

Judgment 51/2005

**Miller & Baird (C.I.) Limited v. States of
Guernsey – Royal Court (Civil action file 939) –
26 September, 2005**

Arbitration (Guernsey) Law, 1982 – contract for construction of marina – plaintiff contractor’s application for summary judgment – States’ application for stay under the arbitration clause in the contract – stay refused – plaintiff entitled to have its application for summary judgment heard.

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 26th day of September, 2005 before Alan Robin Winston Hancox, Esquire EGH CBE,
Lieutenant Bailiff; sitting alone

In the matter of:

MILLER & BAIRD (C.I.) LIMITED

(Plaintiff)

v.

THE STATES OF GUERNSEY

(Defendant)

Whereas on 31st August, 1st September and
8th September, the Lieutenant Bailiff considered an application by the States of Guernsey for a
stay of these proceedings under Section 4 of the Arbitration (Guernsey) Law 1982, and heard
thereon Advocates F. Raffray and J. P. Greenfield, Counsel for the Defendant and Plaintiff
respectively

The Lieutenant Bailiff this day gave
judgment in terms attached hereto and

1. REFUSED the application
2. RESERVED the question of costs

S. M. D. ROSS
Her Majesty’s Deputy Greffier

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:

MILLER & BAIRD (C.I) LIMITED

Plaintiff

And

THE STATES OF GUERNSEY

Defendant

Judgment

1. On 23rd December, 2000, Board of Administration, as it then was, of the States of Guernsey, by a Press advertisement, invited expressions of interest by ‘suitably qualified consortia’ for the design and build of a marina in the harbour at St. Sampson’s. It was intended to accommodate approximately 350 vessels ‘at fully serviced pontoons’. Tenders were subsequently invited for the project and the extent of the works to be constructed is summarised in paragraphs 1 a) to j) of the Notice and Information for Tenderers exhibited as ARL 1 to the Affidavit of Mr. Lewis, the Deputy Chief Officer of the Public Services Department, of 21st July, 2005, in support of the States’ Application for a stay of these proceedings

2. The Notice specified that the tenders were required to be delivered to the President of the then Board of Administration by 25th November, 2002 (which had been extended three times from the date originally given) and, under the heading ‘Programme of Works’, stated *inter alia* that, dependent on the outcome of the States’ deliberation on the matter, it was anticipated that the works would commence during March, 2003.

3. The Plaintiff company, Miller and Baird (C.I) Ltd, submitted its tender for carrying out the Works in the sum of £3,561,793.94 by the specified date. Due, *inter alia*, to the later start date of 1st April, 2003, the Plaintiff’s tender was revised, by letter of 17th February, 2003, to £3,235,890.03. Shortly afterwards the Plaintiff was notified that it was the successful tenderer by the letter from the Director of Guernsey Technical Services of 3rd April, 2003. A further revised Contract Sum was then given as £3,391,506. This contrasts with the original estimate of £1.75 million in the initial advertisement.

4. The contract thus awarded to Miller & Baird incorporated the standard Conditions of Contract, 5th Edition, issued by the Institution of Civil Engineers jointly with the two other professional associations described in paragraph 6 of the Affidavit of Graeme Falla, the Director of Engineering Services of the States’ Public Services Department, sworn on 19th August, 2005. These conditions were revised and reprinted from time to time and modified by the contract and other documents which Mr. Falla mentions in paragraph 7 of his Affidavit. These included the folder entitled ‘States of Guernsey, Board of Administration: St Sampson’s Marina, Volume 1, containing, *inter alia*, the Notice and Information for Tenderers’ to which I have referred in paragraph 1 hereof, the Form of Tender and the Conditions of Contract.

5. As is usual in building and similar contracts provision was made for a system of payment whereby regular payments would be made by the States of Guernsey, the Defendant, against certificates issued by the Engineer. This process would be generated by the Contractor—Miller & Baird—who were enjoined to render each month a statement showing

the estimated value of the Works executed during that month, and the other matters stated in paragraph [6] (*infra*). In the instant case it is accepted by the parties that the Engineer was at all material times Mr. Graeme Falla, who was described in the initial advertisement as the Project Director. Mr. Jeremy Mew was appointed as the the Engineer's representative under Clause 2(1) and acted as the Project Manager and Resident Engineer. He corresponded with, and issued detailed instructions to, the Plaintiff from time to time.

6. The specific provision regarding remuneration appears as Clause 60 in the standard Conditions, known universally as 'the I.C.E. Conditions of Contract', and exhibited as I.G.1 to the Affidavit of the Plaintiff's Managing Director of 1st August, 2005. It is set out in full at page 23 of the I.C.E. Conditions, and in essence provides that in addition to the estimated value of the works, the Contractor would submit lists of goods and materials delivered and not yet delivered to the Site, further estimated amounts to which it is entitled in connexion with other matters provided in the contract, and amounts for temporary works or plant reflected in the Bill of Quantities.

7. The duration of the Contract was specified in the Appendix to the Tender as thirty-four weeks from the date of commencement as notified by the Engineer in writing under Clause 42. There does not appear to have been a formal notification, but in the undated minutes of the pre-contract meeting, which took place on or about 22nd April, 2003, it is recorded that three representatives of Miller & Baird were present, and that the commencement date was to be 9th June of that year. This agrees with paragraph 8 of Mr. Greenfield's outline submissions of the 24th August. I am therefore satisfied that it was well understood by all parties concerned that that would be the date of commencement.

8. Accordingly, subject to any extensions of time assessed under Clause 44(2), in the normal course, allowing for the revised period of thirty-six weeks referred to in paragraph 8 of Mr. Lewis' Affidavit supporting the States' Application for a stay under Clause 66 (leaving aside any delays or extensions of time) the Works would be completed on 16th February, 2004. According to exhibit ARL 4, at page 81 of Bundle C, a total of seven weeks by way of interim extensions were granted by the Engineer. Thus, the extended date for completion, allowing for the seven weeks, was 5th April, 2004. In his outline sub- missions Mr. Greenfield gives the dates as 5th February and 25th March, 2004, respectively.

9. Miller & Baird say that this did not happen partly because of delays by them, which, in turn, were allegedly caused by the States of which Mr. Graham, the Plaintiffs' Managing Director complained in his letter to the Chief Officer of 3rd May, 2005, page 114 of C. During the currency of the contract the Accountants' complained on 5th January, 2004, that there was a shortfall of in the November payment due from the States of £67,000 (see the letter at page 44 of C) which gave rise to the Contractor's stated inability to make the payment in respect of the pontoons (page 46).

10. It is common ground that at a relatively early stage of the period of the Contract, Miller & Baird encountered cash flow problems. Indeed on the 27th January there is a reference by the Vice-President of the States' Board of Administration to the avoidance of any options 'adversely affecting any of your creditors' (page 50), just over seven months after its tender had been accepted. In view of the cash flow situation, as Mr. Lewis records in paragraph 2 of his first Affidavit, the States endeavoured to assist the Plaintiff through its difficulties by (a) ensuring that the payments against the Certificates were made well before the expiry of the twenty-eight day period specified in this respect under Clause 60(2), and (b) by relieving it of the obligation to install the Pontoons in the Marina.

11. The second of these objectives (see paragraph 15 of Mr. Falla's Affidavit of 19th August, 2005) was achieved by concluding the 'Pontoon' Agreement of 2nd April, 2004. By Clause 2.1, the design, fitting and supply of the pontoons became thenceforth 'the Excluded Works'. As a result, under Clause 3.2, Miller & Baird were disentitled to receive payment for the pontoons, and thus became liable to refund to the States £122,000 representing the

Advanced Payment referred to in Clauses 3.1 to 3.4 of that Agreement (of which £43,000 was stated still to be due in July, 2005—page 153 of C). It is to be noted also that Clause 9.2 also provides for a reference to arbitration in the event of a dispute under the Pontoon Agreement.

12. Reverting to the main Agreement, in paragraph 15 of his Affidavit Mr. Lewis states that, despite the States' indulgence, as at the date of Certificate number 31 of 26th April, 2005, which related to work completed by 19th April, and which is the relevant document both for the purposes of the Cause and of the Plaintiff's Application for summary judgment of 1st August, 2005, the performance of the Contract was fifty-four weeks and 2 days late. I have noted first that, for some reason, Certificate No. 31 is stamped 'For Information Only'; secondly that the next Certificate, No. 32, was issued for work completed up to 14th June, and dated the 13th July. That date, however, is the same as that on which service of the Cause was effected on the States. As the balance due is £1,243.91 less than No. 31, on one view it might be taken as relevant as to *quantum* in the event of the summary judgment Application being successful. However Advocate Greenfield, representing the Plaintiff, insisted that his client is claiming these two sums as due in the aggregate, not in the alternative.

13. The alleged delay, as at the date of Certificate No 31, purports to take into account the extensions of just over seven weeks referred to in paragraphs 16 and 21 of Mr. Graham's second Affidavit of 3rd August. By his letter of 27th April the Engineer refused to grant to the Plaintiff any further extension of time and, simultaneously, advised the Chief Officer of the States' rights under Clause 47(4) to claim liquidated damages and to deduct these from the sum otherwise due to the Contractor. Mr. Kirkpatrick, accordingly, claimed, on the States' behalf, the sum calculated under this provision, less that due under Certificate 31, from Miller & Baird.

14. The same day a meeting took place between the representatives of Barclays Bank and of both parties to the conflict, as it was by then developing. At that meeting the Plaintiff's Managing Director, Mr. Graham, intimated that Miller & Baird had already submitted a claim to the Engineer for £950k, which might well increase to £1.5 million, with a deadline of twenty-eight days. At the meeting, Mr. Cresswell, the Plaintiff's Contract Manager, is recorded as having questioned the accuracy of the letter 'they had just received with regard to liquidated and ascertained damages'. He then said that the Engineer had not made his final determination and that therefore 'LADs were not properly applicable'. It was, of course, on that very same day that Mr. Falla (page 105 of C) notified Miller & Baird that under Clause 44(3) that no extension of time had been awarded.

15. The Plaintiff's Managing Director reacted strongly to the letter from the Chief Officer. He claimed that the States were in breach of its obligations under the Contract in several respects. These fall broadly into four categories. First, Mr. Graham claimed that the Certificate of Completion of 17th September, 2004, for the work on the Inner Harbour, to the approximate value of £250,000, had been ignored; secondly the Plaintiff had received no timeous notification under Clause 44(3) as to whether an extension of time had been granted due to any of the circumstances envisaged in sub-Clause (1) of that Clause; thirdly, that the States had required several variations to the original Contracted Works to be undertaken by Miller & Baird subsequent to the due date for completion of the contract (which are then particularised), some of which had been the subject of formal request prior to completion, but for none of which had any extension of time been granted.

16. Finally Mr. Graham claimed that certain other instructions had been issued prior to the date for completion, namely to delay excavation of the rock from the Outer Harbour, and the filling to the Reclamation area, in order to enable the Works to be completed, but again no extensions of time had been granted. A similar letter was sent to the Engineer two days later, enclosing a diary of events from 13th June, 2003, (which was shortly after the date of commencement of the Works) until 14th January, 2005.

17. Letters were then exchanged between Mr. Kirkpatrick and Mr. Graham which, in particular, centred upon a dispute as to whether the Engineer's certification of his refusal to grant an extension on the 27th April, 2005, could reasonably be regarded as being 'as soon as possible' after the due or extended date for completion within the wording of Clause 44(3), which, according to Mr. Graham, presumably after allowing for the seven weeks' extension, would have been 25th March, 2004.

18. The rest of the correspondence that ensued between Mr. Graham, the Engineer and the Chief Officer, in which a partner in the Accountants Grant Thornton intervened to seek a meeting with the Minister of Public Services regarding Miller & Baird's 'critical' financial position (allegedly brought about by the States' delays in certifying or effecting payments due to them) concerned whether or not a 'dispute or difference' had arisen between the parties within the meaning of the Arbitration Clause, No 66, or whether Miller & Baird's letters constituted a series of requests for information as to Mr. Falla's actions and responses (as he contended) made in his capacity as Engineer. His letter of 1st June, 2005, ended with a request that Miller & Baird should send him full and detailed particulars of any claim they wished to make regarding further extensions of time in accordance with Clause 44(1) (page 134).

19. The Engineer's letter crossed with that from Mr. Graham of even date protesting about the claim for liquidated damages and the non-extension of time, but the correspondence proved to be fruitless and resulted in Advocates Carey Olsen's letter before action of the 29th June. The parties' respective positions as to Miller & Baird's right to be paid in accordance with Certificate No. 31 on the one hand, and on the other hand the States' rights to deduct liquidated and ascertained damages (the claim to which is described as 'deeply flawed and invalid' in Carey Olsen's letter of the 15th July) and thus to claim the balance of these after giving credit for the £45,123.55 due under Certificate No. 31, became further entrenched, and culminated in these proceedings.

20. The issues now for decision arise as a result of the cross- applications on behalf of the States, as Defendant, for a stay of the proceedings pursuant to section 4 of the Arbitration Law 1982, and by Carey Olsen on behalf of the Plaintiff for summary judgment under Rule 17 of the 1989 Rules, on the basis of Certificate No. 31, for £45,123.55. These Applications are supported by the first Affidavits of Mr. Graham and of Mr. Lewis, the Deputy Chief Officer of the Public Services Department of the 21st July and 1st August respectively. In paragraph 24 of the latter Affidavit, Mr. Lewis has sworn that the Defendant/ Applicant was and still is ready and willing to do all things necessary to the proper conduct of the arbitration, which is a pre-requisite under the second limb of section 4 of the Law.

21. That this is not an entirely novel situation in Guernsey is indicated by the following passage from the judgment of Carey D.B. (as he then was) in Morgan v. Ash & Foster of 25th August, 1993, a case which concerned arbi-tration consequent on the dissolution of a partnership between dental surgeons. It reads:

“This application was before the Court at the same time as the Plaintiff's application for summary judgment. It was first tabled in April of this year but due to pressure of business the Court was unable to deal with these applications until June. At that time I indicated that I first wished to deal with the question of summary judgment, as if there was no defence to the Plaintiff's claim then the question of staying the proceedings and referring the matter to arbitration did not arise. In the event I gave judgment for the substantial part of the Plaintiff's claim but did find that there were a number of matters in dispute between the parties as to the amounts payable under the partnership agreement between them following the deemed death of the Plaintiff in accordance with its terms.”

Later on Carey D.B added that in his view the plaintiff had rightly acceded at the outset to the defendant's suggestion to consolidate both applications.

22. In the instant case, when the matter initially came before the Deputy Bailiff on 15th July, two days after the Cause was tabled, the File Note shows that it was envisaged that there would be two applications, one for a stay under the arbitration Clause, and one for summary judgment on Certificate No. 31. In the event the cross-applications were filed on the 20th July and 1st August respectively. It was canvassed before the Bailiff at the Directions hearing of 5th August, 2005, that the Court should consider whether they should be heard individually or together, and if the former which should be dealt with first—irrespective of the order of filing.

23. As I understood the submissions of Crown Advocate Raffray, on behalf of the States of Guernsey, it is in the forefront of his case that it is well established by the Commentary in the White Book, and by authority, that the onus is upon the party seeking to avoid a stay to show that the action should proceed. He relied in particular on the passage in Megaw L.J.'s dissenting judgment in Fakes v. Taylor Woodrow Construction Ltd [1973] 1 QB 436, in the course of which, at page 445 E & F he approved these passages from Lord Selborne L.C. in Willesford v. Watson [1873] 8 Ch App. 473 at page 480:

“If parties choose to determine for themselves that they will have a domestic forum instead of resorting to the ordinary courts, then since that Act of Parliament’ [meaning section 11 of the Common Law Procedure Act 1854, which was the forerunner of the modern arbitration legislation] ‘was passed a prima facie duty is cast upon the courts to act upon such an agreement.” (Lord Selborne).

and from the 18th Edition of Russell on Arbitration:

“Once the party moving for a stay has shown that the dispute is within a valid and subsisting arbitration clause, the burden of showing cause why effect should not be given to the agreement to submit is upon the party opposing the application to stay.”

24. Those passages were cited with approval two years earlier by Davies L.J. in Ford v. Clarkson’s Holidays Ltd [[1971] 1 W.L.R.1412] at page 1416 in which the Court of Appeal unanimously held in a non-building case that the arbitration clause should prevail. On the same page Davies L.J. said:

“It is perfectly true that the plaintiff in this case had, as it were, this arbitration clause imposed on him by the standard form of the defendants’ contract’ [as is the case here]. ‘But he did agree to it and he is bound by it.”

That being so, Mr. Raffray continued, if there is a valid arbitration clause to which both parties have, *sui juris* and with their eyes open, agreed—without any form of compulsion—then the Court, exercising its discretion judicially, must hold that the stay should operate.

25. Once that stage is reached he submitted that no question of embarking on the action, begun by Cause, arises, still less an application for summary judgment based—as it is here—on a Certificate which has been isolated from the rest of the material in correspondence Bundle C and elsewhere in the documentation. At the very least his case is that the States are entitled to the amount by which the liquidated damages claimed, which are substantially greater than the amount on the face of Certificate No. 31, exceed that sum, and moreover, to a refund of the £43,000 mentioned by Mr Thornton in his letter to Advocate Greenfield, who now represents Miller & Baird, of 18th July, 2005.

26. Mr. Greenfield wholly disagreed with this. First, he said, simply because the Engineer, Mr. Falla, calls the letter at page 105 of C a ‘certificate’ that does not make it so, if, as he contends, it is invalid as such under Clause 44(3). Even so, it is not for the Court, at this stage, to examine minutely every point advanced by the respondent on a summary judgment application. Once the Plaintiff passed the test stated by Lord Denning M.R. in Ellis Mechanical Services Ltd v. Wates Construction Ltd [1976] 2 BLR 57, then, as is indicated by

the first holding in the headnote to the following case in Bundle D at TAB 7, Chatbrown Ltd v. Alfred McAlpine Construction (Southern) Ltd [1986] 35 BLR 44, if the court concludes, without reference to contested facts, that the defence advanced, though arguable, is bad, then judgment will be given for the plaintiffs and the presence of an arbitration clause makes no difference.

27. The issue as to whether these two Applications, lodged within twelve days of each other, should be heard separately or together has now been thrown into sharp relief. When the case was heard on the 25th and 31st August, and the 1st and 7th September, 2005, the impression was gained that it had been tacitly understood that the applications were inextricably interwoven and should be heard together. However, I have now had an opportunity of perusing the transcript of the proceedings before the Bailiff on 5th August, which considerably enlarge the material on the File Note of that date.

28. It is clear that the Bailiff's concern was to keep the momentum of the case 'going swiftly', and that, if the trial judge, that is myself, did decide to hear the stay application first, and then, if necessary the summary judgment application, with a short gap in between, he did not want there to be an inordinate delay, with the parties producing files 'by the wheelbarrow load' in order to deal with separately with the two applications. The Bailiff said he would allow three hearing days, although he hoped it would be concluded in half that time—Mr.Raffray having given an estimate of between half a day and a day and adding 'I wouldn't envisage a full day'. In the event, the case occupied four full days and two half days' hearings—as well as two sets of directions.

29. It cannot, however, be gainsaid that Mr. Raffray had earlier contended before the Bailiff that the stay application should be heard first, and that, from the context of his replies to the Bailiff on 5th August, he was of the view that if his application were successful, then the Court would not be troubled with the summary judgment application. On consulting my notes it seems that his opening remarks on 25th August were consistent with this eventuality. On 8th September I therefore invited Counsel to confine further argument to that which I may call the separation issue, for it is one thing for an applicant for a stay to demonstrate to the Court that there is a dispute or difference and quite another to persuade the Court that it is one on which he is right.

30. In addressing this issue I have not overlooked Mr. Raffray's point that the Plaintiffs can have been under no illusions from the outset as to the course the Defendant would pursue if the threatened proceedings materialised. Mr. Thornton's letter at pages 142 to 144 of Bundle C made it crystal clear that the States would apply for a stay under to the Arbitration Law in view of the agreement to refer disputes to arbitration in Clause 66(3) to (5).

31. Mr. Raffray added that the comparatively recent decision of Judge Bowsler Q.C in R.M.Douglas Construction Ltd v. Bass Leisure Ltd 53 BLR 119 at pages 124 *et seq.* showed that the view of Saville J. in Hayter v. Nelson (*infra*) was in keeping with the latest decisions of the Court of Appeal and should pre- vail. Accordingly he submitted that the line of cases in which Chatbrown featured, on which Mr. Greenfield had so strongly relied, should not be followed.

32. In the Chatbrown case, at page 53, Kerr L.J. referred to his earlier judgment in S.L.Sethia Liners Ltd v. State Trading Corporation of India Ltd [1985] 1 WLR 1398, and Mr. Greenfield invited my attention to this passage on the following page:

"In' [Ellis] case] 'there was an arbitration clause, but the three members of this court approached the question whether or not judgment should be given under Order 14 in precisely the way which has now become accepted, without any suggestion that the presence of the arbitration clause made any difference.So I reject Mr.Keating's first submission, based on his original notice of appeal, that the arguability of the

construction which he now puts forward is a sufficient reason for saying the whole of the dispute, subject to the £28,000-odd, should go to arbitration.

So in this case, Mr. Greenfield argued, the construction of the various Clauses in the Conditions, in particular Clauses 44 and 47, does not provide a valid reason for referring the whole of the Contract, including the £45,123.55, to arbitration.

33. The Sethia case, a passage from which is cited by Judge Bowsher *in extenso* at page 127 to 128 of the R.M.Douglas case, had in effect decided that an application for summary judgment and for a stay of proceedings are the reverse sides of the same coin. Mr.Greenfield submitted that Chatbrown, in which reliance was placed on the Sethia case, re-asserted the point made ten years earlier in Ellis’ case in which Lord Denning MR said, at page 61:

.....if a case comes before the court in which, although a sum is not exactly quantified and although it is not admitted, nevertheless the court is able, on an application of this kind, to give summary judgment for such sum as appears to be indisputably due, and to refer the balance to arbitration’ [which was the course followed by the Master at first instance]. ‘The defendants cannot insist on the whole going to arbitration by simply saying that there is a difference or a dispute about it.’

34. After tracing the development of the cases since Ellis and Chatbrown, in each of which there was an Order 14 summons matched by a summons for a stay for arbitration, Judge Bowsher, then referred to the ‘intellectual tension’ in the authorities (to which Mr. Raffray drew particular attention) and said at page 130:

“In this present case, on the view I take of the facts, it is not necessary to resolve any intellectual difficulty, but if it were necessary to form a view, it seems to me that the view expressed by Saville J. is in keeping with the latest decisions of the Court of Appeal and should be followed in this case in relation to section 4 of the 1950 Act.”

35. I pause here to note parenthetically that a portion of the first morning’s hearing on 25th August, was taken up with supposed differences between section 4 (1) of the Arbitration Act 1950 and section 4 of the local Law. The importance, of course, is that if there is a material distinction between the two statutory provisions, the English authorities on arbitration clauses contained in Bundle D might not be wholly applicable, or persuasive, in Guernsey.

36. After hearing both Counsel on this issue I am perfectly satisfied that the differences, namely:

“.....or after the inscription of the cause on the Pleading List but.....”

which appear in the Guernsey section and

“.....that Court or a judge thereof.....”

in the English sub-section, are differences in form only, consequential on the much smaller structure of the judicial system here. The substance is the same (leaving aside, of course, the latest statute in England—the Arbitration Act 1996—which re-casts most of the earlier statutes). I therefore have no hesitation in looking to the English authorities on the issues which have arisen in this case, as the Courts here habitually do, for guidance in arriving at a just decision.

37. Earlier in the judgment in R.M.Douglas, at page 126, Judge Bowsher cited a passage from his own decision in Thyssen Engineering GmbH v. Higgs & Hill PLC July 1990 (unreported) in which he analysed the judgment of Saville J. in Hayter v. Nelson & Home Insurance [1990] 2 Lloyd’s Reports 265. In the Thyssen case Judge Bowsher had said:

“By a rigorous application of logic, Saville J. in’ [Hayter v.Nelson] has demonstrated that that assumption’ [for a stay of proceedings and for summary judgment are opposite sides of the same coin] ‘cannot be correct. By the application of the same logic he demonstrated that one could only make sense of Section 1 of the 1975 Act if one interprets the word ‘dispute’ in the 1975 Act as having a meaning different from its normal meaning in most arbitration agreements. He held that the words ‘there is not in fact any dispute’ mean ‘there is not in fact anything disputable’.

In this passage Judge Bowsher was clearly referring to the following portion of Saville J.’s judgment at page 268:

“In my judgment neither the word ‘disputes’ nor the word ‘differences’ is confined to cases where it cannot then and there be determined whether one party or the other is in the right.”

38. Having then posed the question ‘is there in fact anything disputable?’ Judge Bowsher said he was in agreement with the whole of the judgment of Saville J., and in particular with his statement that:

“Only in the simplest and clearest cases, that is where it is readily and immediately demonstrable that the respondent has no good grounds at all from disputing the claim, should that party be deprived of his contractual right to arbitrate.”

39. Thus, Mr.Raffray said, it is crucial in this case for the Court to be clear as to that which is in dispute and also as to that which is disputable. True, here, he said, there is no issue as to the validity of Certificate No. 31 itself, whereas in R.M. Douglas there were grounds for questioning whether the sums certified were in fact due, in addition to the defendants’ claims to set off their counterclaims for damages for delay and other breaches of contract [see (a) and (b) at page 125 of the Report]. But Mr. Raffray submitted that it is perfectly clear from all the material before the Court that there is a valid dispute as to Clause 44 (which, he submitted, triggers the action taken under Clause 47) in its entirety.

40. If it be accepted that the trigger to the right of set-off is in Clause 44(3), and that the letter from Mr. Falla of 27th April at page 105 of C activated the trigger in that sub-Clause, then, Mr. Raffray said, the right itself is clearly conferred by a combination of sub-Clauses (1)(b), (2)(a), 2(b)(i) and (4) of Clause 47. If that combination is properly understood and applied they give rise not merely to a partial set-off, and diminution (see Lord Diplock (*infra*)), but to the extinguishment of the supposed debt under Certificate 31 by a large margin. As the States’ entitlement is disputed by the Contractor, the only conclusion possible is that the differences between the parties fall within the meaning of ‘disputable’ and amount to a dispute under the Agreement.

41. Mr. Raffray continued that as it is settled law that where there is a valid arbitration agreement, and the onus is on the party resisting arbitration as has been seen at paragraph [23] hereof—and it had not been suggested otherwise—then unless Mr. Greenfield could persuade the Court that there was no entitlement on the part of the States to set-off liquidated damages, then the States’ right to deduct such damages was clearly conferred by the wording at the end of Clause 47(4) namely:

“...the Employer may deduct and retain from any sum otherwise payable by the employer to the Contractor hereunder’ [as is the case under Certificate No. 31] ‘the amount which in the event that the Engineer’s said opinion’ [meaning in the instant case the opinion expressed in the letter of 27th April that no further extension of time had been awarded] ‘should not be subsequently revised would be the amount of the liquidated damages payable by the Contractor under this Clause.”

42. At this juncture it is convenient to refer to Gilbert-Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd [1974] A.C 689, because at page 133 of the R.M.Douglas case Judge Bowsher said:

“Notwithstanding the decision in Gilbert-Ash, it is perfectly possible for a contract to provide that there shall be no set-offs allowed against any certificate at all but the paying party must pay up first and then argue about recovery of any counterclaim afterwards. It is common ground that that is not the contractual situation here.”

In view of the express terms of the sub-Clause I have just set out Mr. Raffray said the instant case fell precisely within the passages from Lord Diplock’s Speech from at pages 716 to 720 from which he read extensively.

43. In Gilbert-Ash the question at issue concerned the construction of a building sub-contract and whether the appellants, as the main contractor, were entitled to set off unliquidated and disputed counterclaims for defects and for delay as a defence against the respondent sub-contractor’s otherwise undisputed claim for £4,532.94, being the balance due under a certificate issued by the Bradford Corporation’s architect, (as employer) of which the contractors had paid £10,000 and had withheld the balance. Mr. Raffray referred in particular to the passages at pages 716C to H; 718 D to F; 719E to F and 720 E of the Report.

44. I begin with the extract from Lord Denning M.R.’s judgment which Lord Diplock quoted in the first of those passages, namely:

“When the main contractor has received the sums due to the sub-contractor—as certified or contained in the architect’s certificate—the main contractor must pay those sums to the sub-contractor.’ [I interpolate here that the passages cited in Gilbert-Ash equally apply to a situation, as here, where the conflict is between the employer and the contractor]. ‘He cannot hold them up so as to satisfy his cross claims. Those must be dealt with separately in appropriate proceedings for the purpose. This is in accord with the needs of business. There must be a ‘cash flow’ in the building trade. It is the very life-blood of the enterprise. The sub-contractor has to expend money on steel work and labour. He is out of pocket. He probably has an overdraft at the bank. He cannot go on unless he is paid for what he does as he does it. The main contractor is in a like position. He has to pay his men and buy his materials. He has to pay the sub-contractors. He has to have cash from the employers; otherwise he will not be able to carry on. So once the architect gives his certificates, they must be honoured all down the line. The employer must pay the main contractor; the main contractor must pay the sub-contractor, and so forth. Cross-claims must be settled later.”

45. After referring to this extract as ‘a strained construction upon the express words of the contract’ Lord Diplock said at page 718:

“So when one is concerned with a building contract one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law, including the remedy of setting up a breach of warranty in diminution or extinction of the price of material supplied or work executed under the contract. To rebut that presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed their agreement that this remedy shall not be available in respect of breaches of that particular contract.”

In that passage Lord Diplock was examining the situation in relation to the common law right to set up breach of warranty in diminution or extinction of the price, although in that case there was, additionally, the contractor’s right to do so under the clause cited at letter G.

46. I next come to the passage which Mr. Raffray said epitomised his case that unless and until the Court rejected his submission as to the primacy of the arbitration clause it could not

enter into issues of construction, which were far more suited for consideration by an arbitrator familiar with such issues and with this type of clause. Still less, at this juncture, was it appropriate for the Court to embark on the trial of a summary judgment application, as was demonstrated by Parker L.J in Home & Overseas Insurance v. Mentor Insurance [1989] 3 AER 74 at page 77, to which I will come shortly. At letters E to G on page 719 of the Gilbert-Ash case Lord Diplock said:

“It is conceded by counsel for the respondent that despite the provision that the contractor ‘shall be entitled to payment’ of the amount certified as due to him by the employer, the employer is empowered by other conditions of the contract [which are then enumerated] ‘to make deductions from the certified amount for breaches of particular warranties by the contractor. So the certified sum is not sacrosanct. The methods of calculating the sums deductible under these conditions is set out in the conditions themselves. They do not necessarily result in the same figure as the measure of damages for those particular breaches of warranty at common law. The effect of these conditions is to substitute for the sums which would be deductible from the price by operation of law in respect of those breaches of contract, sums calculated in the manner agreed. The expression unius rule of construction cannot be prayed in aid to exclude the right of the employer to set up breaches of other warranties in diminution or extinction of the instalment of the purchase price stated in the certificate as due.’”

47. Lord Diplock then continued at page 720

“I therefore conclude that there is no provision in the main contract in the standard R.I.B.A. Form which excludes the common law remedy of the employer to set up breaches of warranty by the contractor in diminution or extinction of any instalment of the price notwithstanding that such instalment has been certified as due from him to the contractor in a certificate issued by the architect.”

...and added at letter G:

“It is open to the contractor and the sub-contractor to negotiate whatever terms they please for inclusion in the sub-contract.”

48. The relevant parts of the judgment of Saville J. in Hayter v. Nelson (*supra*) are consistent with the views of Lord Diplock in this type of case. At page 268 Saville J. said:

“.....it must not be forgotten that by their arbitration clause the parties have made an agreement that in place of the Courts, their disputes shall be resolved by a private tribunal. Even assuming that this tribunal is likely to be slower or otherwise less efficient than the Courts, that bargain remains—and I know of no general principle of English law to suggest that because a bargain afterwards appears to provide a less satisfactory outcome to one party than would have been the case had it not been made or had it been made differently, that bargain can be simply put on one side and ignored.....if the Courts are to decide whether or not a claim is disputable, they are doing precisely what the parties have agreed should be done by the private tribunal. An arbitrator’s very function is to decide whether or not there is a good defence to the claimant’s claims—in other words whether or not the claim is in truth disputable.

49. Equally in this case, said Mr. Raffray the Conditions of Contract, including, of course, Clauses 44 and 47, were annexed to the Notice and Information for Tenderers. It was thus open to the States and to Miller & Baird to negotiate such terms as they each wished to be included or, as the case may be, dispensed with at the inception. There had been no objection to these conditions by the Contractor when submitting the tender or when embarking on the Works once their tender had been accepted.

50. This brings me to another case, decided in the same year as R.M. Douglas by the Court of Appeal consisting of Nourse and Bingham L.J.J. and Sir George Waller, namely Mayer Newman & Co Ltd. v. Al Ferro Commodities Corporation S.A [‘The John C. Helmsing’] [1990] 2 Lloyd’s Reports 290. That case involved damage to the hull of the John C. Helmsing while manoeuvring into a berth at Pasajes in Spain. It was carrying a cargo of steel turnings which the plaintiffs had sold to the defendants and which was being carried in the John C. Helmsing which the plaintiffs had chartered from a third party.

51. The plaintiffs held the defendant’s responsible for the damage to the ship, which they had chartered, under clause 6 of the sale agreement, since the owners of the vessel, in separate arbitration proceedings, had recovered DM 514,000 from the plaintiffs as the cost of the repairs. The plaintiffs then sought indemnity for that amount from the defendants and invoked the arbitration provisions of Clause 8 of the sale agreement, which had specified two arbitrators. They accordingly appointed an arbitrator but the defendants did not. The plaintiffs then applied and obtained leave to serve an originating summons outside the jurisdiction in Switzerland seeking the appointment by the court of an arbitrator on the defendants’ behalf.

52. The defendants moved to set aside the order on the grounds that the application should have been made under Order 73 r.7(1), and not under Order 11, and that the plaintiffs had to show a good arguable case on the merits and (they also had to show) that there was a genuinely disputable issue. On the appeal the defendants claimed, *inter alia*, that there was no dispute or difference capable of being referred to arbitration. Having resolved the procedural point and taken the view that Order 73 r.7(1) was the more appropriate to the instant case as, more specifically than Order 11, it provided for service out of the jurisdiction of an application for the appointment of an arbitrator, Bingham L.J. then addressed the issue as to whether the plaintiffs’ case was clearly unsustainable and, if so, that there was, accordingly, no dispute or difference capable of being referred to arbitration.

53. As Judge Bowsher did eight months later, Bingham L.J. quoted extensively from the judgment of Parker L.J. in Home & Overseas Insurance Co Ltd v. Mentor Insurance [1989] 3 A.E.R. 74 [1990] 1 W.L.R. 153, which, at pages 77 and 158D respectively contained the following passages:

“The purpose of Order 14 is to enable a plaintiff to obtain a quick judgment where there is plainly no defence to the claim. If the defendant’s only suggested defence is a point of law and the court can see at once that the point is misconceived the plaintiff is entitled to judgment.”

Further on Parker L.J. said:

“But the Order 14 proceedings should not in my view be allowed to become a means of obtaining, in effect, an immediate trial of the action, which will be the case if the court lends itself to determining on Order 14 applications’ [lengthy] ‘points of law and the citation of many authorities.’”

Thirdly I set out two passages on which Mr. Raffray particularly relied, which, I would add, are cited both by Bingham L.J. and by Judge Bowsher in the authorities I am currently considering:

“In cases where there is an arbitration clause it is in my judgment the more necessary that full scale argument should not be permitted. The parties have agreed on their chosen tribunal and a defendant is entitled *prima facie* to have the dispute decided by that tribunal in the first instance, to be free from the intervention of the courts until it has been so decided and thereafter, if it is in his favour, to hold it unless the plaintiff obtains leave to appeal and successfully appeals.

“In the case of a commercial arbitration the above remarks apply with even greater

force, perhaps especially when the dispute turns on construction or the implication of terms or trade practice. Arbitrators and umpires in the same business or trade as the parties are certainly as well or better able than the court to judge what the parties must be taken to have meant or intended by the words or phrases they have used....”

54. Similarly, though in different contexts, both judgments contained the identical passage from Kerr L.J.’s judgment at page 1401 of the Report in the Sethia case—which was not included in the list of authorities in Bundle D—regarding the two types of application being different sides of the same coin. In the The John C. Helmsing, broadly speaking, the case for the plaintiffs (remembering that the parties were in reverse to the present case as it was the plaintiffs there who were seeking to sustain the case for arbitration) was that the arbitration clause applied where there were differences arising out of the transaction; that the expression ‘differences’ meant claims by one party against another which the other did not admit; that in order to show a difference the plaintiffs needed to show that they had a reasonably arguable case on the merits of the substantive claim and that they had shown a reasonably arguable case. Counsel for the plaintiffs relied in particular on the passages in Saville J.’s judgment which I have set out above.

55. The defendants’ case, however, was that ‘difference’ meant a genuinely disputable issue—that is, not merely an unaccepted claim or a bare denial of liability, but a claim or defence which the Court could recognise as possibly capable of being made good. Their counsel relied on Bridge L.J.’s judgment in Ellis’ case (*supra*), and in particular on the passage in Kerr L.J.’s judgment in the Sethia case to which I referred at paragraphs 32 and 33. He submitted that Saville J.’s judgment was wrong as being contrary to the established body of case law as recognised in the then current edition of Mustill & Boyd.

56. I do not need to recite any part of the quotation from Kerr L.J. in the Sethia case, for the substance of it is adequately explained in both R.M.Douglas and The John C. Helmsing (as well as in Chatbrown) save to note that in the latter, immediately after the citation, Bingham L.J. said at page 296, Col. 1:

“The differing submissions of the parties reflect different approaches to the question in the decided cases. Given the modern attitude to arbitration and if the matter were free from authority, I would for my part be much impressed by the arguments of logic and principle deployed by Saville J. and Mustill & Boyd. But the matter is not free from authority and the defendants have a body of authority on their side.”

57. Bingham L.J. clearly recognised that there was a divergence in the authorities as to the course the Court should take in cases where there are cross applications for summary judgment and for a stay, one line of authority being represented by Lord Diplock’s Speech in Gilbert-Ash, the earlier case of Ford v. Clarkson’s Holidays Ltd, the judgment of Saville J. in Hayter v. Nelson and that of Judge Bowsher, Q.C. in R.M.Douglas which followed it, and the other by Fakes v. Taylor Woodrow Construction Ltd, Ellis’ case, the judgments of Kerr L.J. in the Sethia case and Chatbrown. However it must be noted that in the Sethia case (a) the provision being considered was Section 1(1) of the Arbitration Act 1975 (not section 4 of the Arbitration Act 1950) and (b) that Kerr L.J., who delivered the leading judgment was of the view that the sellers did have an arguable case, and that the case which followed it, Forestal Mimosa Ltd v. Oriental Credit Ltd [1986] 2 A.E.R 400 at page 403, had no arbitration clause.

58. Bingham L.J. took the view that he did not need to resolve the divergence between the two lines of authorities in The John C. Helmsing and posed the question:
“Can the plaintiffs show a genuinely disputable issue.”

He went on to hold, at page 297, Col.1, that the plaintiffs had raised a disputable issue sufficient to justify an order of service of the application to appoint an arbitrator outside the jurisdiction. However it must be emphasised that in reaching that finding Bingham L.J. had assumed for the purpose, but without deciding the point, that the defendants were right to

submit that leave could only be given if the applicant had shown a genuinely disputable issue on the substantive merits of the case.

59. It now behoves me to decide which line of authorities I should follow in the instant case—which, to adopt the phraseology which has been used by Counsel here, lies between the ‘robust approach’ and ‘the sophisticated approach’. The first observation I would make on R.M.Douglas is that while Judge Bowsher said that he had had the benefit of a full transcript of Saville J.’s judgment in Hayter v. Nelson in the Thyssen case, but that in neither that case nor another he had heard recently, John Mowlem & Co PLC v. Carlton Gate Development Co Ltd [1990] B.L.R 104, did he have any report of The John C. Helmsing.

60. While I am well aware that the point for decision in the latter case was different from the type of case before me and that its facts bear no resemblance to those now being considered, nonetheless the fact of the matter is that an authoritative Court in which Bingham L.J, now Lord Bingham, delivered the leading judgment, did recognise that there are two divergent lines of authority on the issue of whether there a genuinely disputable issue which should lead to the process of arbitration or whether the claim on which an application for summary judgment is made is merely unaccepted or denied, without thereby raising a disputable issue.

61. Secondly, whereas in The John C. Helmsing, Ellis’ case and Chatbrown the statutory provision being considered was Section 4 of the Arbitration Act 1950, the one being considered in Hayter v. Nelson was the non-domestic arbitration provisions in Section 1 of the Arbitration Act 1975. The former Act is virtually identical to the Guernsey Law, but in the latter there are significant differences: for instance in the 1950 Act the Court ‘may’ if satisfied that there is no sufficient reason why the matter should not be referred to arbitration, order a stay, whereas in the 1975 Act the Court *shall* make an order staying the Court proceedings a stay *unless* satisfied of one of the three matters then specified, one being that there is not in fact any dispute between the parties as regards the relevant matter.

62. Thirdly, Judge Bowsher applied the principle of Gilbert-Ash which had been commented on by Kerr L.J. in Chatbrown at page 48-49 as follows:

“The Revisions made in 1978’ [to the RIBA form of contract] ‘were designed to neutralise the decision of the House of Lords in’ [Gilbert-Ash] ‘which had of course held that rights of set-off were available in a wider number of cases than may have been considered appropriate in the construction industry.’”

63. Fourthly, the editorial comment on the R.M.Douglas case says that Bingham L.J.’s view is to be preferred to that of Judge Bowsher, and it is possible to speculate on the conclusion to which the Judge might have come if he had had the reports of *both* The John C. Helmsing and Hayter v. Nelson available to him when preparing his judgment.

64. Fifthly, in Croudace Ltd v. Lambeth Borough Council [1986] The Times March 31st Page 9, Balcombe L.J, who delivered the leading judgment in the Court of Appeal in a case not unlike the present one said:

“In deciding whether to exercise its discretion to grant a stay under section 4, among the factors which would weigh against doing so were the absence of any defence on liability, the fact that it was appropriate to order an interim payment on account of damages’ [which does not apply here], ‘and unmeritorious conduct by the party seeking the stay.’

Associated Bulk Carriers Ltd v. Koch Shipping Inc. [1978] and Ellis’ case are then cited.

65. In the instant case the Certificate of Completion (page 104 of Bundle C) was issued under Clause 48 on 26th April this year, showing that the Works were substantially completed

on 19th April, at which date, according to the memorandum at page 106, which is reflected in the letter at page 107 to Miller & Baird (both of which bear the date following that on which page 104 was issued) the period of delay in respect of which liquidated damages were assessed was 54 weeks and 2 days. According to my calculation the 54 weeks would have begun on Wednesday 7th April, 2004, and two days before that takes the correct date of completion to Monday, 5th April, 2004—not the 25th March as both Mr. Greenfield and Mr. Graham seem to have assumed.

66. If the date of completion is calculated from the accepted date of commencement, namely 9th June, 2003, as I said in paragraph [8] hereof then completion date should have been 16th February, 2004, to which has to be added the total of seven weeks extension making, again, 5th April, 2004. The supplemental contract excluding the installation of the pontoons was 3 days earlier, namely 2nd April, 2004. No notification either way, of a further extension of time or a refusal thereof under Clause 44(2) or (3) was given at that time by the States. Instead the Pontoon Agreement was made during the currency of the permitted time, and the notification of the 6th August, 2004 (page 81 of C) was given without any intimation that the permitted time for the completion of the Works had by then been exceeded.

67. Indeed, not to put too fine a point on it, the Engineer allowed Miller & Baird to bask in the belief that the Contract for the Works was still in being until the very moment when the Completion Certificate was issued on 26th April, 2005, and then waded in, virtually simultaneously, with a notification of no further extension of time (page 105), which included an invitation to them to submit information required to assess further entitlement in this respect, and with a claim for liquidated damages in the sum of £204,492.14. The differential rate in the assessment of this claim, as I understand the position, reflects the excision of the Pontoon part of the original contract. In turn the main contract was itself undated, though Mr. Lewis, in paragraph 1 of his first Affidavit, says that this was accepted as 23rd March, 2004, less than a fortnight before Mr. Falla said the Works should have been completed.

68. There is another aspect of the States' failure to issue a certificate that no further extensions would be granted until April of 2005. In Mr. Graham's letter of 16th May, 2005 (page 129) he says the importance of adhering to the issue of a certificate under Clause 44 was that a Contractor needed to know whether or not there would be any further extension so as to balance his costs of accelerating the Works against the potential risk of liquidated damages. Although in both his Affidavits of 3rd and 19th August Mr. Graham leaves little doubt as to whom he regards as to blame for the present alleged critical state of his company's finances, I do not need to enter into those details at this stage.

69. Mr. Raffray deprecated the Plaintiff's attempt to involve the Court in the evidential differences and, during his submissions on the 1st September, referred to portions of the case at TAB 20 of Bundle D, Cantrell & another v. Wright & Fuller Ltd [2003] 91 Con.L.R. 97 (which mainly concerned the form, effect and validity of a final certificate issued by the architect in a nursing home building contract, and which was an appeal from the arbitrator's award). I note in that case that at paragraph [74] of his judgment, Judge Thornton Q.C. held that in the construction of the applicable Standard J.C.T. conditions he was entitled to derive assistance from the factual matrix known to the parties at the date of the contract and at the date of the certificate—so here I consider I must pay regard to the opposing contentions in this respect.

70. In the instant case the Engineer acquiesced in the contract running on for well over a year before purporting to act under Clause 44. At paragraph [101] of his judgment, Judge Thornton says that, ordinarily, time limits imposed on the parties for the successive events in the working through of a J.C.T. contract are neither rigid nor immutable, and in paragraph [103] he expresses the view, in effect, that the lateness of a particular certificate does not necessarily render that certificate invalid. He goes on to say, at paragraph [117] that timescales and time bars in certification clauses provide for a timetable which is not mandatory unless the contract conditions expressly compel that conclusion.

71. Both Mr. Kirkpatrick at page 127 of C and Mr. Graham in his letter of 16th May (page 129) refer to the relevant ‘trigger’ Clause providing that the Engineer shall issue a certificate of extension of time, or notify the Contractor that no or no further, as the case may be, extension of time is being given

“...at or as soon as possible after the due date or the extended date for completion...”

In my judgment that requirement applies equally to the notification that an extension will be granted and to one that an extension of time will not be granted.

72. What, then, in the context of this case, is the meaning of ‘as soon as possible’? In The Hydraulic Engineering Company Ltd v. McHaffie, Goslett & Co [1878] 4 Q.B.D. 670 the Court of Appeal had to consider this phrase in relation to the supply by the defendant of a ‘gun’ which was a necessary component part of the plaintiff’s pile driver which they were manufacturing for the defendant. Although the order was received on 26th July the ‘gun’ was not ready until the end of September. All the judges agreed that the phrase ‘as soon as possible’ within which the plaintiffs had agreed to supply the part meant that it should be done within a reasonable time. At page 673 Bramwell L.J. said:

“.....to do a thing ‘as soon as possible’ means to do it within a reasonable time, with an undertaking to do it in the shortest practicable time.”

In the Canadian case of King’s Old Country Ltd v. Liquid Carbonic Canadian Corporation Ltd. [1942] 2 W.W.R. 603 Dysant J. gave a similar direction, and, as Judge Newey Q.C said in A.Bell & Son Ltd v. C.B.F. Residential Care & Housing Assn [1989] 46 B.L.R 105, a case relied on by Mr. Greenfield, at page 107:

“A certificate properly granted under the contract would have created certainty.”

73. In the instant case the failure of the Engineer, on behalf of the States, to notify the Contractor, or to put it the other way, to issue a certificate, that no further extension would be given within a reasonable time of the due date for completion created anything but certainty. In the circumstances of this case I do not think any Court would regard the period of a year and two weeks’ after the extended date for Completion (given also the intervention of the Pontoon contract) as constituting a reasonable time, or that the certificate had been issued ‘as soon as possible’. That was, in my view, a condition precedent to the issue of the certificate under 44(3). It was not complied with. Indeed, as Balcombe L. J. observed in Croudace:

“The defendant’s conduct in failing to have the plaintiff’s entitlement ascertained merits the strongest condemnation and entitles the Court to infer that its purpose in applying for a stay had been to cause further delay.”

74. On the authority of Croudace I hold that that conduct may be taken into account. Whether intentionally or not, referral to arbitration, as in that case, would occasion further delay to the detriment of the Plaintiff. Accordingly, for the reasons I have endeavoured to give, I decline to grant a stay of the Court proceedings at this stage. As Kerr L.J said in the Sethia case, it is settled that in applications for summary judgment the Court will consider the submissions of the parties in order to see if there is any substance in the proposed defence to the Application of 1st August, 2005. I hold, therefore, that the Plaintiff is entitled, at the very least, to have its application for summary judgment on the certificate heard. I propose to reserve the issue of costs unless otherwise persuaded.

A.R.W.Hancox
Lieutenant Bailiff
26th September 2005