays. Plans were prepared for various purposes. Planning permission, manufacture of components, layout of site, construction of the central geodesic dome and the wings – two longer, one entrance and two shorter – and for some outer works of drains, roadway and other ancillary purposes. The works were supervised at various stages (in addition to CME and its clerk of works) by Sussex Site Agents, principally ISL, whose detailed Daily Reports make interesting reading, but are clearly not those of a Quantity Surveyor engaged in checking the works for quality or value.
21. Funding was obtained from bodies with different application criteria, it seems. Some required supporting by detailed plans, estimates and/or specifications, before agreeing finally in principle. Others, one at least, required detailed proof by way of invoices, work sheets and certificates, before finally releasing funds on a “work done” basis. What is clear beyond argument is that, apart from the so-called “Preliminary Works”, estimates of the complete cost of the Project and the funding for it – or at least reliable assurances of it – cannot be shown in the documents before me to have been finalised before any works commenced. The project was marked by a series of “moving targets” – some more substantial than others, it is true – as to so-called estimates, revised estimates, plans, revised plans and allegedly varied requirements by the client. Delays in obtaining funding caused – or contributed to – hold ups in work on site, storage costs and deterioration of constructed parts. Although perhaps not relevant to my present function, in a document as late as 18 September 2001 (E 161) is found the last – I believe – report by ISL of a continuing failure to decide what should be done about some rotting panels awaiting erection. And so on.
22. By Summer 2002 funding is virtually drying up, the work is incomplete. However variable the estimates, the projected cost of works has certainly doubled – no matter why. Mr Standen had been approached by Mr Averillo during May, about the financial records concerning the Project. FCA, as a Charity, had clearly been receiving substantial annual sums to fund this Project, yet had submitted no accounts of the kind required of a Charity. There are various suggestions – not presently relevant – as to who had advised them that they need not do so. By that stage it seems Mr Averillo, whose function was variously described during the history but who was never, I believe, an officer of the FCA itself, became more closely involved – as a Centre Co-ordinator, even doing some labouring on site for CME. In July 2002, he was even “signing off” work done at the request of Duncan Attwill. It seems he had no qualifications for doing so, certainly not under the terms of the Project Management Agreement.
23. Mr Standen, having sought and partly obtained various prime documents from CME or from the original suppliers, arrived at what seemed a startling conclusion. CME had been invoicing FCA – and had been paid – for their own fees (as “Project Manager” one assumes) and for the costs of construction work. For the latter they had submitted not the Invoices or Accounts of manufacturers,

suppliers or others, but their own, which included a substantial “mark-up” on the former.

24. During Summer and Autumn 2002, whilst all this came to light amidst attempts to obtain funding (some of it theoretically already approved, but subject to Retention), attempts to complete the works and threats by CME to cease them, Mr Averillo is removed from the conflict. CME continue to assert that they are holding creditors (of FCA) at bay and/or funding the delayed works themselves. ADC are attempting to broker a solution. Any suggestion that all the Trustees (some of them now remaining as Defendants) were kept au fait with all of this by either ADC or CME would be unrealistic.
25. Until finally the relationship is severed, CME are offering to fund continuation/completion of the works by way of “a loan” to FCA. This offer goes through various stages and part of it is an issue before me.
26. The final severance is not at once easy to identify. I have doubts whether it is strictly relevant to the issue before me to decide whether, after refusing to work further, in the absence of payment or some form of “loan” agreement, CME declined to continue, or whether FCA, upon learning of the discoveries of Mr Standen decided to put CME off the site, or whether the latter simply left and then sued for the monies they alleged were outstanding.
27. In November 2002 they certainly issued proceedings. They sued Mr Parker, Jackie Painter and Mrs Hinton, all of whom seemed to have been officers – in some capacity – of the Association since 1998. Also, Mr Kybett, who “came in” in 2001 and became Chairman some time in 2002, I think when Mr Hemsley (who is not a Defendant) retired. I am not even certain that he is still about. All four are sued personally and as representing FCA. Proceedings were issued – three in all – in November 2002, in Cheltenham, using local solicitors.
28. Claim 4098 was for £344.11, originally being one monthly payment under a Deed signed by Messrs Hemsley & Parker on behalf of FCA on 1 August 2002. The claim was amended in November 2004 to claim the total due under that Deed - £50,000, plus interest.  
Claim 4099 is for £10,860.13, the amount allegedly due and outstanding for building works to the Claimants (on their interpretation of the Project Agreement) as builders.  
Claim 4284 is for £4,381.81, as fees for services “of co-ordination” I suppose, of the building works, the Claimants being CME Associates – a partnership, although the other partner, Mr Attwill senior, is now deceased. I simply sketch the outline.
29. There is no dispute – and I certainly find as a fact – that the only document relevant to the original relationship is between Cleeve Mill Associates Ltd and FAC; the “Project Management Agreement”. The only shareholders were Donald Attwill and his father, Ronald. They – particularly the latter, I believe – claimed an international reputation for the design and construction of simple, inexpensive and “sustainable” types of public buildings and housing. Mr Ronald Attwill died in January 2004. Prior to that, in May 2001 (E 145), CME

Associates Ltd changed its name to Cleeve Mill Estates Ltd and, it is alleged, CME Associates commenced (or continued) as a partnership between father and son. The former to do building works, it seems, the latter partnership to deal with design, supervision and other functions.

30. The Defendants raise Defences and Part 20 Counterclaims. To the Deed, it is alleged that this was obtained by a misrepresentation that £50,000 was indeed due under the “Main Agreement” (that of 31 March 1998). The Defence talks about the “Main Contract” (para 7). That seems a non-sequitur, but no matter. There was no separate Building Contract in any traditional form. The absence of such a written Contract is alleged as a breach of the “Main Agreement”. There is a Counterclaim based on alleged secret profit - taking and breach of duty in agency, as well as various breaches of the Main Agreement. Also, a claim based on allegedly defective works.
31. The Amended Defence and Part 20 Counterclaim to Claim 4286 covers similar ground. Both assert an overpayment to / a secret profit by the Claimants exceeding £194,000. Replies and Defences were filed.
32. Having come upon this dispute in April 2004, as retired but sitting as a Deputy Circuit Judge, it was apparent that the dispute was in a horrendous state. It had already run two years. No other description fits. The few documents by then disclosed indicated uncertainty over the contractual nexus – if any – between the parties; unclarified involvement of ADC, who are not parties; officers of an unincorporated association being personally sued over a substantial building project, without any indication that they had either the ability or had received the professional guidance necessary to manage such a project. The Order then made – echoed by subsequent Orders of my former colleagues, urged the parties to Alternative Dispute Resolution. I am uncertain what, if anything, has been attempted in that direction. Mr Attwill senior was dead. It was, I believe, not apparent – as now seems the case – that neither of the Claimants carried any relevant insurance. I have not investigated that fully, nor should I be influenced by it, save as an alleged breach of contract by them. I assume the Defendants and the Association are not wealthy. The legal costs to date are probably the crowning horror.
33. I was, after another year had passed, asked to take the case as an Arbitration. I say nothing of the reasons why it took another two years to have the case ready for me to consider. The few weeks necessary for me to do so are regretted.
34. I have considered counsel’s helpful List of Issues, Schedules and Skeleton Arguments. Doubtless their occasional lapses in the expressions of mutual regard common between counsel are in part generated by their understandable frustration that such an admirable project should have become mired, as it has, with such dire consequences for individuals who should never have become involved personally in this dispute.
35. I consider first the contractual position. Again, I work only from the witness statements and documents before me. As to involvement of Defendants in negotiations prior to March 1998, I have only Duncan Attwill’s first statement

and the documents therein disclosed, to which were later added the substantial bundle exhibited to his second statement. The FCA members at the ADC office on 3 February 1997 are alleged to have been “the Chairman, Treasurer and other Trustees”. With no statement from Mr Hemsley (seemingly then the Chairman), the statements of the other Trustees that I have are silent on this series of events. It seems unlikely Mrs Hinton was then involved. Mr Parker may then have been the Treasurer. He does not say.

36. Mr Attwill says he “produced” the document (517) for FCA. I have no evidence as to who saw it. It talks of “Design Brief” and gives what may be sound advice on several issues. It says nothing about sorting out the nature and obligations of any contracts to be entered into.
37. At various stages in the papers the term “Design and Build Contract” is used. Even Mr Averillo in August 2001 refers to it (E 150). Carefully defined, such a Contract may set out the obligations both as to design, as to construction, and as to proper oversight and certification for payment of a project. I believe, however, that many Architects, Surveyors and Lawyers regard it as a term requiring caution, since a client needs to know exactly how the independent assessment of the works to be carried out, both as to quality and as to value, is to be provided for. To say nothing of similar control of sub-contractors (if any) and the proper supervision of works in progress.
38. The document emphasises the need to have funding secure “before proceeding with the selection of contractors”. It needs to be said, whether strictly relevant here or not, that the Trustees / Directors of a Charity, incorporated or not, have a duty to be responsible in undertaking financial obligations. I specifically avoid considering, since it does not arise on the pleadings, the position of any person who causes or allows such Trustees to behave otherwise. That includes the position which may arise when initial estimates, costings and fund-raising become inadequate, even if not so originally. The need to say “stop”. Very hard, when it arises. That, however, is arguably what both Project Managers and Trustees are for. Nor do I comment on the suggestion in the documents that some estimates and supporting documents used for funding purposes may have been inflated or “improved”, to make the needed funds more swiftly available.
39. The early history of negotiations is significant. Duncan Attwill made a statement on 13 April 2004 (page 495 – 515) when many relevant documents have still not been disclosed – as he acknowledges. His second statement (23 pages) of 14 July 2006 exhibits some 278 further pages of documents. In chronological order, Ms Elmes (for the Claimants) asserts that by 4 April 1997 Duncan Attwill (DA) had prepared project proposals for detailed discussion with the Defendants (FCA). So says Mr Attwill’s first statement (p 500 - para 23). That is not quite how I see the documents. It was Mrs Wilson of ADC who first approached CME and to her, not to FCA, that the “suggestion for .... Project” seemed to have gone, with Mr Attwill’s letter of 27 February 1997 (E 1). The FCA witnesses support this account of the first steps. Ms Elmes accepts Mr Attwill’s assertion that he prepared project proposals for discussion “with the Defendants”. She does not deal, I think, with the obvious inference to

be drawn from the Notes for the meeting of 4 April 1997. Clearly, as I must find, FCA were not yet involved. It was ADC who signed the first Confidentiality and Project Agreement (E 4) on 4 April. In language very similar to the later document signed by FCA, this one states “(ADC) intends to commission the design and construction of a community hall ....” No mention of FCA.

40. In parenthesis, not having heard from ADC, it is perhaps a cause of concern that in the several months before FCA became contractually engaged with CME, works of design and otherwise may have been done by the latter, when their clients were arguably ADC, but for which FCA subsequently were billed and paid.
41. It is clear that the local community already knew what ADC had in mind. Regeneration funding perhaps was already approved in part at least, in an amount later referred to (E 9) between Duncan Attwill and Mrs Wilson as in the range of £300,000 to £400,000. Formal involvement of FCA, however, after the site visit (May 1997), public meetings and so forth, came later. Meanwhile, Duncan Attwill continued to treat ADC as the client – letter of 15 July 1997 re budgeting (E 6). Clearly a good deal – plans included – was already done when Mrs Wilson, acting for FCA writes on 22 December 1997.
42. Nowhere in the documents or statements have I found any evidence that FCA made a final decision to take on this project, prior to the Meeting on 22 February 1998 – the “SRB Group”. All I can see (E 7) is who attended (including Messrs Averillo, Jordan, R.J. Hemsley and Mrs Hinton, with Mrs Wilson). Mrs Wilson reports as if having acted for the SRB Group with CME. Clearly Mr Jordan was then elected Chairman, a decision was taken to go ahead with the project. Jackie Painter, then FCA Secretary, was present. The Chairman of the Group, Father Graham Carey, was retiring. FCA itself already existed – it looks very much as if the edges were blurred and there may have been questions of authority to consider. None are raised before me.
43. The first clear and formal involvement of FCA with CME seems to be the Project Management Agreement (20 March 1998). It was signed for FCA by Mr Jordan. I regard it as a singularly unfortunate document – to put it no higher – and one into which FCA should never have been allowed to enter without clear advice upon its manifest inadequacies, to say nothing of its loose, confusing and conflicting terminology. It is a convincing example of the dangers involved in so-called “Design and Build” Contracts.
44. In view of what happened later I make it clear that, limited as I am to the material before me, I have no idea whether Mr Attwill’s view of his and of his father’s experience and abilities is justified; but this Agreement is no good example of clear drafting. The document itself and what I have seen of events that followed by way of fund-raising, works carried out and payments made do not allow me to form any concluded view on several issues, which may in any event not be for my decision. If Mr Attwill thought he was following acceptable, professional practice or “normal commercial terms”, I am not to

comment on that here, nor on his qualifications to carry out any of the identifiable functions allocated to him under this Agreement.

45. Ms Elmes refers to an antecedent oral contract with CME. That may be a proper construction of Duncan Attwill's first statement (E 501, paras 29 – 31). What is apparent, as she seems to acknowledge, is that neither Mr Attwill, his father, or anyone involved at ADC seem to have been aware of or to have considered that this Agreement was or should be treated as a Design and Build Contract, in terms of the JCT Design and Build Contract and its attendant sub-contract Agreements and Conditions.
46. Further, as to formalities, Mr Attwill's first statement (p 501, para 29) speaks of "specimen contractor agreements and duty of care documents" being discussed, drafted and approved by ADC solicitors. Where are they? Yet later, as it happens, he is explaining to the FCA – SRB Group (page E 40, Minutes 30 November 30 November 1998) that the standard form of contract for contractors had not been used "because it is now so long and complicated that it was felt (- by whom?) a simpler form would be more appropriate to the project." Where is it? Where is evidence of its approval by FCA – or even ADC on their behalf? Another example of what counsel call "evidencing the contract"? CME plead in their Amended Defence to the Part 20 Counterclaim (para 26 (j)), that all sub-contractors entered into equivalent written agreements based on an ICS form. It may be my oversight, but I find no evidence of that in Mr Attwill's statement or in the documents. I wonder if that averment is itself sustainable?
47. Examining the PMA, the parties are clearly the Limited Company (then CME Associates Ltd) and FCA. It refers to the Project as "described in the outline work programme in Appendix A." That Appendix (p 525) is signed by Duncan Attwill and R. Jordan.
48. It is not an "outline work programme" or anything of the sort. It is an Estimate, totalling some £35,000, for preliminary formalities, to be paid for over some 14 weeks, which seem to include preparation of drawings for site layout, ground works and unspecified working drawings, which from later documents all seem consistent with proceeding up to ground level, in preparation for erection of the building thereafter. No more. There was, as I find, never any attempt to embody in a single contract anything by way of an overall price for the project. Merely a series of revised (some times conflicting) estimates for the next stage or, latterly, to completion of construction. A kind of "price it as you go along" arrangement. This document has CME Associates Ltd to act as Project Managers. It makes no provision for CME to design anything – simply to make designs available to the "Professional Team". The Project Manager shall "appoint and maintain contact with contractors and sub-contractors."
49. Despite the careful arguments of counsel, I find that to describe this Agreement as having any of the essential characteristics of a Design and Build Contract is unsustainable, even ridiculous. The Agreement (Clause 1) is "to the intent that Project Manager shall act as the Client's representative to direct and co-ordinate and supervise the Project in association with the Professional Teams and

contractors and sub-contractors..... which shall be appointed by the Project Manager.”

50. The function of the appointing of contractors and sub-contractors for the Project Manager is reiterated in Clause 3 (b).
51. Pause there. Whether or not you call a construction contract “Design and Build” which may more easily give rise to blurred edges of function and conflicts of interest, or regard it as a series of separate contracts may matter little, provided the client can tell who is responsible for what. If CME ever obtained advice on its different roles and functions, there is little sign of it in this documents or on the facts of the case following. Happily, however, I believe that also matters relatively little.
52. Before this PMA was signed, FCA clearly knew that CME had produced some designs and plans, as well as some costings, to allow erection of the proposed Community Centre. They seem to have neither sought nor to have received advice as to the separation of functions or responsibilities in relation to CME, simply to have gone along with the contractual arrangements between ADC and CME already signed on 4 April 1997, whether they actually knew of them or not, being substituted as clients in a new Agreement. They clearly expected CME to “do the job”. There is no evidence as to how FCA thought at any stage – save perhaps the first, for which funding appears to have been already available – that the project would be financed, save by applying to others for funding. Again, not an issue for me, any more than considering whether FCA at any stage were entitled responsibly to sanction the works – or further works – in the light of the funding as yet available.
53. This is a case where CME and/or CME Associates seek payment for building works done, and for monies “lent” or due under a Deed entered into in August 2002. The Partnership, which nobody so far seems to dispute came into existence in 2001 (although I have seen no documentary evidence of it, simply a bold statement from Mr Attwill unaccompanied by any record of the decision) claims for unpaid fees, allegedly under the PMA.
54. Despite, again, the efforts of counsel, I find the nature of the PMA clear beyond argument, albeit limited. It is an agreement of Agency, to appoint those who are to construct the building, the contractors (one or several, if any) and sub-contractors, and any necessary producers of designs or other services. CME Associates Ltd are the Agents. They are to act “in association with the Professional Team”. Although that is then stated to include the contractors / sub-contractors, nothing is said about appointment of other members of the Professional Team. Fortunately, not an issue relevant to my function, I believe.
55. It is, I believe, beyond argument that CME may well originally have intended to act both as Project Managers (the Agency function) and as contractors. But that is no way made clear in the PMA. Both counsel find themselves involved in attempting to investigate whether or not the conduct of the parties after March 1998 “evidences” the original nature and content of the original contract. I confess I find no convincing evidence to justify such post-rationalisation. An

agent owes firstly a duty to his principal to avoid anything which may amount or lead to a conflict of interest inimical to those of his client. In this case, that obligation included (I do not repeat the Clauses again)

1. Appointing those who were to build.
  2. Providing the builders with the client's "brief" (whatever that means) and all designs and specifications and relevant information. Also, to see that those are "executed as specified".
56. The Project Manager is to "appoint and maintain contact with contractors and sub-contractors and suppliers on all matters concerning costs and provision of services and materials..."
57. The Project Manager is to "be responsible for approval after due consultation with the client for all costs and charges and fees ..."
58. Then, the much quoted duty "for appointing an independent and fully qualified quantity surveyor or civil engineer for the purposes of obtaining certification of all works completed."
59. This duty in the Agent highlights possible conflicts of interest in a so-called Design and Build relationship. An apparently very competent site supervisor (ISL) was appointed to supervise and report on works at various stages and did so. That is not what Clause 3 (d) is about. It is to certify that, when works are allegedly completed, the client can know from an independent source that they are so completed, have been completed competently and that the value claimed for them – whether fixed or on a quantum meruit – is justified.
60. This Agent was also obliged to ensure that all members of the "Professional Team" – which includes contractors and sub-contractors (see above) carry all relevant insurance. "Liability to the client" includes liability for defective, incomplete or negligent work by a contractor and, if they are in direct contractual relationship with the client, one who might otherwise be called a sub-contractor. And they must all be appointed under suitable JCT contract forms. In parenthesis, the PMA was not, as I have found, a Design and Build Contract. Whether it was or not, however, I find that the appropriate form of JCT contract is what is here meant and – whatever it was – it was not used. I am not convinced, however, that this necessarily matters in the end.
61. FCA as the client had duties. The obligation to provide funding (Clause 6). Proof that it had was dependent on what I take to be the full costing of the Project – to be annexed as Appendix C. It never was. Nor was such full costing every provided. Not an issue before me, save as to arguments, if relevant, over delays to the works.
62. Clause 7 is the only provision for remuneration of the Project Manager. It is vague and contradictory. It is almost beyond belief that CME never, until later in Project, provided FCA with any idea of their own fee structure for acting as Agents for FCA. That they started to change it when problems arose in Spring

2002 does not alter this. As to contractors (and/or sub-contractors) or others, I suppose “all other properly certificated bills and costs” applies to them.

63. With hindsight, it seemed clear that what happened is simply that, up to 2001 at any rate, Messrs Attwill did several different things under their Limited Company.
1. Long before March 1998, they had prepared certain drawings, plans and cost estimates which were approved by ADC. How much of all that was paid for prior to March 1998 is uncertain, but £5,557.50 is referred to in the SRB Group Minutes of 2 February 1998 (E 7).
  2. At some earlier stage, CME produced some plans for and ordered manufacture of components – and continued to do so. I have found an Invoice (p 1089) as early as 10 August 1998 for design work, which the spreadsheet produced by Mr Cansdale (Accountant for the Claimants) indicates is CME’s earliest expenditure “outwith”. I find no evidence as to whether they had already made such payments relating to this proposed project, prior to March 1998. I believe no issue is before me as to what payments were made by FCA of respect to works of this kind, nor can I find clear evidence that Mr Standen’s enquiries go back that far.
  3. How much of the “provisional works plan and costs” (Appendix A to the PMA - p 525) is to be seen as costs paid by CME as Project Manager, as opposed to costs to be paid for contract works is not, I believe, an analysis required of me. So far.
  4. Then goods were manufactured, others were supplied and work was done on site.
  5. Then CME Associates Ltd (up to 2001) put in for payment the two Forms of Invoice to be found exhibited to Mr Cansdale’s Report (p 1499 ff). Up to 14 March 2001 (p 1534) the Invoices seem to be some in respect of what are clearly construction works, some for what are – or may be – project management. Some are mixed.
64. Up to this stage, there is nothing in the evidence to show that either of Messrs Attwill or anyone else at ADC or FCA had spared a thought for the true nature of their relationship. The position bears all the hall-marks of lack of any professional input or thought as to relationships, functions or responsibilities. Having considered all the evidence and submissions before me, I am entirely convinced that the PMA was a contract of Agency/Management with its own specific functions and duties, in addition to those normally implied in a relationship of Project Manager/Agent. It also contained powers in the PMA to appoint all those necessary to manufacture or construct the projected building. Despite the presence of Appendix A, I am wholly unconvinced that this written Agreement contained or can be construed as, an overall building contract.
65. Whatever may now be said, CME Associates Ltd could, under this PMA, have handed over the whole process of construction to a separate Company,

partnership or individual, under an appropriate JCT Contract. I have no doubt that, provided Mr Attwill remained “in charge” and supervised and certified all work as fit for payment, FCA could have had and would have had no complaint. In fact, it seems obvious that Mr Attwill seemed to see no conflict between the functions of acting as Agent, and employing himself to do such parts of the work as he wished, with his Company or not, despite the requirement upon him to ensure that bad works or overcharging by whoever carried out those other functions was prevented. It was not impossible to achieve that, provided he followed the PMA and appointed sufficient, qualified and independent outside monitors.

66. It is difficult to imagine circumstances more likely to lead to a conflict of interest, if those provisions were not followed. The only protection contained in the PMA would have been the appointment of a Quantity Surveyor etc. I repeat, this was not only not done but there is no indication that Mr Attwill even considered doing it.
67. CME Ltd in their own name ordered materials, the construction and delivery of parts and – although the detail is unclear at present – the labour to carry out the construction, whether their own or third party. It seems that assistance was provided by the employees of some suppliers, in the unloading and possibly partially in the construction of some of the parts delivered, but I can not tell if they were separately paid for that. Mr Attwill then delivered to FCA – not directly but almost invariably to Mrs Wilson at ADR – the Invoices referred to.
68. FCA no longer seems so troubled by the issue of a “secret profit” as when Mr Standen first reported in Summer 2002. Equally it seems clear that, there being no formal contract between FCA and CME Associates Ltd – whether directly or via the Project Manager – for the actual building works, CME charged fees as Project Manager, but also put forward claims for work done, where on the face of the Invoices one could not clearly tell, in respect of building works, those in respect of which CME had ordered goods or services from a third party, had directly employed their own staff (e.g. a clerk of works) or contract labour, or those items in respect of which it is now clear they put a “mark-up” on a third party invoice.
69. In respect of allegedly Project Manager functions, the basis for charging seems to have varied throughout the history of the job. From the documents, it is very difficult to tell how and when (if at all) the rate of charging was agreed, or simply charged, passed by ADC, for example, and paid. On some Invoices one has “professional fees”, “professional attendance on site”, “site management”, “CME direct costs”, “CME hour based fees”. It is a hopeless confusion, if one took seriously the functions and duties of an Agent, as opposed to Building Contractor – as I believe I am asked to do.
70. If CME up to Spring 2001 had been employed by FCA as a contractor under a proper JCT Agreement, such matters as costs estimates, or prime costs plus “uplift” and so forth would have been provided for. In the present case, even had CME (as Project Manager) done its work properly by way of certifying

costs and monitoring them, FCA was at risk of duplication of Project Manager fees and some building cost functions.

71. In May 2001 CME Associates Ltd renamed itself and purported (ex post facto) to become the building contractor on this Project. Not a shred of evidence to indicate that this was agreed in advance. Still, on any view, without a proper contract and with no distinction as to whether it employed third party suppliers, sub-contractors or others, or whether they were employed directly by FCA via their Project Manager. Assuming – it is not challenged – that the partnership of CME Associates in truth came into existence about now, the forms of Invoice certainly changed, being now delivered to Mr White (who was soon to go permanently sick) as Project Manager for ADC. There is no suggestion that FCA was consulted about this or in any way formally agreed to it. The Estates Ltd Invoice of 11 June 2001 (p 1535) is issued the same day as a Partnership Invoice. It charges for supervising delivery of the portal frames, whose delivery is separately charged for on the Estates Ltd Invoice. If necessary, one might have to consult original records to see exactly who did what. My hope is that the work of the appointed Quantity Surveyors and Accountants may obviate this.
72. In plain terms, whoever the builder is – contractor or sub-contractor – it seems clear that the function and prime duty of a Project Manager/Agent towards his client is imperilled when the risk of duplicating cost is so evident, without a clear and independent oversight. The only evidence of such might have been – Mr Attwill clearly purported to treat it as such – the periodic use of “independent accountants” to certify charges. Mr Standen’s professional criticism of such “independence” apart – again, not a prime issue before me – neither the Invoices before or after Spring 2001, nor any offerings from the “independent accountants” seem to have disclosed original Invoices, or the “mark-up” upon them; until questions were asked in June 2002. Mr Attwill (p 508) says third party invoices were seen by ADC – presumably acting for FCA. Neither the witness statements nor the documents disclose any evidence in support of that. I take leave to doubt it.
73. Mr Attwill does say that some estimates and invoices went to funding organisations, but that generalisation does not obviate the fact that there was in my view no agreement, by conduct of the parties or otherwise, that allowed CME, before or after Spring 2001, to act as Main Contractors who might charge such a “mark-up”. Assuming, as is perfectly arguable, that CME, acting as Project Manager/Agent, appointed themselves to do work on site, there is no secure basis for arguing that the orders to suppliers and other third parties and the invoices received from them were not the product of CME acting for themselves, wholly contrary to the interests of FCA. Invoices in bundle 4 (p 1088 ff) bear the title CME Associates Ltd up to January 2001 (p 1201). Thereafter they are varied. Some are delivered in the name of the Partnership. It is difficult to discern a proper separation of functions here, let alone any avoidance of duplication of work.
75. Perhaps more to the point, Mr Attwill says he informed Mrs Wilson of the split by letter of 27 April 2001 (E 144). There is no evidence that she informed

FCA, let alone that they agreed to it in advance, let alone appreciated the contractual nexus so far, nor that they had assented to it or to any change in it. The works were by now well advanced. This was a unilateral decision by the Attwills. There is no evidence that the Project Management/Agency Contract with the Limited Company was ever consensually terminated, or a new one created with the Partnership. Even if it were so, however, the duties of the March 1998 PMA would necessarily have been imported upon the “new” Agent, who would even more clearly have the duty to oversee both the works and the costings of the Limited Company and all other contractors. Whether or not the Limited Company could delegate (or sub-contract) its functions and duties under the PMA to its only shareholders and Directors, acting as a Partnership, without the separate consent of FCA is difficult. I have no evidence as to the reasons for the “split”, whether economic or otherwise. The Defendants argue that CM Associates/Estates Ltd were under an obligation to ensure that all contractors and sub-contractors carried full insurance (p 523, clause 3 (h)). That duty also must in my view fall upon the Partnership, if they became in a legal relationship with FCA. In fact, it is difficult to see why the Project Manager function emanating from the PMA can not and did not continue upon the re-named Limited Company, jointly and severally with the Partnership, even if the “split” resulted in FCA having a contractual relationship with the Partnership.

76. Although, having come to law, the parties now advance arguments upon differing constructions of their contractual relationship(s), I noted that on 7 August 2001 (E 150) Mr Averillo is writing to the Lottery Fund about the question of changing contractors. He talks of CME Associates (sic), of a “Design and Build” contract and refers to a “fundamental clause” about return of all drawings, etc. to CME, if an alternative contractor is sought. The PMA contains no such clause. Is this just another example of convenient invention? Something akin to it does appear in para 6 of the Agreement signed by ADC on 4 April 1997.
77. With problems of further funding and delays, the work partly continued. The documentation from May 2001 onwards presents a somewhat confusing picture. Mr Attwill in his second statement (p 11 para 41) recounts a meeting of 24 May. I have no evidence as to who attended. The notes (E 146) on Partnership notepaper seem to speak as if with the voice of a contractor, yet talk of a client and talk about “commissioning work from suppliers.” Mr Attwill does not help as to which hat he thought he was wearing. It is arguably odd language for an Agent to use. There is no evidence that I can see that FCA agreed to any of this, nor do I have any evidence as to how or why FCA paid any Invoices thereafter – it seems alleged that they all went to ADC until about October 2001 (p 1539), when the Partnership submits an Invoice seemingly direct to FCA – “to be paid from client BHI account, as instructed by Graham White.” I find no clear evidence of which account this was. The same applies to Invoices thereafter, both from the Partnership and Estates Ltd. Without more evidence they are unconvincing evidence of FCA either knowing or appreciating the effects, if any, of the “split” on their relationship with their Project Manager/Agent or, if the Limited Company was originally or later employed by

them as a contractor, with that Limited Company, or of FCA consenting to any change in the contractual realities.

78. In August 2002 the project, contractual issues apart, was clearly in financial difficulties. On 23 July 2002 (p 197) Duncan Attwill wrote to Mr Hemsley, then Chairman of SCA. He wrote on Partnership notepaper. He headed it “Without Prejudice”. Odd, if this was an Agent writing to a Principal. Or is it simply yet another lay person having no idea what is meant by “Without Prejudice”? He refers to two earlier letters – 3 July and 12 July. I have only the former (p 196), on Partnership paper to Mr Averillo. He was, it seems reasonably clear, at this stage acting for FCA. Whether as an employee or otherwise may matter not, nor whether and which of the Trustees knew what he was doing. Mr Standen was already asking Mr Attwill for prime documents in support of the charges made by CME over the years to FCA. That letter refers to “revised estimates for the completion of the Community Centre.” The phrase “revised estimates” has by now a very familiar ring. Whether Mr Attwill in his role as Agent is approving them, I have no evidence that FCA ever did. Or perhaps he is just the builder. He quotes £62,059.00 and says that Estates Ltd would “lend” £25,000 towards it. Who is he representing? The rest of that letter endorses the confusion of roles.
79. On 23 July (p 197) Mr Attwill states his position to Mr Hemsley. He writes he says, “representing both Cleeve Mill Estates and CME Associates.” A remarkable duality, on any view. He talks of legal action by a creditor and says this will “at the least result in the Community Association assets being sequestered.” One wonders why? Mark that, so far as he is concerned he talks of the creditor being one of FCA – not as a sub-contractor of CME, for instance. He says “we are unable to continue to commission work on your behalf” – as Agent or Project Manager, one supposes. He then talks of a previous undertaking by FCA to “assign the whole of the Sport England retainer of £25,000 to CME Associates.” That refers to the current funders, who were in part at least brought in by FCASC and/or Mr Averillo, and who were being invoiced directly by CME. That refers to a letter from Mr Hemsley to Mr Ron Attwill (E 177). This was the only instance, I believe, where funding for a particular section of the Project was being paid direct to CME by the funder. CME – Associates, it seems – (see FCA Minutes 28 January 2002, E 175) had offered FCA £25,000 to fund these works, against the Sport England retention monies. FCA had in reply preferred to undertake to pay the retainer to CME, when received. The letter specifies two other creditors and lumps Estates Ltd and Associates together as creditors for £68,201 (approx). In parenthesis, at the end of the affair I can not ascertain for sure whether these or any other outstanding third party creditors were eventually paid and, if so, how and by whom.
80. By now it must be arguable that all semblance of separation of functions between the roles of the Attwills as Agents/Project Managers and as builders is elided. Lest it should seem overlooked, CME (in either or both guises) has, throughout these works, asserted that the position of FCA was protected by certificates from “independent accountants” or auditors. Leave aside Mr Standen’s criticism of their “independence”, it is certainly only when that

accountant, in Summer 2002, obtains original Invoices from suppliers, etc. other than CME itself, that the question of “mark-up” is disclosed. Mr Attwill suggests – by clear inference – that ADC knew of it. There is no evidence of that, so far as I have found; even were it so, however, Mr Attwill offers no explanation that I can see of one essential concern. He is clearly capable of seeing other contractors as directly employed by FCA, via Associates or otherwise, when they threatened to sue. Assuming that they really did. I have found no “independent” evidence of that, as it happens. He makes no distinction, it seems, of his duty as Site Agent, either to have the work of all contractors, including Estates Ltd, independently checked and certified, nor of his obligation to satisfy himself on behalf of FCA that all demands for payment are in accordance with whatever the terms of contract may be between FCA and each creditor, be those suppliers, main or sub-contractors.

81. At all events, on 4 September 2002 (p 230) again “Without Prejudice”, Ron Attwill is writing on Associates paper to Mr Averillo “as from CME Associates and Cleeve Mill Estates jointly,” holding themselves (in both personae, I presume) as discharged from all contracts with FCA. The letter bears careful reading. It talks of claiming all monies allegedly due (to both personae again, doubtless) with an 8% additional claim “as now allowed by law”. I refrain from comment. The letter refers to “two third party creditors”. The same two as in the paragraph above. It is clearly now convenient – if nothing else – for Messrs Attwill to attempt to distance themselves from these claims. Hardly consistent, one again might think, if the building persona regarded itself as main contractor, entitled to put a “mark-up” on other bills. Of course, they may prefer to argue it both ways, in the alternative. I am not sure that they have pleaded either. One might wonder what their agent persona would see as their duty to their principal in those circumstances.
82. CME (in either or both personae) then are seemingly invited to meet with ADC on 11 September. A meeting to which the FCA Trustees were separately invited – as they clearly thought, without CME. See Jackie Painter (p 622), Mr Parker (p 636) and Mrs Hinton (p 625). Mr Averillo may have this meeting in mind when he told Duncan Attwill (p 233) he would check with the Trustees about Mr Attwill coming to the meeting. I have no statement from Mr Hemsley. Before this, however, it seems that Mr Parker had, with Mr Hemsley, already signed the Deed concerning the £50,000. All Mr Parker says is that he did it, at Mrs Wilson’s request. The copy letter from Duncan Attwill to Mr Hemsley – assuming he read it – is against the background of an offer (to Mr Averillo) on 3 July 2002 (p 196) of “a second loan to the Community Association of £25,000.” This allegedly left £37,059 “to be found by the Association”. For exactly what, is unclear, save that it fits the “balance of costs on completion - £62,055.” Yet on 23 July, the amounts allegedly outstanding total £98,866 – all “approx”, of course. It is not now relevant for me to analyse such differences. The explanations may be simple. It is, however, arguably the duty of an Agent – of whatever sort – critically to scrutinise claims against his principal, not least when made by himself, as it were. With suitable provisions and clauses, “Design and Build” contracts may indeed give good value – and protection to the client, provided those protections are put in place and

enforced. For one person to do it all may strain even the role-diversity functions of an Archbishop of Titipu.

83. For the removal of doubt and lest I overlook it later, there is nothing in the whole papers before me to suggest deliberate dishonesty by Duncan Attwill. Even if it existed, the evidence does not show it. His father and the designs he produced may have been as innovative and successful as seems claimed, despite Mr Plant's criticisms, which are not an issue before me. Had this project been completed, the benefit to Fishersgate and the satisfaction of all involved may have been justifiably immense. It is, however, hard to justify – whoever be responsible for it – that this group of well-intentioned and devoted residents, supported seemingly by a Council anxious to improve their quality of life and having access to funds to do so, should have become personally involved in financial disputes and possible failure of the Project from some easily identifiable causes.
- (i) The clients, FCA, had none of the management, business or professional skills to oversee and control such a project. Proper Constitutions, ensuring Corporate Status where necessary, employing competent professionals and ensuring both funding in place and proper control of expenditure, are all elements essential to this kind of exercise.
  - (ii) Firm and final decisions as to the extent and cost of a project, followed by a similar exercise in respect of any proposed variations, matched by assured funding already in place, are vital.
  - (iii) Any one acting for the clients must have a proper professional qualification so to do, or have a clear grasp of their functions, duties and, if need be, separate roles. Blurring the edges, to say nothing of self-interest, is not tolerable. In parenthesis, I neither say nor infer anything about the solicitors now instructed by the Defendants, who have clearly been involved in giving some advice at various stages. I know nothing of the limits of their instructions, or whether such assistance was given pro bono, or anything else.
84. These papers disclose on the part of both Messrs Attwill, apart from an arguable talent in building design and a knowledge of building practice and a reasonable competence in co-ordinating and overseeing works, combined with a perhaps admirable industry in and devotion towards obtaining the best terms for a client in respect of applying for funding, the bargaining with manufacturers, suppliers and others, a nevertheless woeful lack of appreciation of separation of functions and of concomitant legal duties to their clients. There is evidence of a patina of professional expertise and terminology, unallied to any real understanding of the responsibilities involved; of substituting what is not contracted for with an alternative, both inferior and unauthorised and – most sadly – an inability to put the clients' interests at all times in prime place, however pressing the needs of their own financial position may have come to be.
85. Being wise – or trying to – after other people's events, or hindsight, is a dangerous viewpoint, even for arbitrators. Other than anxiety by ADC and/or

FCA to do a good thing and of CME to sell a good (if it be so) building, there is nevertheless no reason why the limits of a project cannot be set and properly funded, before the client is legally committed to it. Except, of course, that funds come and go, prices increase and enthusiasms rise and wane. That was apparent in April 2004. I have no idea, with ADR being available, why the parties are still spending money on lawyers, instead of enjoying their new Community Centre.

86. The first claim is for £50,000 and interest, based on the Deed signed on 14 August 2002. As a Deed, it is not challenged on grounds of want of consideration or want of authority. Arguably it could not be. I have not seen the FCA Constitution, nor is it relevant now. Mr Parker is the only signatory now sued. The only Defence raised is inducement by misrepresentation, followed by a Counterclaim based on the PMA. Counsel for FCA asserts that this “loan agreement” is void or voidable thereby (Skeleton February 2007, para 4.2.8). I find that the claims for payment by CMA (in both personae) made during June/July 2002 were not, on the evidence before me, dishonest. They may, however, have been incompetent, negligent, mistaken – even grossly so – and amount to material representations that substantially induced FCA to sign this Deed.
87. In the absence of an oral hearing and of any substantial input from ADC as to evidence or – being not parties – submissions either, it is tolerably clear that areas of possible prejudice to the Defendants, leading up to this Deed, can be chronologically identified.
1. From the time that Regeneration was in the air, FCA was persuaded, allowed or caused to become the client vehicle for the Community Hall Project. In the absence of a complete financial guarantee, for instance, by ADC – of which I have no evidence – this should never have been allowed to happen to an unincorporated association.
  2. A series of persons with limited, if any, training, experience or competence to undertake such a role were caused, allowed and/or encouraged to do so.
  3. None of the professionals or experienced administrators involved seemed to have been concerned to protect the individual members of FCA against personal liability.
  4. ADC seemingly accepted CME (Messrs Attwill) as being capable of both overseeing and completing the project. FCA had no independent advice as to the design capabilities, management or contractual abilities of CME, who it now seems clear were promoting their own design ideas. No-one even seems to have thought to check that they were insured, as designers, overseers, contractors or builders, in relation not to the site, third parties or similar liability, but for breach of duty towards their clients. Whether as advisers or builders, that is. The Claimants’ Skeleton Argument carries the clear inference that neither the Limited Company or the alleged Partnership were so insured.

5. The whole preliminary relationship to the project was between ADC and CME. Whatever the Claimants now argue, arising from the 2001 change of name and the alleged Partnership Agreement, in 1997/98 both ADC and the Defendants were dealing with one legal entity, but no one seems to have raised with FCA the need to ensure that, whatever the legal entity, proper provision was made for their protection by there being in place independent advice as to the competence of the proposed design, the provision of full and competent plans to complete the project, right from initial project concepts, through Planning and Building Control, drawings for manufacture, drawings for all site work and erection, in sufficient detail to complete the project. If this was provided by ADC, I have no evidence of it.
6. If ADC were satisfied on all this – I note the Claimants do not allege they were agents of the Defendants for that or any other purpose – I have again no evidence of that. Even less, that such independent advice was ever available for the Defendants.
7. The PMA proffered by CME seems to have “cleared” the ADC “professionals” without comment in early 1997. As the Claimants now assert that the Defendants had in fact employed CME Associates Ltd as a Design and Build Contractor in February 1998 (Skeleton, para 67 (d) and earlier) the failure of any of the professionals involved to ensure that FCA had clear contractual provision for the construction and separately for the supervision and control of the Project is highlighted – as is, I must make clear, the persistent use of “Design and Build” to describe – or even to justify – what some would describe as a relationship (or a series of them) devoid of any attempt to initiate documents which guaranteed a separation of functions and a competent performance of each.
8. The PMA in any event is in my view a profoundly unsatisfactory document. If Ms Elmes is correct, however, CME were already employed as builders when it was proffered and signed. How the Company can argue that, to its own advantage, when the PMA itself – which they put forward for signature – states “the client proposes to erect and fit out a building” etc... and then goes on to provide for the Company to appoint contractors and sub-contractors to do so, is difficult to justify.
9. The PMA has all the sign of amateur drafting. Its provisions are conflicting, inconsistent and incomplete. It does not – if the Claimants are now right – identify the main contractor, nor deal with the obvious conflict arising from the Attwills being already employed (as now alleged) to construct the project, yet here being employed to find someone to do it. “Design and Build” is a loose enough concept without this kind of pseudo-professional jargon. It is unjust to call it anything less.
10. The Company on any view totally failed, whether in employing or contracting to employ itself or otherwise, to comply with the terms of the PMA in more respects than its compliance with it. So long as funding came in – albeit by a series of freshets followed by droughts – it is clear

no-one thought again about the PMA or, indeed, any other formality. There seems to have been an almost blind confidence in the probity and competence of the Attwills.

11. The Company “split itself” without prior notice to or prior consent of either ADC or FCA. There is not a shred of evidence that the former batted an eyelid or that the latter were really even aware of it let alone that either considered whether they agreed to some form of novation or whatever, with the Partnership as to the PMA. Let alone, whether the exercise is binding on these Defendants, even if it proved to their disadvantage.
  
88. The issues. Counsel have identified those upon which they seek a Preliminary Award. I shall endeavour not to be distracted by the manifest presence of others, like birds circling in the dusk, but the Claimants raise arguments that may make it helpful, or even necessary, to adopt a chronological analysis. I am told by Duncan Attwill (p 495) that CME Associates Ltd (not a firm, as Ms Elmes asserts – Skeleton, para 5) was formed in 1985. He then tells me that Cleeve Mill Estates Ltd was formed in 1996, as a private Limited Company. As a fact, correspondence in 1997 with ADC was on paper of CME Associates Ltd (registered number 3226838), the only corporate title and number I can find in use up to May 2001. I must assume Counsel is in error and in any event find that in legal terms, CME Associates Ltd was the only body with which FCA did business up to May 2001 and, since a change of name does not alter the corporate status, the only legal persona with which they continued to do business thereafter; unless they must be held to have entered into a relationship of privity of contract with the partnership, CME Associates, assuming it exists, in or after May 2001.
  
89. I have already noted that everyone – so far, at least – seems to have regarded ADC’s involvement in this Project and this dispute as largely irrelevant. With the knowledge I now have my attitude, were I still dealing with the case with the full Case Management Powers of a Circuit Judge, might (or might not) accept that. I note also, however, that neither Claimant so far appears to allege that ADC were agents for FCA. Certainly not in the pleadings. In Counsel’s Submissions, the effect of the phrase “Margaret Wilson, on behalf of the Defendants” is not altogether clear. Allegations of agency are surely better if clearly pleaded. It must be said that I have no reliable evidence, in statements or documents, that any of the officers of FCA ever thought about, certainly were never advised upon, nor agreed to, dealing with or being liable to anyone other than “Cleeve Mill”, save that (and this would require careful analysis), prior to May 2001 they paid bills to the Limited Company with whom the PMA had been signed; after May 2001 that, whilst they may have known that “Cleeve Mill” were saying they had “split”, they were never asked to nor did agree to deal separately with a re-named Limited Company and an alleged new Partnership. The overwhelming picture I have is that they were – very understandably, it must surely be said – more concerned with finding funds and having their Centre completed.

90. I have no idea what Duncan Attwill was in truth about, or why. An internet search in June 2007 with Companies House and British Business Names discloses that CME Associates Ltd was indeed first registered on 18 July 1986 and changed its name to Cleeve Mill Estates Ltd in May 2001. Registered Number 3226838. CME Associates Ltd reappears on 9 August 2005; “Activity – Labour Recruitment”, under number 05531851.
91. The alleged partnership – “CME Associates” or “CME Associates – Partnership” appears nowhere in the records I have had searched so far. Domain Names show that “CME Associates Inc” is “taken” by a USA body that does building design and inspection and bores deep holes in the process. In our law, of course, the creation of a partnership is largely a question of fact. Applying for and obtaining a VAT Registration may indicate that those authorities, at least, accept that a partnership as a reality exists. If they require any documentary proof of it, I have seen none. The Limited Company in its documentation seems to carry no VAT Registration Number.
92. The question of whether or not FCA are bound by the “split” is difficult. The PMA imposed duties on the Limited Company. If it, or a separate Company, partnership or individual undertook to carry out building works, that seems permitted. If the “Project Manager” role was ever passed to anyone else, I believe it requires more than a unilateral assertion and the payment of some bills, delivered mostly to ADC, who is not yet alleged to be or identified as agent for FCA, to establish a legally binding contractual relationship with any such partnership. The “loan” in August 2002 was with the Limited Company.
93. In any event, in the absence of any oral evidence, the documents do not support such a relationship – save that the Attwills chose, or attempted, to separate their functions. I do not know why. I do not necessarily impute any improper motive. Leaving aside the rather ridiculous, I fear I must say, proposition – which might occur legitimately with a properly defined and implemented Design and Build Contract – of one Attwill wearing one colour of hard hat whilst independently and critically supervising and certifying the other Attwill (or even himself) in carrying out a clearly defined and separate function, the simple picture is that FCA expected Cleeve Mill – the Attwills – to do the job of constructing the project, with seemingly endless confidence, to say nothing of their probity. Since they undertook (in the PMA) to look after their clients’ interests in doing so and purported to be competent to do so, they will have no complaint if so held to account.
94. It is at present impossible to analyse in any convincing detail how much of the project was carried out by “Cleeve Mill” wearing their builders’ hat – as now claimed – and how much by third parties and how much by Cleeve Mill wearing their Project Manager hat. Clearly they produced some designs/plans and sub-contracted others. Clearly they had parts manufactured – whether by “suppliers” or “sub-contractors” is not easy to determine. Ground works, foundations and the installation of services were provided. Again, I cannot clearly separate whether Cleeve Mill employed labour or contracted for others to do so. The same for construction of above-ground works. As to erection and fixing of pre-manufactured components, I can tell who provided the crane, but

not whose labour prepared and erected them on site. I noted the comment that various parts might have been better constructed on site. As to supervision, clearly Cleeve Mill employed a local person (ISL) to supervise work on site. I find in terms that they were not instructed to, nor did they attempt to certify the work, or any part of it, as completed, let alone certify its value for payment.

95. Prior to signing the PMA, I find that FCA – via its officers – were willing to have “Cleeve Mill” put up the Community Centre for a cost in respect of which they believed funding was already available, not least because they committed themselves to do so when only the preliminary works had been costed (Appendix A). That they may have been enthused into doing so – legitimately, for all I can say on the present evidence – by the combined efforts of ADC and the Attwills may be nothing to the present point.
96. I have no evidence that the FCA were aware of the April 1997 Agreement signed by ADC with Cleeve Mill, or that they knew of its format, scope or legal implications.
97. By 31 March 1998 (the PMA), the design of the proposed building had been largely committed to paper. I decline in this analysis – already too long, I fear – to identify each new idea put forward and/or amended by FCA, with the need for funding to cover it, which was not already available. Ms Elmes asserts (Skeleton para 56 (e) (iv)) that in February, CME Associates Ltd were “engaged” to “carry out the design and build of the Project”. She does not specify the terms upon which they were to do so, as to Construction, Supervision, Certification and so forth. Prior the PMA, I have found no evidence to support that contention, but fear that such thoughts seem to have figured in nobody’s mind, until things went wrong.
98. Happily, one might say, the PMA set out some of the duties of “Cleeve Mill”. It did not specify who was to build the project. In theory, the Attwills could have done it all – but no-one suggested they should. We have no evidence at all as to what, if any, labour force they had. They seemingly had a “clerk of works” later on. For all I know, he or she was an “Independent Contractor” or “Consultant” or some other identity convenient for tax purposes. The PMA entitled and obliged Cleeve Mill to engage anyone they wanted – including themselves – to carry out the works, whether of design, manufacture and supply of materials or parts, construction or otherwise. And to liaise and to deal – on behalf of FCA – with all the Planners, Building Inspectors, Service Suppliers and anyone else who could help – or even hinder – the Project.
99. It would require a detailed analysis to work out who did what. In legal terms, that is. I am reasonably certain, however, that at no stage did FCA approve that “Cleeve Mill” should be entitled to act as a Main Contractor, in the sense that they were entitled to employ “sub-contractors” and then charge a “mark-up” on the latter’s bills. The PMA entitled Cleeve Mill to hand the whole construction over to a third party. The fact that FCA probably, as I find, never thought this whole out (nor did ADC, if Ms Elmes is correct in saying that they were “acting for “ FCA) does not alter my view on that.

100. In parenthesis – a good deal of argument in the Submissions is not supported by specific allegations in the pleadings. On both sides. I shall overlook that. Save where I feel any reaction of mine to the papers would in fairness require further argument before this Preliminary Award is made, I shall just get on with it.
101. It is clear and obvious that Cleeve Mill already had approval to their design before the PMA. They had no specific approval (call it “Design and Build” or anything else) to go on and behave as Main Contractors, as distinct from Project Managers who would go and get everything done that was necessary to complete the project. As it happens, my strong impression is that no “Main Contractor” was in fact necessary. The Attwills set out to organise things and did so. Without a detailed analysis as to how much work was done directly by Cleeve Mill, one can say no more. The result, so far, has been found to have defects in it. The cost, so far, may be far more than is justified. That is not here the issue. What is sadly clear is that Cleeve Mill never, in the PMA or otherwise until the project was nearly completed, set out or agreed the financial terms upon which they were to be remunerated, either for acting as builders, or even as Main Contractors, with or without any percentage or “mark-up” of third party bills, or separately for all the other functions of a Project Manager. They certainly could not claim fees for certifying completed works, as to quality or value, since they had specifically undertaken to have that independently done. Which it never was.
102. That point is emphasised because there is nothing in the PMA which sets out the fee base. Ms Elmes suggests that the contract (whichever, of Project Management or Construction, or both) is “evidenced” by the fact that accounts were delivered and – and certainly until the end – were paid. She cites authority. Like most authorities, it depends in large part on its own facts. For the several occasions when, reading the papers, one finds assertions by Mr Attwill that the basis for his charges will have be, or is this, that or several others, all delivered (as it seems) to ADC, I can see no evidence that FCA were ever consulted or agreed to any particular fee structure, or rate of payment. There is an incredible degree of naivety, one might say, without any information or argument provided by ADC, as to the way in which Cleeve Mill (Limited Company or Partnership) delivered their Invoices and in which they were accepted and paid.
103. Conclusion.
- (i) On the present evidence I cannot be clear as to whether the Partnership ever existed or exists – prior, of course, to the death of Mr Ron Attwill. Apart from the information referred to above, Duncan Attwill clearly produced notepaper and delivered Invoices in its name, including a VAT Registered Number (771-0060-65). I find no evidence of a VAT Registration for the Limited Company. It is not for me to infer, let alone, speculate, what legal realities (however informal) lay behind what may have been only a matter of convenience for the Attwills. Indeed, I cannot discern for sure whether separate payments were in fact made to Estates (the Limited Company) and the alleged Partnership. At most, it might be asserted that FCA accepted that Estates had delegated some of its functions

to the Partnership, but without in any way altering the original legal relationship with the Limited Company, which continued.

- (ii) Whether or not the Partnership existed, it can be in no better position than the Limited Company, in relation to FCA.
- (iii) Both entities have claimed to carry out services for FCA.
- (iv) Nevertheless, there is no convincing evidence as to when, if at all, FCA first became aware that the Partnership was doing work for them, if it separately was. The Invoices delivered are not in a form to detect any separation of functions, let alone the avoidance of any duplication of time and so forth.
- (v) Even assuming such awareness, there is no evidence as to whether any of the officers of FCA appreciated or agreed to the separation of functions in the alleged “split”. A contract requires more than a unilateral statement.
- (vi) In any event, the Partnership would be and is liable (from May 2001) for carrying out functions under PMA, including the oversight, supervision and certification of the works, whether by themselves or by any third parties, including the obligation of independent certification.

In my judgement Estates, both before and after May 2001 were and continued to be liable to FCA for the proper performance of all the implied obligations of agency and all those specified in the PMA. If they “employed” the Partnership to carry out some of them, they are still liable for their due performance. The Partnership, if I am wrong, are liable after May 2001 for some of these functions. They are so jointly and severally with Estates. There was, I believe, no separate contract, express or implied between FCA and the Partnership, whereby Estates were relieved of any of their functions or obligations.

103. The terms of what I referred to as the Main Agreement are all found in the PMA. As I have already indicated, I reject the allegation of a “Design and Build” Contract, utilised as it seems to have been by everyone, as being too imprecise on the present facts. Although the PMA was a sadly untidy agreement, one can deduce all the necessary terms of the relationship from it. The only estimate given at the beginning (Appendix A) was for what I identify as Preliminary Works. There was never anything remotely resembling a proper, complete contract price, even one subject to later variations. The whole arrangement had an atmosphere of “let’s do as much of this as we can obtain funding for”. The PMA itself clearly identified no Main Contractor. There was nothing in the PMA to prevent Estates doing works themselves, as a contractor, provided that their so doing did not conflict with their duties as Agent and Project Manager. As to the employment of others, for all the various purposes necessary, whilst the Project Manager might have chosen to appoint a Main Contractor in any ordinary sense of that work, it was equally permitted under the PMA and entirely consistent with the facts on the evidence before me, that they employed all others simply as Agents for FCA. Hence the entitlement to add anything to the charges and bills of those others is never established. Nor is

there a shred of evidence that Estates were ever authorised, expressly or impliedly, by FCA to do so. Clearly the PMA laid upon Estates specific obligations as to how they were to employ all contractors and/or sub-contractors, both as to the form of contract to be employed and as to insurance. There is no evidence to show that they were ever relieved from those obligations. Nor from the clear obligation to appoint and obtain “independent and fully qualified” quantity surveyors and/or civil engineers, to have all completed works independently certified. That phrase must and does include certification both as to quality and as to value. In other words, that the works were fit for payment. For the removal of doubt, lest I forget it later, neither ISL nor Mr Averillo or anyone else disclosed in the evidence was qualified to carry out this task. The so-called “independent accountants” were, I fear I must say, a worthless exercise. All they could certify was the mathematics. To certify the various Invoices as “fit for payment”, whilst concealing the various mark-ups and percentages added by Estates may not have been deliberately dishonest on their part; they may not have been concerned as to the terms of the contract that is under discussion. But Mr Attwill knew. I am not concerned whether he was being muddled, misguided, devious or deliberately obfuscatory. Simply that he did not remotely do as he agreed to. I cannot comment on what part, if any, ADC played in all this. Clearly, however, Mr Standen’s disclosures in Summer 2002 were a surprise for FCA.

104. I see no other terms of the PMA, as to building or agency, as requiring more detailed analysis at present. On that basis, the claimants, both before and after May 2001, were entitled to be paid on a quantum meruit basis as contractors or sub-contractors, a meaningless distinction in this case. Whichever it was, they clearly should have signed up to the appropriate JCT Form of Contract and never did. Nor did any one else. That quantum meruit was devoid of any entitlement to a “mark-up” or “profit”, beyond that normally charged by any contractor for his own work. That is a matter for the joint Surveyors. Any charge, however, for supervision or the like must be justified with care, and not as a substitute for performance under Clause 3 (d). On the voluminous documents I have seen the exercise involved here, since clearly they have been paid up to the Invoices now claimed, is surely academic. As to the latter, once the Claimants’ own building work (if any) is independently certified, they should in theory be paid. All other contractors/suppliers in these invoices should have their money, with no additional mark-up, paid directly by FCA as having been employed by their agent for them. In theory, so far.
105. As to the non-building activities of Estates and/or the Partnership, the entitlement to fees is much more problematic, even without the Part 20 Counterclaim. Until a very late stage, there is little if any evidence of an agreed fee structure for such activities, in particular for separating the agency functions from those of design and/or construction. On the present evidence, I can not attempt it. It seems apparent – or at least likely – that neither side considered these distinctions. The amounts cited in Appendix A for the preliminary works (p 525) refer to various “fees”. The whole Appendix, however, was then divided into stage payments, up to week 14. And so paid. Much of it seems repeated in the “Estimate” of “current estimated project costs” (p 45 - 47). Again, it seems that amounts for “fees” of whatever sort, have been paid in all

but the Invoices now claimed by the Partnership. Assuming they can be seen as based on Project Management/Agency Costs, the parties must address further – at a hearing – on proper quantification if they can not agree it, whether it is a claim in truth of Estates or of the Partnership. A point I suggest may prove academic.

106. The Deed of August 2002. This document is referred to in various places, including the pleadings, as a “Loan Agreement”. I confess I am at a loss to understand that. By August 2002, Associates/Estates were telling ADC and/or the Defendants that money was due to them. (E 181 ff). Sport England had been separately “invoiced” by the Claimants (now using almost exclusively the name of the alleged Partnership) and, subject to a substantial Retention, were paying (as I understand it) Associates direct.
107. The letter of 24 April asserts expenditure of £50,000, against CME’s earlier agreement “to forego seeking payment of £25,000, pending release of funds from Sport England and/or other funders.” Thereafter, some work is clearly done and documents (Statements of Account and Invoices, some to Mr Averillo, are probably among those at (1694 -1702). None of them is independently certified.
108. In early June, with Mr Standen making enquiries of Associates being met by allegations of “independent accountants’ verification of the figures”, Mr Attwill (E 190) is asserting that ADC had received such documents “acting on behalf of FCA.” An assertion not apparently emphasised in the pleadings. Currently irrelevant, perhaps. I have already referred to these “verifications”.
109. On 3 July 2002 (E 196) Ron Attwill is asserting that the outstanding balance of costs “on completion” (whatever that means) will be £62,059. He offers a “secured loan” of £25,000 towards it. On 23 July, a rather egregious letter from Duncan Attwill to Mr Hemsley (E 197) asserts that CME/the Partnership are already owed £68,200. “Approx”, of course, with two other creditors claiming £30,665. Again, “approx”. No explanation for the increase over three weeks. One has to wonder about communication in this Partnership. Then, the “Final Certificate”, giving an alleged figure for “contract sums at July 2002 for the financial year - £58,703.79.” It is almost beyond belief that anyone could suggest this document represented any attempt at claiming the cost of properly certified works, let alone anything else, or that (on the face of it) Mr Averillo was competent or authorised to sign it. Even if he was, however, it forms only part of the background to this “Loan Agreement”. The exact circumstances of that, save for Duncan Attwill’s statement, are somewhat uncertain.
110. He writes to Mr Averillo on 1 August (letter of 5 August, E 208). I can not find that letter, or see a copy. Thereafter, however, CME are clearly receiving some payments. (Letter 5 August, Averillo to Ron Attwill, E 209). Ron Attwill refers (E 210) to “CME’s £50,000”, whilst acknowledging receipt of other funds and copies to Mrs Wilson.

111. Duncan Attwill's letter to Mr Hemsely (undated – E 212) refers to tying up the “loan” agreement, refers to the earlier e-mail and seems to be asserting the same figures as his father. Then, follows the Deed (attached to the pleadings).
112. It bears no resemblance to a loan of any sort, whatever else it is. It is simply an acknowledgement of an alleged existing debt of £50,000 for “various construction and building works ... for work carried out and completed”. None of the statements or documents explain the reconciliation (if any) between that figure and the various earlier figures. At least part of the latter seem to include “fees” for the alleged Partnership. I believe it is simply an agreement to defer the enforcement of an existing debt, acknowledged in the Deed, for two years, upon terms. Subject to the Defence of Misrepresentation, it seems to me enforceable. It may contain irrelevant assertions and is perhaps internally inconsistent in some respects. The alleged £50,000 may indeed not have been due. None of this is raised as a Defence.
113. Misrepresentation. There is clear evidence that FCA owed no amount at all to Estates, let alone £50,000 at this juncture. Assertions to the contrary by both Messrs Attwill in the period leading up to the signing of the Deed are clearly capable of amounting to a misrepresentation and seem to have been accepted by both ADC and FCA. That they were deliberately dishonest, however, is not proved on the evidence. Duncan Attwill may indeed have been deliberately less than frank in his financial dealings with FCA and/or some of the funders, or simply over-confident in his ignorance but, without an oral hearing, the evidence does not allow me to discern deliberate dishonesty. I believe that the misrepresentation must therefore be categorised as “innocent”. It was also, in my judgement clearly “negligent”, whether pleaded or not, in that the whole claim to monies due arose (see below) out of patent breaches of duty in both the building and the Project Management/Agency functions undertaken by Estates. Most of the Invoices already delivered were therefore tainted and represented false facts. In that, I must disagree with Ms Elmes. Her assertion that, by mid-August 2002, more than £50,000 was legitimately due to CME is simply not proved on the evidence, by my reading of the Accountants' Statements to date. Nor has she pleaded it. As I have said, it may be irrelevant, and an absence of pleading would be no bar to raising it, save in a case where the issues require further argument in fairness to either or both parties.
114. As to Inducement, there is a clear allegation of it in para 6 of the Amended Defence. As to evidence, I have none from Mr Hemsley. Mr Parker (p 636, para 5) only refers to being asked to “countersign a £50,000 loan to ensure the completion of the building.” It is unclear on this evidence whether he ever considered or understood that he was “borrowing” fresh funds for completion, or was acknowledging an existing debt and its postponement, or both. The correspondence already referred to, however, clearly indicates that Mr Hemsley was being told of the pre-existing debt and the only inference I can and do draw is that he accepted its existence.
115. I regret that I do not find a clear assertion (as Ms Elmes points out) in the Defendants' pleaded case as to whether the misrepresentation, which I find was clearly made, was made innocently, negligently or fraudulently. Nor do I read

Ms Elmes as clearly asserting which, if any, would defeat the Deed. This one issue may require further argument, if the parties can not agree it. I only find as a fact that, on the evidence before me so far, it was not fraudulent. It may have been, but the evidence does not so far establish that it was.

116. Breaches.

- (1) If the legal relationship of Estates and FCA was in existence before the PMA, it was oral, arrived at in various stages. That does not make the terms of the PMA any the less effective. Ms Elmes is probably correct that, initially at least, Mrs Wilson had ostensible authority to ask CME to help FCA (p 520 – letter 22 December 1997). Probably also, to find a building in the design and construction of which CME would play a major part. No agreement as yet, as to who should actually design, manufacture or construct it. There is no evidence of a contract, oral or written, which covers these issues with FCA, prior to the PMA.
- (2) Under that Agreement, I find on clear evidence a breach of the obligation to ensure that all contractors (including themselves) and sub-contractors carried Insurance. CME failed entirely, as Project Manager, to do so. That breach clearly will prove to have caused loss, if CME itself, the Partnership, or any other contractor or sub-contractor is found to have overcharged or produced defective work, where any resulting loss can not be recovered from the party and/or their Insurers.
- (3) There is also a clear breach by CME in failing to ensure that all contractors (including themselves) were employed under proper JCT terms. They failed entirely to do so, and there is nothing in the evidence to justify their use of any alternative form of contract, so as to bind FCA. If, indeed, they did so. I have seen none. It will require further argument to confirm whether or not the use of such a contract would have been a further assurance of the existence of insurance.
- (4) As contractors, CME were only entitled to charge for their work on a proper quantum meruit. I can not on the present evidence tell whether they did so, but the clear inference is that they did not.
- (5) As Project Managers, CME were obliged to oversee all manufacturers and construction work (including their own) and have it all independently certified as to quality and value. They wholly failed to do so. The nature of the loss arising from that may be a combination of resultant overpayment by FCA, which may not now be recoverable elsewhere, combined with the cost of remedying such works, which may indeed be more expensive than if the defects had been discovered before further works were continued.
- (6) Both before and after May 2001, CLE and/or the Partnership were obliged to consult with FCA as to all costs, charges and fees. They entirely failed to do so, save perhaps for Mr Attwill's assertion that his Invoices had been in some way vetted by ADC. I have no evidence of that other than his own, and I take leave to doubt it. Even if it occurred, however, they must

have been as misled about the over-charging already referred to as anybody else.

- (7) Subject to any further argument, in breach of their duty as Project Managers, CME and/or the alleged Partnership miss-represented to FCA the alleged £50,000 indebtedness to the former, in July/August 2002. Strictly speaking, if the Deed is in the result set aside, which may itself require further argument, little loss may have flowed save by way of legal costs. If it is not, however, the undertaking of that obligation by FCA may separately found a claim in damages, as to which again further argument will be required.

117. Termination of Contract. Although this is raised in various ways in the Issues and in the Skeletons before me and although I have not seen Duncan Attwill's letter to Mr Kybett of 10 October 2002 (E 256), I can not find any assertion, either in the evidence or the documents, that the contract had been terminated. There are statements of an intention not to do further work on behalf of FCA until amounts currently outstanding are in some way dealt with. There is an assertion that Mr Attwill is coming to collect property. Then, both the statements and the documents seem to halt. For the removal of doubt, I have not the slightest doubt that the facts as to overcharging, which by far preceded the discovery of defective works, would have entitled FCA to put the Claimants off site, amounting to a clear breach and/or repudiation of the PMA and of the whole relationship of Agency and the duties due there under. Nevertheless, interestingly enough and as a fact, it is difficult to see whether Mr Attwill was "put off" or simply decided to "lay down his shovel". The cessation of work might almost, oddly enough, be argued to have been consensual. In that event, looking at the terms of it in the correspondence, it might even be argued that the contract is still in existence. I feel constrained to ask whether it matters? If so, I should doubtless hear further argument upon it.
118. Measure of Loss and Quantum. I have already dealt with this in part, above. If the matter is to be taken any further, I should indeed require further argument as to how precisely the loss arising from the various breaches I have identified should be calculated. Again, I hope I may be forgiven for asking whether it matters? For, upon any analysis that I can make of the evidence of the Surveyors and the Accountants, the amounts already paid by FCA for works which are either defective or, whether or not they are defective, have been over-charged, should provide sufficient funds to ensure reasonable completion of this project by the Claimants, whose duty it undoubtedly was under the PMA to see that this was done. Whether the contract is still in existence or not, the answer seems to me the same. If I may be forgiven a somewhat blunt Sussex Phrase; rather spend the money on cobbling together the materials and the labour to complete the project, than spend the money (and the time involved) on more legal argument. I have no current information as to the state of the building, whether or not it is being used, or whether Mr Attwill can lay his hands on the necessary materials and labour to do the job. I shall therefore allow the parties a brief period – brief, because this matter must surely be brought to an end – to consider their respective positions. In default of an agreement, which I first tried to encourage three years ago, I shall give Directions for a hearing at which

all parties will be required to attend in person, whether represented or not, so that everyone can see where we have gone so far and where, if anywhere, we should go next. The solution, albeit a simply and practical one, seems to me clear beyond argument.

Michael Kennedy  
13.vii.07