

THE ROYAL SOCIETY FOR PUBLIC HEALTH

ASSESSMENT FOR THE

**LEVEL 5 DIPLOMA IN ADJUDICATION IN THE
CONSTRUCTION INDUSTRY**

Date xxxxxx

Paper No. xxxxxxxx

Unit Four:

**Production of an Enforceable Decision by an Adjudicator in the
Construction Industry**

Case Study

A dispute has arisen between a main contractor, Craftbuild Contractors Ltd ('Craftbuild'), and its Employer, Westwood Estates Ltd ('Westwood'). Whilst there are some differences as to specific matters of fact, which may or may not be relevant, the factual circumstances underlying this dispute are largely agreed. In essence, the dispute concerns the interpretation of certain provisions of the contract. As a result of events arising from a burst water main, the cause of which not being a matter of dispute, a dispute has arisen as to the interpretation of the contract in respect of the extent of Craftbuild's entitlement to payment for its alleged additional costs. Details of these costs are not to be considered at this stage: this dispute concerns only the operation of certain contractual provisions.

The events in question gave rise to a delay in the works for which an extension of time has been granted. Although the period granted is not in dispute, the contractual basis of the award is disputed. The contract is based on the JCT Standard Form of Building Contract Without Quantities 1998 Edition. The primary aspect of the dispute centres on the clause 22C insurance provisions and their relationship to the extension of time and, in particular, the loss and expense provisions in clauses 25 and 26, respectively. The dispute is, therefore, rooted in Craftbuild's claim for loss and expense arising out of the delay to the works.

Both parties are legally represented.

You are required to:

- (1) Prepare an Adjudicator's Decision; and
- (2) Provide a separate supporting explanation of any issues you feel should be explained or expanded upon.

You are provided with the following documentation. No other documents are available and your Decision should be based on the information provided.

- (1) The Referring Party's Referral; (Document 1)
- (2) The Respondent's Response; (Document 2)
- (3) The Referring Party's Reply; (Document 3)
- (4) 3 witness statements; (Documents 4-6)
- (5) A contract instruction. (Document 7)

There are no jurisdiction issues or issues concerning the timing of evidence. You should provide a brief explanation of any reasonable assumptions made.

Document 1

**IN THE MATTER OF AN ADJUDICATION PURSUANT TO THE JOINT CONTRACTS
TRIBUNAL PRIVATE WITH QUANTITIES STANDARD FORM OF BUILDING CONTRACT
(1998 EDITION) BETWEEN**

CRAFTBUILD CONTRACTORS LTD

(Referring Party)

AND

WESTWOOD ESTATES LTD

(Responding Party)

REFERRAL

Towers Walker
58 Victoria Mews
London
EC9Z 0BY

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1 The Parties

- 1.1 The 'Contractor' is Craftbuild Contractors Ltd whose registered office is at Temple Hill, Selsdon, Surrey KT19 2XY (hereinafter referred to as the 'Referring Party')
- 1.2 The 'Employer' is Westwood Estates Ltd whose registered office is 60 Walton Square, London, W8V 2JQ (hereinafter referred to as the 'Responding Party').

2 The Contract

- 2.1 The Contract is the JCT Standard Form of Building Contract without Quantities 1998 Edition with Amendments 1, 2 & 3 incorporating the JCT Contractor's Designed Portion Supplement and Sectional Completion Supplement together with amendments.
- 2.2 The Contract was executed as a deed by both parties and is dated 5 November 2004.
- 2.3 The Referring Party considers the key clauses in this submission are as set out below:
- 2.4 Article 4 - Contract Administrator

'The term 'Contract Administrator' in the Conditions shall mean ABC Plc of 1 East Street, London E4 10AB, who shall act as Contract Administrator ('CA')... Any reference in the Articles and Conditions to 'the Architect' shall mean the Contract Administrator.'

- 2.5 Article 5 - Quantity Surveyor

'The term 'the 'Quantity Surveyor' in the Conditions shall mean ABC Plc of 1 East Street, London E4 10AB...'

- 2.6 Article 6 Dispute or Difference Adjudication.

'If any disputes or differences arise under this Contract either Party may refer it to adjudication in accordance with Clause 41A'

- 2.7 Clause 41A - Adjudication

The entire clause 41A applies with the following amendments:

- 2.8 Clause 41A. 1 - *Delete the clause and insert as follows - 'When pursuant to Article 6 a party requires a dispute or difference to be referred to adjudication then that party shall give notice to the other party of his intention to refer the dispute of difference to adjudication and shall include with that Notice of Intention to Refer particulars of the dispute of differences together with a summary of the contentions on which he relies, a statement of the relief or remedy which is sought and any material which it wishes the Adjudicator to consider. Within 7 days from the date of such notice or the execution of the Adjudication Agreement by the Adjudicator if later, the party giving the Notice of Intention shall refer the dispute of differences to the Adjudicator for his decision ('the referral') and the documents comprising the referral shall be only the particulars, summary of Intention to Refer. The referral and its accompanying documentation shall be copied simultaneously to the other party.'*
- 2.9 Clause 41A.4 - *Delete the references to Article 5 in Sub-clause 41A.4.1 and Substitute a reference to Article 6.*
- 2.10 Clause 41A.5.4 - *Delete the word 'not' and insert at the end of that sub-clause the words 'and shall deliver his decision to the parties within 2 days from the date of making such decision'.*
- 2.11 Clause 41A.5.5.7 - *Delete the words 'giving prior notice to the Parties together with' and insert the following 'obtaining prior written approval from the Parties of'*

- 2.12 Clause 4 - 'Architect's Instructions'
- 2.13 Clause 4.1.1 - *"The Contractor shall forthwith comply with all instructions issued to him by the Architect in regard to any matter in respect of which the Architect is expressly empowered by the Conditions to issue instructions..."*
- 2.14 Clause 13.2.1 - 'The Architect may issue instructions requiring a Variation.'
- 2.15 Clause 13.2.3 - *'The valuation of a Variation instructed under clause 13.2.1 shall be in accordance with clause 13.4.1.1 unless the instruction states that the treatment and valuation of the Variation are to be in accordance with clause 13A or unless the Variation is one to which clause 13A.8 applies....'*
- 2.16 Clause 22.2 - *'In clauses 22A, 22B, 22C and, so far as relevant, in other clauses of the Conditions the following phrases shall have the meanings given below:*
- Alls Risks Insurance:*
- insurance which provides cover against any physical loss or damage to work executed, and against the reasonable cost of the removal and disposal of debris...'*
- 2.17 Clause 22C.2 - *'The Employer shall take out and maintain a Joint Names Policy for All Risks Insurance for cover no less than that defined in clause 22.2 for the full reinstatement value of the Works (plus a percentage, if any, to cover professional fees stated in Appendix) and shall maintain such Joint Names Policy up to and including the date of issue of the certificate of Practical Completion.....'*
- 2.18 Clause 22C.4 - *'If any loss or damage affecting work executed or any part thereof or any Site Material is occasioned by any one or more of the risks covered by the Joint Names Policy referred to in clause 22C.2 or clause 22C.3 then, upon discovering the said loss or damage, the Contractor shall forthwith give notice in writing both to the Architect and the Employer of the extent, nature and location thereof.....'*
- 2.19 Clause 22C.4.4 - *'If no notice of determination is served under clause 22C.4.3.1, or where the relevant procedures referred to in clause 22C.4.3.1 have not been invoked and the notice of determination has not been upheld, then...'*
- 2.20 Clause 22C.4.4.1 - *'after any inspection required by the insurers in respect of a claim under the Joint Names Policy referred to in clause 22C.2 or clause 22C.3 has been completed the Contractor with due diligence shall restore such work damaged, replace or repair any such Site Materials which have been lost or damaged, remove and dispose of any debris and proceed with the carrying out and completion of the Work; and'*
- 2.21 Clause 22C.4.4.2 - *'the restoration, replacement or repair of such loss or damage and (when required) the removal and disposal of debris shall be treated as if they were a Variation required by an instruction of the Architect under clause 13.2.'*
- 2.22 Clause 25.2.1.1 - *'If and when it becomes reasonably apparent that the progress of the Works is being or is likely to be delayed the Contractor shall forthwith give written notice to the Architect of the material circumstances including the cause or causes of the delay and identify in such notice any event which in his opinion is a Relevant Event.'*
- 2.23 Clause 25.2.2 - *'In respect of each and every Relevant Event identified in the notice given in accordance with clause 25.2.1.1 the Contractor shall, if practicable in such notice, or otherwise in writing as soon as possible after such notice:'*
- 2.24 Clause 25.2.2.1 - *'give particulars of the expected effects thereof; and'*

- 2.25 Clause 25.2.2.2 - *'estimate the extent, if any, of the expected delay in the completion of the Works....'*
- 2.26 Clause 25.3.1 - *'If, in the opinion of the Architect, upon receipt of any notice, particulars and estimate under clauses 25.2.1.1, 25.2.2 and 25.2.3,'*
- 2.27 Clause 25.3.1.1 - *'any of the events which are stated by the Contractor to be the cause of the delay is a Relevant Event and'*
- 2.28 Clause 25.3.1.2 – *'the completion of the Works is likely to be delayed beyond the Completion Date the Architect shall in writing to the Contractor give an extension of time by fixing such later date as the Completion Date as he then estimates to be fair and reasonable. The Architect shall, in fixing such new Completion Date, state:'*
- 2.29 Clause 25.3.1.3 – *'which of the Relevant Events he has taken into account.....'*
- 2.30 Clause 25.4 – *'The following are the Relevant Events referred to in clause 25:'*
- 2.31 Clause 25.4.5 – *'compliance with Architect's instructions'*
- 2.32 Clause 25.4.5.1 – *'under clause 2.3, 2.4.1, 13.2.....'*
- 2.33 Clause 26.1 – *'If the Contractor makes written application to the Architect stating that he has incurred or is likely to incur direct loss and/or expense in the execution of this Contract for which he would not be reimbursed by a payment under any other provision in this Contract.....because regular progress of Works or of any part thereof has been or is likely to be materially affected by any or more of the matters referred to in clause 26.2; and if as soon as the Architect is of the opinion that direct loss and/or expense has been incurred or is likely to be incurred due.....the regular progress of the Works or of any part thereof has been or is likely to be so materially affected as set out in the application of the Contractor then the Architect from time to time thereafter shall ascertain.....the amount of such loss and/or expense which has been or is being incurred by the Contractor....'*
- 2.34 Clause 26.1.1 – *'the Contractor's application shall be made as soon as it has become apparent to him that the regular progress of the Works or of any part thereof has been or was likely to be affected as aforesaid; and'*
- 2.35 Clause 26.1.2 – *'the Contractor shall in support of his application submit to the Architect upon request such information as should reasonably enable the Architect to form an opinion as aforesaid; and'*
- 2.36 Clause 26.1.3 - *'the Contractor shall submit to the Architect.....upon request such details of such loss and/or expense as are reasonably necessary for such ascertainment as aforesaid.'*
- 2.37 Clause 26.2 – *'The following are matters referred to in clause 26.1:'*
- 2.38 Clause 26.2.7 – *'Architect's instructions issued under clause 13.2... requiring a Variation'*
- 2.39 Clause 26.3 - *'If and to the extent that it is necessary for ascertainment clause 26.1 of loss and/or expense the Architect shall state in writing to the Contractor what extension of time, if any, has been made under clause 25 in respect of the Relevant Events referred to in clause 25.4.5.1 (so far as that clause refers to clauses 2.3, 13.2, 13.3 and 23.2)....'*

3 The Dispute

3.1 The Background

- 3.1.1 The Referring Party entered into a Contract with the Responding Party for the refurbishment of existing offices at 25 South Street, WC15 2JQ. The works consist of provision of air-conditioned office accommodation to developer's Category A standard, a new roof to the south west wing of 25 South Street, an additional floor at roof level to main east/west wing and the renewal of one elevation. The value of the Works as defined in the Contract Sum is £11,650,000.00.
- 3.1.2 The Referring Party took possession of the site on 3rd December 2004 and the date for completion was set at 30th July 2006.
- 3.1.3 The Completion Date has been amended by the Contract Administrator
- 3.1.4 As part of its Works the Referring Party entered into a Sub-contract with J.Miffed & Sons Limited for execution of a sewer heading including chamber construction at 25 South Street. The position of the sewer heading was from inside 25 South Street and out into the South Street roadway.
- 3.1.5 In January 2006 J.Miffed & Sons Limited had commenced the sewer heading work.
- 3.1.6 On Saturday 21st January 2006 the neighbouring site controlled by another main contractor was moving mechanical plant using a mobile crane positioned in South Street roadway. The loadings imposed by the crane fractured the Thames Water Main beneath the roadway and caused the heading to flood.
- 3.1.7 The fractured main was reported to Thames Water by the other main contractor on Saturday 21st January 2006 and by the Referring Party on Sunday and Monday 22nd & 23rd January 2006. The Referring Party's Site Manager Mr. Fred Bullet informed Thames Water of his concern that the live heading was full of water and that the two submersible pumps that had been installed at that time were only controlling the level of incoming water.
- 3.1.8 The Referring Party's Mr. Bullet became further concerned during the course of Monday 23rd January 2006 as it had been noted that the road had begun to subside and there was genuine concern that the external scaffold could be brought down.
- 3.1.9 Thames Water attended site late on Monday 23rd January 2006 and repairs were made to the fractured water main. By the morning of Tuesday 24th January 2006 the water levels in the heading had drained away but large deposits of silt had been left.
- 3.1.10 The Corporation of London attended site on Monday 23rd January 2006 and closed the road to all traffic until they had had the opportunity to establish the integrity of the ground beneath the road surface. The heading was abandoned due to the unstable ground conditions which raised health and safety issues for the operatives working in that area as it was considered unsafe.
- 3.1.11 The closure of the road meant that the Works became isolated as no deliveries of materials could be made to site and no removal of demolition or excavated material could leave site as access was via the South Street roadway.
- 3.1.12 The Referring Party wrote to the Responding Party's Contract Administrator on 24th January 2006 informing that the access to the site was to be closed until further notice from the Corporation of London. The heading had been abandoned and the Corporation of London agreed the safest option now was to sink a new shaft in the roadway down to the existing sewer and form a new manhole then continue the heading back to the building.
- 3.1.13 The Contract Administrator in his letter of 24th January 2006 confirmed that due to the danger of subsidence to the roadway adjacent to the repaired water main and the need for remedial works and the associated road closure, deliveries to site over the period until 3rd February 2006 were largely restricted.
- 3.1.14 On the 25th January 2006 the Referring Party wrote to the Responding Party and the Contract Administrator regarding the event of the fractured water main stating that they believed that this was a matter to which clause 22C (Insurance of existing

structures/works) refers. The Referring Party suggested that the Responding Party notifies his insurers as soon as possible as they may wish to inspect prior to replacement works being carried out.

- 3.1.15 The Referring Party wrote to the Department of Technical Services of the District Surveyor on 25th January 2006 following a site meeting where the ramifications of the fractured water main were discussed. The road surface would have to be removed in order to inspect the ground conditions and an alternative sewer connection via a shaft and new manhole in the roadway were to be constructed.
- 3.1.16 The Referring Party wrote to the Contract Administrator on 27th January 2006 requesting an Instruction to carry out the formation of new manhole and sewer connection back to the building. The Referring Party also notified that the incident would have a major effect on progress of the Works due to additional time to mobilise revised sewer work and delays due to access to the site being denied. The notification was given under Relevant Event clauses 25.4.3 (Specified Perils) and 25.4.5.1 (Architect's Instructions).
- 3.1.17 The Referring Party on the 27th January 2006 wrote to the Contract Administrator informing that the Corporation of London intended to commence the investigation/repair works to South Street on Monday 30 January 2006.
- 3.1.18 The Referring Party wrote to the Contract Administrator on 30 January 2006 requesting that the Responding Party issue a letter to the Corporation of London advising that they agree to pay for new manhole works. They further advised that they had been notified by Corporation of London that the new manhole works may take up to 22 days to complete dependant on what damage they find.
- 3.1.19 The Responding Party 's Structural Engineer wrote to the Contract Administrator on the 30th January 2006 informing they had inspected the existing structure and had not identified any apparent structural damage resulting from the fractured water main in South Street. The Engineer confirmed they were happy with the scope of works proposed by the Referring Party and Corporation of London concerning proposed new manhole and noted that the work would be carried out by Corporation who will want to be paid.
- 3.1.20 The Referring Party wrote to the Contract Administrator on 13th February 2006 enclosing a copy of email from Corporation of London dated 3rd February 2006 detailing an estimate of cost for remedial work to carriageway and revised sewer connection as £15,000. The Referring Party confirmed they had received confirmation from the Contract Administrator that the Corporation of London were to carry out the works.
- 3.1.21 The Referring Party received Instruction No. 22 issue date 22nd February 2006 to proceed with remedial work as letter dated 13th February 2006.
- 3.1.22 On the 8th March 2006 the Referring Party wrote to the Contract Administrator requesting further extension of time listing Relevant Events that have or were delaying the Works including delays due to new manhole construction and road closures associated with fractured water main. The Referring Party stated that they believed the Relevant Events were matters under clauses 25.4.5.1 & 25.4.6.2 (both of which are under the heading of Architect's Instructions) and 25.4.3 (Specified Perils).
- 3.1.23 The Contract Administrator replied to the Referring Party's request for extension of time for Relevant Event of Fractured Water Main to South Street roadway on the 7th June 2006 and awarded six weeks (water main fracture 21st January site operating normally 6th March 2006) under clause 25.4.3.
- 3.1.24 The Referring Party wrote to the Contract Administrator on 22nd June 2006 noting that the 6 weeks had been awarded under clause 25.4.3 'Specified Perils.' The Referring

Party informed that the delay period stated in Contract Administrator's letter was covered by the Relevant Event for the new manhole in the roadway of South Street which caused the road to be closed and barred access to site. This Event was cited in delay notice 8/3/06 and 12/5/06 under clause 25.4.5.1 (Architect's Instruction).

3.1.25 The costs associated with repairs, remedial work and delay and disruption due to the fractured water main were included by the Referring Party in their interim applications. The Responding Party certified money to cover both work and on account associated costs in the March and April 2006 valuations. The Responding Party did not include any money for associated costs in the May 2006 valuation but did include work costs. The Responding Party have withdrawn both work and associated costs in all valuations since June 2006.

3.1.26 On the 11th July 2006 the Referring Party wrote to the Responding Party's Quantity Surveyor stating that it had been brought to their attention that costs associated with the fractured water main were to be excluded from the next valuation. The Referring Party requested that they be informed under what element of Contract such action could be taken. It was the Referring Party's view that all costs associated with the work should be included in the

valuations and requested confirmation of this point by close of business on 14th July 2006 to preclude having to instruct legal advisers to commence proceedings for recovery of costs.

3.1.27 The Referring Party wrote to the Contract Administrator on the 12th July 2006 again setting out his reasons why he believed monies associated with the fractured water main should be included in interim valuations. It was recorded that representatives from both the Referring Party together with his Legal and Insurance Advisers would meet with the Responding Party and the Contract Administrator to explain their views.

3.1.28 The Responding Party's Quantity Surveyor wrote to the Referring Party on the 17th July 2006 stating that it was their view that recovery of costs associated with the flooding was a Specified Peril and as such does not entitle the Referring Party to recover 'all associated costs'. It was their view that the Responding Party under clause 22C was required to take out insurance to cover the cost of reinstatement of the Works and professional fees and there was no requirement to insure against other costs, accordingly any loss and expense could not be claimed under the Insurance Policy. In addition their view of the position under the Contract was that there was entitlement for an Extension of Time for Specified Perils under clause 25 but there was no entitlement to recover loss and expense under clause 26.

3.1.29 The Referring Party wrote to the Contract Administrator on the 27th July expressing his disappointment that the meeting set for the 2nd August 2006 to discuss contractual mechanism to deal with the events concerning the burst water main and the instruction to construct new manhole had effectively been cancelled.

3.1.30 The Contract Administrator in his letter of the 28th July 2006 stated that the matter had been clarified in correspondence which he felt set out contractual mechanism and as such he could see no benefit of debating the matter further.

3.1.31 The Referring Party had attempted via correspondence and dialogue with the Contract Administrator and Quantity Surveyor to demonstrate that there was an incorrect administration of the Joint Names Insurance, Valuation of Variation, Extension of Time and Loss & Expense clauses of the Contract with regard to the Fractured Water Main and instruction for new manhole in South Street. It is the Referring Party's view that the following procedure should have been adopted:

- The consequences of the fractured water main is a Risk for which the Joint Names Insurance Policy should apply.

- The Event did not affect the existing structure but did affect the Works and therefore clause 22C.2 applies. This is evidenced by the Responding Party's Engineer's notice of 30.1.06 stating ... *'we confirm we have inspected the existing structure and have not identified any apparent structural damage resulting from the fractured water main...'*, and the Quantity Surveyor's letter of 17.7.06 confirming.... *'under clause 22C the Employer is required to take out insurance policy to cover the cost of reinstatement of the Works....'*
- Clause 22C.2 is an All Risks Insurance and Specified Perils does not apply.
- Clause 22C.4.4.1 states that after any inspection by the insurers in respect of a claim under the Joint Names Policy referred to in clause 22C.2 has been completed the Contractor shall restore such work damaged and proceed with the carrying out and completion of the Works. The Referring Party wrote to the Responding Party on the 22.1.06 notifying that they believed the matter to be a claim under 22C and suggested they contact their insurers as soon as possible as they may wish to inspect prior to replacement works being carried out.
- Clause 22C.4.4.2 states that the restoration, replacement or repair of such loss or damage shall be treated as if they were a Variation required by an instruction of the Architect under clause 13.2. The Referring Party in their letter of 27.1.06 requested from the Contract Administrator an instruction to cover the revised work of a new shaft to be excavated in the road down to the sewer and the formation of a new manhole and a new sewer connection back to the building. The Contract Administrator issued an instruction to cover the work on 22.2.06 reference number 22.
- Clause 13.2 states that the Architect may issue Instructions requiring a Variation and covers the rules of valuation of the Variation.
- Clause 25.4.5.1 covers the Relevant Event of complying with the Architect's Instruction issued under clause 13.2 for which an Extension of Time can be granted. The Referring Party wrote to the Contract Administrator on the 27.1.06 and 8.3.06 requesting an extension of time be granted for the work of new shaft and manhole construction in South Street roadway and claimed under clause 25.4.5.1
- Clause 26.2.7 relates to Architect's Instructions issued under clause 13.2 which can be used when valuing loss and expense which has not been itemised under any other provision of the Contract. The Referring Party in his letter of the 8.3.06 issued notice of his intention to claim loss and expense as the Event had materially affected the regular progress of the Works.

3.2 Responding Party's Failures

- 3.2.1 The Responding Party has not issued an extension of time for the consequences of the fractured water main and new manhole construction under the correct clause of 25.4.5.1 of compliance with Architect's Instruction issued under clause 13.2.
- 3.2.2 The Responding Party has not included money in the interim certificates for the construction of shaft and new manhole in South Street roadway caused by the fractured water main in accordance with clause 13.2. Initially money was included in the March, April and May valuations but has been withdrawn in valuations since June.
- 3.2.3 The Responding Party has not included money in the interim certificates for loss and expense associated with the delays and disruption caused by the closure of the roadway while new manhole and associated sewer work was undertaken in accordance with 26.2.7. Initially the Responding Party included on account sums for associated delay and disruption cost in the March and April valuations but has withdrawn all monies since the May valuation.

3.3 The Issues

- 3.3.1 The dispute concerns the entitlement of the Referring Party to recover costs through the Contract for the work associated with the issue of Architect's Instruction to construct a new manhole in the roadway due to unstable ground conditions caused by a fractured water main.
- 3.3.2 There is no dispute over the award of 6 weeks. The issue is the award has been granted under an incorrect clause. The award was made against clause 25.4.3, Specified Perils, whereas it should have been against clause 25.4.5.1, compliance with Architect's Instruction.
- 3.3.3 As the Responding Party 's Contract Administrator has granted an extension of time under the incorrect clause, the Referring Party has been denied the opportunity to recover loss and expense associated with the issue of an Architect's Instruction pursuant to the provisions of Contract which has caused the regular progress of the Works to be delayed and disrupted.
- 3.3.4 The Referring Party initially understood there was no problem with the administration of the valuation of Architect's Instruction as sums were included on interim certificates. However, recent valuations do not include any costs for this item. The Referring Party has correctly notified the Responding Party of all the events since the initial incident of the fractured water main and has kept it fully aware of all ramifications. Once sums were excluded from the valuation the Referring Party agreed to meet with the Contract Administrator and the Responding Party to explain their views on this matter. Regrettably the Responding Party cancelled the meeting preferring to stand by its statement that there was no entitlement for the Referring Party to recover costs and he could see no benefit of debating this further.
- 3.3.5 The Referring Party considers that it has fully particularised its case and feels frustrated that attempts to explain and resolve matters have not been accepted by the Responding Party . The Referring Party feels it has no other recourse other than to refer the dispute to adjudication in accordance with clause 41A of the Contract.
- 3.3.6 With reference to 3.1.29 and 3.1.30 above, a dispute has clearly arisen.

4 Remedies sought by the Referring Party

- 4.1 The Referring Party requests that the Adjudicator considers and makes a decision as to whether the incident of the fractured water main in South Street roadway causing the sewer heading to flood is a Clause 22.2 Risk which is covered under Clause 22C.2 by the Joint Names Policy for All Risks Insurance for the Works and as such Clause 22C.4 shall be invoked and in particular its valuation provisions shall apply.
- 4.2 The Referring Party requests that the Adjudicator considers and makes a decision as to whether the Contract Administrator's instruction issued on 22nd February 2006 reference number 22 is in fact a variation and is to be valued in accordance with the provisions of clause 13.2.
- 4.3 The Referring Party requests that the Adjudicator considers and makes a decision as to whether the extension of time granted against clause 25.4.3 of 6 weeks by the Responding Party 's Contract Administrator in respect of the fractured water main should have been granted against clause 25.4.5.1 for complying with the Contract Administrator's instruction.
- 4.4 The Referring Party requests that the Adjudicator considers and makes a decision as to whether the Referring Party is entitled to recover any loss and expense under clause 26.2.7 as a result of carrying out the work described in Contract Administrator's Instruction issued on 22nd February 2006 reference number 22.

4.5 For the avoidance of doubt the Referring Party does not request that the Adjudicator makes any monetary award in this reference.

4.6 That the Adjudicator's fees and disbursements be paid by the Responding Party.

5 The Adjudicator's Decision

5.1 The Referring Party requests that the Adjudicator provides his reasons.

6 Reply to the Response

6.1 The Referring Party is aware that some authorities exist, that the Responding Party may argue, bear upon this reference. Whilst it is the Referring Party's position that the valuation aspects of clause 22C have not been tested in the courts, the Referring Party reserves its right to Reply to the Response within the timeframe of this Referral both in general terms and on any matters of law or construction of the Contract.

7 Notices to all parties

7.1 A copy of this Referral has been sent to the Adjudicator and the Responding Party's solicitors, Merlins, 20 Prestige Street, London, EC15 2BR,

Towers Walker
58 Victoria Mews
London
EC9Z 0BY

Dated 22 August 2006

Document 2

IN THE MATTER OF AN ADJUDICATION PURSUANT TO THE JOINT CONTRACTS TRIBUNAL PRIVATE WITH QUANTITIES STANDARD FORM OF BUILDING CONTRACT (1998 EDITION)

BETWEEN:

CRAFTBUILD CONTRACTORS LTD

Referring Party

-and -

WESTWOOD ESTATES LTD

Responding Party

RESPONSE

1. INTRODUCTION

- 1.1 On 15 August 2006 Craftbuild Contractors Limited ("the Referring Party") (hereinafter referred to as "Craftbuild") served a Notice of Adjudication on Westwood Estates Limited ("the Responding Party") (hereinafter referred to as "Westwood"). Craftbuild subsequently served its Referral and supporting documents on 22 August 2006.
- 1.2 This Response to the Craftbuild Referral is made on behalf of Westwood.
- 1.3 The facts relating to this adjudication are in large part agreed. We set out below in Section 3 a summary of the agreed facts and draw the learned Adjudicator's attention to those matters that are not agreed.
- 1.4 We also deal below at Section 3 with those matters which are not agreed in particular paragraphs 3.1.12 to 3.1.22 of the Referral.
- 1.5 This dispute is in essence a matter of interpretation of standard provisions of the JCT '98 Contract.

2. THE ISSUES

- 2.1 The Craftbuild position is set out in Section 3.3 and the remedies it seeks are detailed in Section 4 of the Referral. We set out in Section 5 below Westwood's responses to the

remedies sought. However, we consider that the issue may be more helpfully and succinctly described as follows:

2.2 In circumstances where, as here, a flood due to a burst water main (which is a Specified Peril as defined by Clause 1.3 of the Contract) (hereinafter called "the Flood") causes:

2.2.1 Loss or damage to property outside the Site;

2.2.2 Loss and damage to the Works; and

2.2.3 Delay to the Completion of the Works

what are the remedies prescribed by this Contract?

2.3 We submit that:

2.4 Craftbuild is entitled pursuant to clause 22C4.2, to payment of the costs it incurred in the restoration, replacement or repair of such loss or damage to the Works.

2.5 Westwood and Craftbuild each bear the consequences of any delay to completion of the Works caused by the Flood.

2.6 Therefore:

2.6.1 Craftbuild is entitled to relief from Liquidated and Ascertained Damages and so is granted an extension of time pursuant to clause 25.4.3.

2.6.2 Craftbuild is not entitled to claim for loss and expense if the regular progress of the Works is affected by the Flood.

2.7 We do not believe that Craftbuild can seriously contend to the contrary.

2.8 Craftbuild, however, claims loss and expense for delay in the regular progress of the Works due to the Flood. It does so on the basis that the work undertaken to repair the damage caused by the Flood, constitutes a Variation entitling it to an extension of time under clause 25.4.5 in addition to loss and expense under clause 26.2.7.

2.9 Craftbuild argues that the remedial works constitute a Variation due to:

2.9.1 The concluding words of clause 22.C.4.4.2, which states

*" The restoration, replacement or repair of such loss or damage and ... the removal and disposal of debris shall be treated as if **they** were a Variation required by instruction of the Architect under clause 13.2'*
(emphasis added) and

2.9.2 an Instruction issued by the Contract Administrator on 22 February 2006.

2.10 Craftbuild's claim is misconceived because:

2.10.1 The restoration replacement or repair of loss or damage of that part of the Works effectively destroyed by the Flood ("the Repair Work") was not the cause of delay to the regular progress of the Works. The cause of delay was plainly and obviously the Flood.

The Courts have on many occasions considered issues of causation. In this context the most helpful case is the House of Lords decision in *Leyland Shipping Company*

v Norwich Union Fire Insurance Society [1918] AC 350. The case has been cited and followed most recently, in *Banque Bruxelles Lambert SA v Eagle Star Insurance* [1997] AC 191 and *Brownsville Holdings Limited and another v Adamjee Insurance Company Limited* [2000] 2 Lloyd's Rep 458.

In *Leyland Shipping* the facts (briefly) were that the ship was hit by a torpedo causing extensive damage to the hull. When the ship docked subsequently, the harbour master ordered its removal from port to an area where it could be beached. As a result of an unusually strong storm and tide, the ship's back broke and it sank. The House of Lords determined that the cause of the loss was the torpedo not the storm or the tide. (See pages 370 to 371).

At page 371 Lord Shaw said:

" the vessel, in short, is all the time in the grip of the casualty. The true efficient cause never loses its hold. The result is produced, a result attributable in common language to the casualty as a cause, and this result, proximate as well as continuous in its efficiency, properly meets, whether under contract or statute, the language of the expression "proximately caused".

In this Referral if one substitutes the Flood for the Torpedo the "true efficient cause" of delay becomes clear. It is the Flood. The alleged Variation is a consequence of the Flood - it is not the true cause of delay.

2.10.2 In any event, that replacement work did not constitute a Variation because:

- (a) Under clause 22.C.4.4.2, the restoration, replacement or repair of loss or damage are to be treated as if they were a Variation under 13.2; not as if there were a Variation under clause 13 for all purposes. Therefore the Repair Work is valued under clause 13.2 as if it was the subject of a Variation. This is entirely appropriate because under clause 22C, it is the Employer's duty to insure the Works against physical loss and damage. The Contractor is by clause 22.C.4.2.2. entitled to payment for the Repair Work even if the Employer has not procured appropriate insurance cover. However clause 22.C.4.2.2 does not say that Repair Work is to be treated as if there were a deemed Variation under the Contract for all purposes.
- (b) The instruction issued on 22 February 2006 does not constitute a Variation. It was issued at the request of Craftbuild to confirm that Westwood accepted the price requested by the Corporation of London for undertaking the Repair Work which it had by that time completed.

2.10.3 As matter of fact, the Flood not only destroyed part of the Works, it also caused damage to the road providing access to the Site. The Corporation of London closed the road because it had started to subside and there were very real fears as to its stability. The road remained closed until it and the Repair Work had been repaired on 22 February 2006.

THE FACTS

- 3.1 It is agreed that a contract was executed on 5 November 2004. It is further agreed that this contract is the JCT Standard Form of Building Contract without Quantities 1998 Edition with Amendments 1, 2 & 3 incorporating the JCT Contractor's Designed Portion Supplement and Sectional Completion Supplement together with amendments (hereinafter referred to as "the Contract").
- 3.2 The provisions of the Contract set out in Section 2 of the Craftbuild Referral appear to be accurately set out.

- 3.3 It is Westwood's position that Contract Administrator, ABC, did award the extension of time under the correct provisions of the Contract i.e. Clause 25.4.3 and Craftbuild has no entitlement to recover its loss and expense under Clause 26.
- 3.4 The matters set out in paragraphs 3.1.1 to 3.1.11 of the Referral are agreed. In summary a crane being operated on behalf of the neighbouring site fractured the Thames Water Main flooding both the roadway and Craftbuild's works on site. The flood caused damage to the roadway and to the heading previously constructed by Craftbuild. The Corporation of London closed the road on 24 January 2006 thus severely restricting access to the site and causing delay to the progress of the Works.
- 3.5 The history of events as set out in paragraphs 3.1.12 to 3.1.22 is not agreed. In particular the suggestion that the cause of delay to completion of the Works was primarily due to the Repair Works is denied.
- 3.6 We submit that it is clear from the correspondence attached to the Referral that following the flood the Corporation closed the road due to evidence of subsidence. All concerned agreed that if the roadway was to be opened up for investigation and repair, the safest and most cost effective option would be to sink a new shaft and form a new manhole in the roadway while it was opened up. In the light of Westwood's submissions on the proper interpretation of the Contract this factual dispute is probably of little relevance. In summary following the closure of the road by the Corporation of London on 24 January, the facts are as follows:-
- 3.6.1 There were discussions between Craftbuild, their sub contractor J. Miffed and Sons Limited ("JMSL") and the Corporation of London on 24 January. All agreed that due to damage to the road and the danger of subsidence the road should be shut. It was further agreed that as the Corporation would be repairing the road the most sensible way of carrying out the Repair Works to the Heading would be for a new manhole and heading to be formed in the road. This is clear from
- (a) Craftbuild's letter to ABC which states that the road adjacent to "the site" in South Street is closed to all traffic and deliveries because:
 - (b) *"the amount of silt that has been washed into our heading from the surrounding ground will have inevitably left hollows/voids beneath the road surface that could collapse if vehicles park directly over them"*
 - (c) Further, the letter stated that the existing heading had been rendered unsafe and

"it was agreed that the safest and most cost effective option would be to sink a new shaft in the road to form a new manhole and continue the heading back to our building".
 - (d) ABC's letter of 24 January.
 - (e) Craftbuild's letter of 25 January.
 - (f) JMSL's letter of 26 January.
- 3.6.2 On 27 January, Craftbuild wrote to ABC stating that the Flood would cause delay and claimed an extension of time under Clause 25.4.1 (Force Majeure) and/or

Clause 25.4.3 Specified Peril. Craftbuild plainly recognised at the time that the cause of delay was loss or damage caused by the flood.

3.6.3 On 30 January 2006 Craftbuild wrote to ABC:

- (a) confirming the arrangement by which the Corporation would excavate a new shaft and manhole to replace the damaged heading. Craftbuild asked that Westwood *"issue a letter"* to the Corporation confirming that they would pay for this work, and
- (b) noting that the works may take up to 22 days to complete *"however this depends on what damage they find in the road"*.

3.6.4 On 13 February Craftbuild wrote to ABC asking for a CAI.

3.6.5 *"to cover the attached Corporation of London's email so that we can arrange to raise the cheque."*

3.6.6 On 22 February ABC issued a Contract Instruction which stated:

"Further to your letter of 13th February 2006, regarding the remedial work to South Street carriageway, I confirm that the additional cost of £17,625 is acceptable"

3.6.7 The Remedial Works and repairs to the roadway commenced on 30 January 2006. The Remedial Works were completed on 18 February. The repairs to the road were completed on 22 February. The road was reopened on that same day.

4. THE CRAFTBUILD ISSUES

We have in Section 2 summarised Westwood's position with regard to this referral. For the sake of completeness we set out below our comments on paragraphs 3.3.1 to 3.3.6 of the Referral.

4.1 As to 3.3.1:

The issue is here framed in an unhelpful manner. There is no dispute that the Remedial Works are to be paid for by Westwood. The dispute concerns Craftbuild's claim for loss and expense due to delay to the Works which Craftbuild acknowledges at the end of 3.1.1. was *"caused by the fractured water main"* i.e. the Flood.

4.2 As to paragraph 3.3.2

It is agreed that there is in this reference no dispute over the award of 6 weeks. We submit that the extension of time was properly granted under clause 25.4.3 because the cause of the delay is the Flood. No delay was caused by *"compliance with the Architect's Instruction"*. We repeat our submissions the flood being the main cause of delay set out at paragraph 2.10.1 above.

4.3 As to paragraph 3.3.3.

The award of time in respect of the Flood is correct. In any event an award of time would not automatically necessarily lead to an entitlement to Loss and Expense under clause 26.

4.4 As to paragraphs 3.3.4 to 3.3.6

The Contract Administrator's initial valuations were made under a misapprehension as to the correct interpretation of the Contract.

It is accepted that a dispute has arisen.

5. REMEDIES SOUGHT

5.1 As to Clause 4.1

It is submitted that the cost of repairing physical loss and damage to the Works by reason of the Flood is covered by the Clause 22C Joint Names Policy. Clause 22C2 sets out the full extent of the obligation which is to take out and maintain a Joint Names Policy for All Risks Insurance for the full reinstatement value of the Works.

It is accepted that clause 22.C.4 applies and the Remedial Works fall to be treated "*as if they were a variation.*"

The Remedial Works do not constitute a Variation for the purposes of clause 26.

5.2 As to Clause 4.2

For the reasons set out above, the Architect's Instruction does not constitute a Variation. The instruction was (as it says on its face) merely a confirmation of the price to be paid by Westwood to the Corporation of London for undertaking the Remedial Works.

5.3 As to Clause 4.3

Westwood submits that because the Flood was the cause of delay, the proper clause for the grant of an extension of time is clause 25.4.3.

This is a matter of analysis of the contract and the law of causation. Westwood repeat their submissions set out in Section 2 above. The Flood was the dominant or proximate cause of delay. The Remedial Work was necessary because of the Flood. Craftbuild was plainly not delayed in any meaningful sense by the Remedial Works nor by the Architect's Instruction confirming acceptance of the price to be paid to the Corporation. The instruction was in any event issued on the same day that the road was reopened.

5.4 As to Clause 4.4

Westwood submits that Craftbuild is plainly not entitled to loss and expense under clause 26.2.7 and repeats its earlier submissions. The cause of delay was the Flood not the alleged Variation.

5.5 As to 4.4

Craftbuild's position is noted.

5.6 As to Clause 4.6

As Craftbuild's Referral is misconceived, we would urge the Adjudicator reflect this, when deciding the proportion of fees payable by Craftbuild.

6. SUBMISSION IN RESPECT OF CLAUSE 26.1 OF THE JCT 98 FORM

6.1 This addresses the question of whether a contractor who has failed to make written application under clause 26.1, stating that he has or is likely to incur loss and expense as soon as it has become or should reasonably have become apparent to him that the regular progress of the Works has been affected by a relevant event as specified in clause 26, is entitled to recovery of loss and expense under Clause 26. The first time Craftbuild made written application stating that it had incurred loss and expense to which Clause 26 applies was on 8 March 2006 - some 6 weeks after the closure of the road

6.2 Clause 26.1 of the JCT 98 Form of Contract provides that:

"If the Contractor makes written application to the Architect stating that he has incurred or is likely to incur direct loss and/or expense.... in the execution of this Contract for which he would not be reimbursed by a payment under any other provision in this Contract.... because the regular progress of the Works or of any part thereof has been or is likely to be materially affected by one or more of the matters referred to in clause 26.2; and if and as soon as the Architect is of the opinion that the direct loss and/or expense has been incurred or is likely to be incurred.....then the Architect from time to time thereafter shall ascertain..... the amount of such loss and/or expense which has been or is being incurred by the Contractor, provided always that:

26.1.1 the Contractor's application shall be made as soon as it has become, or should reasonably have become, apparent to him that the regular progress of the Works or of any part thereof has been or was likely to be affected as aforesaid; and

26.1.2 the Contractor shall in support of his application submit to the Architect upon request such information as should reasonably enable the Architect to form an opinion as aforesaid;

26.1.3 the Contractor shall submit to the Architect or to the Quantity Surveyor upon request such details of such loss and/or expense as are reasonably necessary for such ascertainment as aforesaid."

(Emphasis added)

6.3 Accordingly, clause 26.1 provides that the Contractor entitlement only arises IF he has made an application stating that he is likely to incur loss and expense and IF he has made it as soon as it becomes apparent to him that he will incur such loss and expense.

6.4 The plain meaning of the clause is that the Contractor's entitlement to claim only arises if he makes prompt application.

6.5 Clause 24(1) of the 1963 Form of Contract (the equivalent of clause 26(1) in the 1998 form provided that:

"If upon written application being made to him by the Contractor the Architect is of the opinion that the Contractor is involved in direct loss and/or expense for which he would not be reimbursed by a payment made under any other provision of this Contract by reason of the regular progress of the Works or of any part thereof having been materially affected....."

and if the written notice is made within a reasonable time of it becoming apparent...then the Architect shall either himself ascertain or shall instruct the Quantity Surveyor to ascertain the amount of such loss...."

(Emphasis added)

6.6 The old clause 24(1) is largely mirrored in clause 26.1. However the words "Provided" "always that" have been added to the simple "IF". As such, the need to comply with the requirement to make prompt application is given greater emphasis in the 1998 form. Further the 1963 form merely provided for application within a reasonable time whereas JCT '98 requires written application "as soon as it has become apparent". In this case the delay was, of course, apparent almost simultaneously with the Flood.

6.7 The case of *London Borough of Merton -v- Stanley Hugh Leach Ltd* (1985) 32 BLR 51 is authority for this analysis. Vinelott J stated on pages 95 to 96 that:

*"The common features of sub-clauses 24(1) and 11(6) are first that they are both "if" provisions, that is, provisions **which only operate in the event that the contractor invokes them by making a written application**, secondly, that if an application is made the architect must form an opinion whether the contractor has suffered direct loss and/or expense in the circumstances of the kind there set out, thirdly, **[and] that the written application must be made within a reasonable time after a stated event** and, fourthly, that the architect must then ascertain and instruct the quantity surveyor to ascertain the amount of the loss or expense which is then added to the contract sum."*

(Emphasis added)

6.8 Accordingly, in *Leach*, Vinelott confirmed that Clause 24(1) was an "if" provision i.e. if the Contractor failed to comply with those requirements, he would not have any entitlement to additional payment. Therefore, under the JCT standard form contract if the Contractor fails to make prompt application he will not be entitled to any recovery under clause 26.

6.9 *Leach* equally applies to clause 26.1 of the JCT '98 form: indeed clause 26.1 of the 1998 form states that the valuation will only be made "provided always that" written application is made as soon as it has become apparent that regular progress of the works will be delayed and loss and expense will be incurred. If the proviso is not satisfied there is simply no right to claim under clause 26.1 of the Contract.

- 6.10 To summarise.
- 6.11 There is no entitlement to recovery of loss and expense under clause 26 if the written application is not given at the correct time.
- 6.12 In this case not only did the Contractor fail to make application in time he also failed to give ANY indication that he intended to make a claim for loss and expense in respect of the Flood. Indeed by his claim for an Extension of Time by reason of Force Majeure / Specified Perils he indicated to ABC that no such claim was in contemplation.
- 6.13 The purpose of the IF provision is clear. Early warning of a likely claim gives the Architect the opportunity to consider how to mitigate the situation by adopting different working methods or instructing appropriate re-sequencing. Craftwood's failure to give such warning deprived the Architect and the Employer of such an opportunity.

7. ADJUDICATOR'S DECISION

- 7.1 Westwood requests the Adjudicator to provide reasons for his decision.
- 7.2 Westwood requests the Adjudicator to reject Craftbuild's contentions in whole or in part as he thinks fit.
- 7.3 Westwood requests the Adjudicator to decide that Craftbuild has no entitlement to additional loss and expense due to delay and/or disruption to the regular progress of the Works arising out of or in connection with the Flood. Alternatively, to decide the extent of any such entitlement.
- 7.4 Westwood also requests the Adjudicator that should Craftbuild fail in this adjudication, it should bear Westwood's costs.

Signed.....

Merlins

On behalf of Westwood

3 September 2006

Document 3

**IN THE MATTER OF AN ADJUDICATION PURSUANT TO THE JOINT
CONTRACTS TRIBUNAL PRIVATE WITH QUANTITIES STANDARD
FORM OF BUILDING CONTRACT (1998 EDITION) BETWEEN**

CRAFTBUILD CONTRACTORS LTD

**(Referring
Party)**

WESTWOOD ESTATES LTD

(Responding Party)

REPLY

1. Introduction

- 1.1 This is the Reply made on behalf of the Referring Party to the Response of the Responding Party served on the 3 September 2006.
- 1.2 This Reply is presented in conformity with the Adjudicator's direction of 4 September 2006 that it shall be limited to matters arising out of the Response in respect of evidential matters and case law.

2. The issues in contention

- 2.1 As Westwood state, the facts are agreed to a considerable extent, albeit there are some critical differences referred to later in this Reply.
- 2.2 Where the parties differ in critical areas is (i) in the interpretation of the effect of Clause 22C.2 and related provisions of the JCT 98 Contract and their effect on the entitlement of the Referring Party (ii) on certain key facts and (iii) the cause of delay and disruption to the regular progress of the Works and Craftbuild's entitlement to loss and expense and the application of the law to such facts.
- 2.3 As to the facts these are set out in the witness statement of Fred Bullett, the Site Manager.

The interpretation of Clause 22C.2 and related provisions

- 2.4 It is apparently common ground that pursuant to Clause 22C.4.2. Craftbuild is entitled to the payment of the costs it incurred in the restoration, replacement or repair of such loss and or damage to the Works.
- 2.5 There is a clear difference of view on the interpretation and effect of Clause 22C.2. In order to assist the Adjudicator it is helpful to review the principles and differences of the relevant insurance provisions under Clause 22.
- 2.6 Clause 22A is not applicable to this dispute and deals with All Risks Insurance taken out by the Contractor for new buildings. It differs from Clause 22C.2 in that:-
- (i) It is for new buildings, not existing structures and thus makes no distinction between the new building and the Works as in effect they are the same.
 - (ii) It places the risk on the Contractor, including the extent of cover to be obtained.
 - (iii) Under Clause 22A.4.5 the Contract expressly states that the Contractor "should not be entitled to any payment in respect of the restoration, replacement or repair of such loss or damage ... other than the monies received under the aforesaid insurance."
- 2.7 Clause 22C.1 is also not applicable to the dispute in this adjudication. It differs from Clause 22C.2 in that:-
- (i) It is for existing structures, not new buildings or the Works, as it recognises a set of circumstances where there are buildings on site at the outset of a Contract which require to be covered by insurance for certain risks.
 - (ii) It makes specific reference to insurance for Specified Perils unlike Clause 22C.2.
 - (iii) It has no mechanism within it as to who carries out works in the event that a Specified Peril occurs that leads to the need for "the reinstatement, repair or replacement of loss or damage due to one or more of the Specified Perils".
- 2.8 Clause 22C.2, accepted as the relevant provision for the purposes of this adjudication, has the following critical elements:-
- (i) It covers the "Works" as opposed to existing structures, hence its relevance to the facts in this adjudication.
 - (ii) It refers to All Risks Insurance as defined at Clause 22.2 and makes no reference to Specified Perils.
 - (iii) It refers to "the full reinstatement value of the works" which it is submitted must by definition include all time related costs.
 - (iv) It places the risk on the Employer, as a consequence of which Clause 22C.4 and its constituent parts provides a mechanism under which either the Contract can be determined (not relevant here) or, as is applicable here, the Contractor's entitlement to be paid for new works carried out as a result of an event covered by 22C.2 "as if they were a

Variation required by an instruction of the Architect under Clause 13.2".

- 2.9 Thus it is not accepted that Westwood and Craftbuild each bear the consequences of any delay to completion of the Works caused by the flood. Clause 22C.4.2 imposes no such restriction on Craftbuild. The level of insurance obtained by the Employer, provided it is in compliance ("for cover no less than ") with the Contract, is a matter for the Employer, and its failure to insure for wider consequences is not in any way a bar or limitation on the Contractor's entitlement to recover loss and expense under the relevant Contract Conditions. Indeed, insofar as Craftbuild is aware the Employer retains its third party and other rights of recovery for its losses against those involved in causing damage to the water main.
- 2.10 Westwood say that the words "*shall be treated as if they were a Variation*" does not mean as if there **were a Variation under Clause 13 for all purposes**. There is no such qualification or limit of the definition of "Variation" in the Contract.
- 2.11 This attempt to distinguish between different types of Variation is plainly wrong. Clause 22C.4.4.2 actually says that the restoration, replacement or repair "*shall be treated as if they were a Variation required by an instruction of the Architect under Clause 13.2*". These words make it clear that the term "Variation" as used in the Conditions means a number of different things including the carrying out of works under Clause 22C.4.4.2.
- 2.12 The above addresses the legal issues on interpretation of Clause 22C.2 demonstrating that the work carried out constitutes a true Variation and thus Craftbuild has an entitlement to a 6 week extension of time pursuant to Clause 25.4.5.1. and in respect of its loss and expense where such loss and expense cannot be properly included within the valuation provisions of Clause 13, an entitlement to recover such loss and expense pursuant to Clause 26.2.7. because;
- The loss and damage affecting work executed can and should be dealt with pursuant to Clause 22C.2.
 - 22C.4.4.2 denotes that the replacement or repair of work damaged is in all respects and for all purposes under the Conditions of Contract an instruction of the Architect requiring a Variation.

3. The Key Facts

Whilst Westwood state that the facts relating to this adjudication are in a large part agreed there are some important differences. It is not the purpose of this Reply to reiterate the facts as set out earlier in the Reference but, in conformity with the Adjudicator's permission to reply in respect of evidential matters, a witness statement from Mr Fred Bullett has been produced.

4. Key issues of fact are evidenced as follows:

4.1

- (i) The heading filled with water damaging the Works.
- (ii) It is agreed that the fractured water main was repaired through the night of 23rd January 2006. Thereafter no further works were either requested or carried out in relation to the roadway. It is also assumed to be common ground that Westwood's engineers in their letter of 30th January 2006 stated that there was no apparent structural damage to 25 South Street and it was for ABC to consider and select the option for the works in terms of cost, time and risk.
- (iii) It seems to be common ground that a Contract Instruction was required under the Contract from the Contract Administrator. However, it is Craftbuild's position that there are a number of options for deciding upon the works needed, to connect to the main sewer which required the Contract Administrator to choose an option and give an instruction. These were:
 - Fill the existing heading and construct a new heading in the room next door in the building
 - Construct a new manhole in the road and reuse the existing heading once the road had been stabilised above the heading.
 - Carry out ground treatment measures to stabilise the area adjacent to the existing heading to enable the existing heading to be utilised.
- (iv) The statement of Fred Bullett supports the option position. ABC clearly considered options.
- (v) As referred to in Mr Bullett's statement, the Contract Instruction had attached to it the letter of 13 February 2006.

4.2 It is submitted that the evidence of Mr Bullett demonstrates that;

- (i) The instruction issued on 22 February 2006 was clearly a Variation to allow the Works to be completed in conformity with the Contract. As a result the Variation was an instruction changing the working method from that originally specified and was the true cause of the delay to regular progress of the works.

- (ii) The delay to the regular progress of the Works was caused by this Variation, whether classified as a Variation under Clause 13.2 and/or Clause 22C.4.4.2.

Therefore the submissions made in particular at paragraph 2.10.2 of the Response are plainly wrong.

5. The issues on causation

- 5.1 It is Craftbuild's primary case as set out in the Referral that a Variation, issued under Clause 13 and/or Clause 22C.4.4.2 applies, and thus on any interpretation of the facts Craftbuild is entitled to an extension of time and loss and expense more particularly as requested in the Referral.
- 5.2 However, if the Adjudicator decides that Westwood's Response as to the interpretation of the Contract is correct and that Clause 22C.1 applies, and the consequences of a Specified Peril provide no entitlement in principle under Clause 26, then the Adjudicator, in Craftbuild's submission, has the discretion to, and must consider an alternative case based on the evidence and the law as to causation.
- 5.3 On the 23 January 2006 the Corporation of London closed the road for all access for health and safety reasons. It is important to note that the road did not have to be closed for the construction of the original heading as the construction process included tunnelling.
- 5.4 Thereafter, as evidenced by Mr Bullett, the Contract Administrator took a decision on behalf of Westwood, notwithstanding a number of alternative options, to instruct Craftbuild to carry out works to enable the foul water in the building to drain to the main sewer. The original heading had never been an existing structure but was part of the original Contract Works.
- 5.5 It is common ground that as at 24 January 2006 the problems with water escaping from the water main had been resolved and the main repaired. From the 25 January 2006 at the latest, until the 22 February 2006, the road remained closed as a direct result of the Variation to the Works required to make the connection to the main sewer. The onus contractually was then upon ABC to issue an instruction. It is submitted that the evidence establishes that this occurred orally on 1 February 2006. Thus as a matter of fact the delay caused by the flood eased on 25 January 2006 and thereafter Craftbuild is entitled to an extension of time and loss and expense pursuant to Clause 22C.4.4.2 and/or Clause 13.2 as set out in the Referral.

6. The Legal Issues on causation

- 6.1 The Response refers the Adjudicator to the House of Lords decision in *Leyland Shipping Co v Norwich Union Fire Insurance Society*. In the case of the torpedoed ship it sank because the harbour master ordered its removal from harbour. No choices or options were available. On the facts of this case unquestionably the ship was still in "the grip" of the casualty when it sank.

6.2 In the present case the Contract Administrator did have options and instructed works which resulted in the continuing closure of the road, not as a result of the flood, but as a result of the instruction, thereby causing delay and disruption to the regular progress of the Works.

6.3 This submission addresses and counters the points made in paragraph 2.10 of the Response and generally.

6.4 It is helpful to look at the law on 'novus actus' and reference is made to the 17th Edition of Clark & Lindsell referred to with approval by Lord Justice Buxton in the Court of Appeal decision of Roberts v Bellamy which stated, in summary, that:

"The question of the effect of a novus actus can only be answered on a consideration of all the circumstances and, in particular, the quality of that later act or event.....The question which ought to be asked is whether that intervening cause was of so powerful a nature that the conduct of the plaintiffs was not a cause at all but was merely a part of the surrounding circumstances"

6.5 It is submitted that the evidence supports the position that it is the Variation, resulting in the new works to the heading that was the effective and dominant cause of the delay and that the flood was merely part of the surrounding circumstances. There was no structural damage or any significant effect to the road requiring its continuing closure as a result of the flood.

7. **Clause 26.1 of the JCT 98 Form**

7.1 Craftbuild accept that Westwood's summary of the words used in Clause 26.1 is accurate save that there is no reference in clause 26 to "the relevant event." The words used are "the matters referred to in Clause 26.2."

7.2 It is denied that Craftbuild first made written application stating that it had incurred loss and expense to which Clause 26 applies on 8 March 2006. Reference is made to the witness statements of Mr Fairbrother and Mr Bullett.

7.3 Clause 26.1 of the Contract provides that the Contractor must make written application as soon as it has become, or should reasonably have become, apparent to him that the regular progress of the works was likely to be affected. However Clause 26.1 does not oblige the Contractor to make such application as soon as a matter arises which may affect the regular progress of the Works because, (i) as a matter of commonsense the Contractor may not know at the point in time when one of the matters referred to in Clause 26.2 arises if the regular progress of the Works will be effected or not, (ii) Clause 26.1 is not so prescriptive that failure by the Contractor to make a prompt written application is fatal to its entitlement. If this were the case then it is submitted that the JCT would have drafted Clause 26.1 in such a way as to make it unequivocally certain that failure to give prompt written application will prevent the Contractor from recovering direct loss and expense. It is further submitted that the JCT were not minded to be so prescriptive because the activities taking place during the progress of the Works constitute a dynamic series of events whereby it is often only in retrospect that contractors and construction professionals can be certain that matters referred to in Clause 26 have affected the regular progress of the Works.

7.4 The Authority of *London Borough of Merton v Stanley Hugh Leach Limited* does not as Westwood submit deny the contractor its entitlement under Clause 26 in

the event that written application is not made promptly. In the summary by the learned editors in Building Law Reports on page 55 at [5] **issues 7 and 8** the applications under Clause 11 (now 13) and/or Clause 24 (now 26) must be framed with sufficient particularity to enable the architect to do what he is required to do. The application must be made within a reasonable time: it must not be made so late that the architect can no longer form a competent opinion of the matters on which he is required to satisfy himself that the Contractor has suffered the loss or expense claimed AND in considering whether the contractor has acted reasonably it must be borne in mind that the architect is not a stranger to the work and that it was always open to the architect to call for further information either before or in the course of investigating a claim.

- 7.5 The passage in the Judgment of Vinelott J referred to in Westwood's submission does not state that the written application must be made promptly but that the written application must be made within a reasonable time.
- 7.6 The Adjudicator is invited to read the Judgment beyond page 96 and in particular the paragraphs of the interim award of the Arbitrator on pages 96 and 97, which found judicial favour. On page 98, second paragraph, Vinelott J states that:
- "I am not therefore persuaded that the Arbitrator erred in principle in his approach to the documents relied upon by the contractor."
- 7.7 Craftbuild rely upon the witness statements of Mr S Fairbrother and Mr F Bullett which evidence the fact that from the very moment that ABC gave their oral instruction to Craftbuild to vary the Works by constructing the new manhole and sewer connection that Craftbuild were likely to incur direct loss and/or expense. As Mr Fairbrother states the dialogue on this subject was intensive. Indeed it is apparent from Mr Fairbrother's evidence that ABC took the initiative in ensuring that Craftbuild not only kept careful records of the loss and expense that they would incur but that they were urged to regularly report details of such loss and expense to ABC. In such circumstances it is submitted that a written application was otiose. However, for the sake of good order, Craftbuild did in fact write to ABC on 22 February 2006 to "remind" ABC that the Variation had materially affected the regular progress of the Works incurring Craftbuild in direct loss and expense, and handed over a schedule by way of interim assessment of loss and expense on 23 February 2006.
- 7.8 In their submission Westwood at 6.11 make reference to there being no entitlement to recovery of loss and expense under Clause 26 if the written application is not given "at the correct time." This is a meaningless submission as the reference to "the correct time" is a totally abstract reference.
- 7.9 At paragraph 6.12 it is stating the obvious that Craftbuild were not under any obligation to make any application pursuant to Clause 26.1 as a result of the flood but as this Reply makes clear did make such application consequent upon ABC's variation instruction.
- 7.10 Westwood's submission at paragraph 6.13 is akin to an estoppel argument. Westwood have not in their submission developed any argument that Craftbuild are estopped from an entitlement to loss and expense, as clearly neither the Contract nor the one authority that Westwood rely upon provides any support for the argument relating to "early warning of a likely claim", notwithstanding the fact that the evidence of Mr Fairbrother makes it clear that such early warning was indeed given and encouraged by ABC.
- 7.11 Craftbuild submit that the requirements of Clause 26.1 do not oblige them to make a written application promptly, but within a reasonable time (which in fact they did; ie 22 and

23 February 2006) but that in any event it was known to ABC by 24 January 2006 at the latest and continually thereafter that Craftbuild would be claiming loss and expense: here the requirements of Clause 26.1 were satisfied.

8. Conclusion

- 8.1 The Reply addresses Craftbuild's interpretation of Clause 22C.2 and the submission on construction and interpretation of the Contract regardless of causation entitling Craftbuild to a finding in its favour for the relief, as set out in the Referral at paragraphs 4.1 to 4.6 inclusive.
- 8.2 The Reply addresses the evidential issues between the parties which, it is submitted, support the Craftbuild case as to its entitlement to a finding in its favour.
- 8.3 The Reply addresses the legal and evidential issues as to causation which, it is submitted, support the case for Craftbuild's entitlement to a finding in the alternative as set out at paragraphs 5.3 to 6.5 in this Reply.
- 8.4 The Reply addresses issues in respect of Clause 26.1 of the contract.
- 8.5 As to paragraph 7.4 of the Response it is submitted that the Adjudicator is not empowered to make an Award as to the parties' own costs but only on account of his own costs, thus both parties must bear their own costs. In any event it is submitted that Westwood are not entitled to their costs regardless of the outcome of this Adjudication.

Signed.....
On behalf of Craftbuild

Towers Walker

Dated 11 September 2006

Document 4

**IN THE MATTER OF AN ADJUDICATION PURSUANT TO THE
JOINT CONTRACTS TRIBUNAL PRIVATE WITH QUANTITIES
STANDARD FORM OF BUILDING CONTRACT (1998 EDITION)**

BETWEEN

**CRAFTBUILD
CONTRACTORS LTD**

(Referring Party)

AND

WESTWOOD ESTATES LTD

(Responding Party)

**WITNESS
STATEMENT OF
SIMON
FAIRBROTHER**

1. My name is Simon Fairbrother and I am and was at all material times the senior surveyor on site at 25 South Street. I have worked for Craftbuild for a total of about 12 years and have fulfilled the role of senior surveyor on a number of similar projects over the years.
2. I make this statement in response to issues that I understand have been raised in relation to a position statement made by Westwood in an ongoing Adjudication concerning the requirements of clause 26.1. In summary I understand that it is alleged that pursuant to clause 26.1 of the contract that it is a condition precedent to entitlement of the recovery of loss and expense that the Contractor's application shall be made as soon as it has become, or should reasonably become, apparent to him that the regular progress of the works or any part thereof has been or is likely to be affected. I have also seen Westwood's written submission of the 3 September 2006. I further understand that it is said on behalf of Westwood that the first time Craftbuild made written application stating that it had incurred loss and expense to which clause 26 applies was on the 8 March 2006 and it is that issue that I address.
3. I have also read the second witness statement of Fred Bullett and insofar as it is within my own personal knowledge I agree with its content.

4. I recall that a few days after the problems with the manhole occurred I had discussions with both Colin Dixon of ABC for us to provide costs in relation to this event in order for them to present this information to Westwood's insurer's loss adjuster. I particularly recall having such a discussion with Colin Dixon that Craftbuild were to tabulate all costs including an assessment of delay costs from preliminaries. I am absolutely certain that ABC were fully aware that significant costs would occur amongst all the other delay issues that were and remain ongoing. In this respect they informed me that they would on behalf of Westwood be claiming against the client's insurers. Throughout this period Craftbuild together with ABC looked at the possibility of keeping additional costs to a minimum by using alternative plant in lieu of the tower crane, further demonstrating ABC's knowledge of costs being incurred.
5. In compliance with this request I chased up all the cost details during February 2006 and as soon as I had sufficient information to put a package together, I submitted the same to ABC on the 23rd February 2006 by hand. At a meeting I was requested to compile a week on week analysis of costs attributable to the burst water main. I was again asked to produce a list of items of all costs at that meeting.
6. I recall at that meeting that Colin Dixon said he had either initially met with the loss adjuster on the previous Friday, or was due to meet him in the near future. I specifically recall that ABC requested that I include all costs including delay costs for preliminaries which it was intended would be set against the client's insurances. On a number of occasions I was told to "put everything in". I further recall conversations with ABC discussing clause 22.C with them and particularly that we should be paid as a variation. Their conduct in certifying the interim valuations, albeit in some cases later withdrawn, supports the treatment of the works as a variation agreed to by them.
7. On the 22nd February 2006 Craftbuild gave a general notification of our claim for loss and expense, which was passed to ABC by hand.

Signed
Simon Fairbrother

11 September 2006

Document 5

CRAFTBUILD CONTRACTORS LTD

(Referring Party)

AND

WESTWOOD ESTATES LTD

(Responding Party)

WITNESS STATEMENT OF FRED BULLETT

1) I am the Site Manager for Craftbuild for whom I have been employed for 15 years. I have worked on numerous prestigious contracts and have been involved in the refurbishment of 25 South Street since mid August 2004, this being the pre-construction period as the works on site commenced in December 2004. I am responsible for the management of all the construction works.

2) John Miffed & Son Ltd was a sub-contractor employed by Craftbuild to construct the new heading and connect the internal drainage to the main sewer in the South Street roadway. Their works commenced on site on Monday 14th November 2005 and involved the formation of a new heading out from our building to the existing sewer. Their works were substantially complete with all excavation complete and the tunnel formed and they were ready to install the new drainage pipework and make the connection to the existing sewer in the roadway.

3) On Saturday the 21st January 2006 a mobile crane for use by the Main Contractor, Structdown, was situated adjacent to our site on the public highway of South Street for the neighbouring site in Coleman Street.

4) At 12.30pm on Saturday 21st January 2006 the outriggers of the crane caused the water main running beneath the road in South Street to fracture causing water to escape. This resulted in our heading being filled with water. Craftbuild immediately installed temporary submersible pumps in an attempt to control the incoming water which had flooded the heading.

- 5) Craftbuild made several phone calls to the Thames Water emergency number on Saturday, Sunday and again on Monday 23rd January 2006 in an attempt to get the water main shut off. On the morning of Monday 23rd January 2006 I informed Mr C Dixon (ABC Project Manager) of the event by telephone and this enabled Mr Dixon and the planning supervisor to attend site that afternoon together with Mr T Ham from Westwood's structural engineers.
- 6) At 12.58pm on Monday 23rd January 2006 I again made contact with Thames Water emergency, explaining that there was evidence of subsidence to the road adjacent to and along the kerb line on the line of our new heading. I was informed by Thames Water (TW) that someone would attend site within the hour.
- 7) At 13.09pm on the same day I phoned the Corporation of London (CoL) advising them of my concerns with regard to the road above our new heading and my scaffold on the adjacent kerb line. CoL confirmed that they would send their highway officers to investigate.
- 8) At 14.00pm on the same day CoL attended site and met with myself and our sub contractor scaffolding foreman to discuss remedial works required. It was agreed that additional ladder beams should be installed with an additional support scaffold tower to remove the loading away from the affected area as a precaution and to prevent any pressure causing subsidence to the road.
- 9) CoL closed the road for all access on Monday 23rd January 2006.
- 10) At 14.30 pm on Monday 23rd January 2006 TW attended site and managed to shut the water main in the South Street roadway.
- 11) At 17.00pm on Monday 23rd January 2006 TW attended site and began to excavate the road to repair the leaking water main.
- 12) On Tuesday 24th January 2006, the following morning on my arrival to site I found that the road had been reinstated adjacent to the water main repair and that the water in the new heading had gone. However the new heading was filled with large amounts of sand and silt.
- 13) At Craftbuild's request a meeting was held on site on Tuesday 24th January 2006 between CoL Highways Engineers and CoL Drainage Engineers, Miffed (the sub-contractor carrying out the works), the Client's drainage engineers, and Craftbuild to discuss the way forward. ABC was represented on site by Mr C. Dixon at this time; however, I am not sure whether he was at this particular meeting.
- 14) It was agreed with all parties present that we could not enter the existing heading due to safety concerns.
- 15) An informal collective discussion took place at which numerous options were discussed and there appeared to be a choice of three which were viable at that time. These were:-
 - i) Fill the existing heading and construct a new heading in the adjacent room.
 - ii) Construct a new manhole in the road and reuse the existing heading once the road stabilised.

iii) Carry out ground treatment measures to stabilise area adjacent to existing heading to enable existing heading to be utilised.

Following these discussions it was evident that the preferred option of CoL was to form a manhole

- 16) On Wednesday 25th January 2006 I wrote to CoL confirming the discussions held over the preceding two days.**
- 17) On Friday 27th January 2006 Craftbuild wrote to ABC setting out our understanding of the contractual situation and seeking an instruction specifying the works to be done once the option had been decided upon.**
- 18) On Friday 27th January 2006 I wrote to ABC confirming that CoL would commence their investigation works on 30th January 2006 and that the scaffold adaption works had been instigated. I also pointed out that we were still awaiting confirmation of the chosen option for the remedial works.**
- 19) On Monday 30th January 2006 I wrote to ABC stating that following a meeting with CoL on Saturday 28th January 2006 and their sub-contractor, the manhole works could commence week commencing 30th January 2006 and would take a period of 22 working days to complete, thereby setting down the full implications of selecting this option.**
- 20) On Monday 30th January 2006 I spoke to Mr Dixon to see whether an option had been decided upon. I was informed by him that he was meeting Westwood later that day to discuss the options available.**
- 21) On Monday the 30th January 2006 the Client's consulting engineer wrote to ABC (copying in Craftbuild and all other parties) confirming that they were happy with this preferred option and that ABC after considering both programme, cost and risk implications, they should instruct Craftbuild accordingly.**
- 22) On Tuesday 31st January 2006 I wrote to ABC requesting an instruction, pointing out that CoL had been chasing an instruction and informing ABC that this was delaying the works.**
- 23) At a meeting on Wednesday 1st February 2006 I requested instructions on how to proceed during the site meeting and was verbally instructed to carry out the manhole option by ABC. Westwood, the Client's engineers and the architect were all present at this meeting.**
- 24) This was a change to the original scheme. That had been the formation of a new heading (tunnel) beneath the existing road, whereas the construction of the new manhole had to be constructed from the road surface and excavated downwards. This resulted in access to the site being cut off.**

- 25) On 1st February 2006 Craftbuild requested costs for the manhole works from CoL in order to forward on to ABC, stating that this was the option instructed by ABC.
- 26) We received costs from CoL on 3 February 2006 for the manhole works which were forwarded to ABC under cover of our letter of 13th February 2006.
- 27) The construction of the manhole was completed on 18th February 2006 and the re-surfacing on 22nd February 2006. However, I had agreed with ABC to continue demolition work on site where possible and to stockpile the demolished material for removal later which contributed to the overall 6 week delay.
- 28) This enabled the road to be re-opened on Wednesday 22nd February 2006 with the full authority of CoL. It was the works associated with constructing the new manhole that shut the road for this period of time.
- 29) Craftbuild requested a written Contract Instruction for these works on 13 February 2006.
- 30) ABC issued Contract Instruction on 22nd February 2006 attaching our letter of 13th February 2006.
- 31) I confirm that ABC fully understood that there would be cost consequences as a result of the road closure. There is absolutely no doubt in my mind that as early as 24th January and certainly by 1st February that ABC was fully aware that Craftbuild would incur additional loss and expense. On 22 February 2006, Craftbuild gave a written notification in respect of loss and expense.

Fred Bullett

11 September 2006

Document 6

IN THE MATTER OF AN ADJUDICATION PURSUANT TO
THE JOINT CONTRACTS TRIBUNAL PRIVATE WITH
QUANTITIES STANDARD FORM OF BUILDING
CONTRACT (1998 EDITION)

BETWEEN:

CRAFTBUILD CONTRACTORS LTD Referring Party

- and -

WESTWOOD ESTATES LIMITED Responding Party

WITNESS STATEMENT OF COLIN DIXON

I, Colin Dixon, of ABC, 1 East Street, London, EW4 3AA WILL SAY as follows:

1. I am the Senior Project Manager at ABC involved in the refurbishment at 25 South Street. I have been involved in this particular matter from the beginning of April 2004. I am responsible for the management of the Works of the Contractor and the Design Team.
2. On 21st January 2006 a crane operated by another contractor, Structdown, from a neighbouring site, placed a crane adjacent to the Site on a public highway.
3. Craftbuild's sub-contractor, J. Miffed & Son Limited ("JMSL"), who were responsible under their subcontract with Craftbuild for the construction of the heading, had just built the heading to connect the building to the sewage system and laid the sewage outlet pipework in the heading.
4. The stanchions of the crane caused the water main to fracture causing a flood. This in turn caused the heading to flood and washed out the gravels and sands from the soil surrounding the heading creating a health & safety concern and subsequently restricting access to the heading.
5. As a direct result of the flood, the escaped water caused damage to the roadway on South Street, the heading and the water main.

- 6. The flood delayed the Works as it caused damage to the roadway. The Corporation of London required the road to be closed as the escaping water had washed away sand and gravel which caused it to subside, directly affecting access to the site and potentially causing a scaffolding collapse. Due to the restricted access, only those items that were able to be manhandled could be brought onto the Site. This meant there was no access for plant and large deliveries that could not be broken down and manually transported.**
- 7. The heading was also affected by the flood. It was immediately filled with water from the fractured water main and remained so until the breach was stemmed. Sand and gravel from around the heading had been washed away which meant that it was in serious danger of collapse. This could have subsequently collapsed the roadway. The heading itself was blocked by the sand and gravel. Craftbuild, their subcontractor (JMSL), the Structural Engineer and the Planning Supervisor (ABC) recommended against entering the heading due to health & safety risks.**
- 8. Craftbuild and JMSL proposed at a meeting on 23rd January 2006 to abandon the contracted heading which they indicated might now be unsafe as a result of the flood and construct a manhole to provide access to the main sewer instead. This revised strategy would not have been required if it had not been for the flood caused by the incorrect placing of the crane and subsequent fracturing of the water main.**
- 9. I have checked with the Corporation of London and they have informed me that:-**

 - 9.1 The water main was fractured by Structdown on 21st January 2006**
 - 9.2 The water main was repaired by Thames Water on 24th January 2006.**
 - 9.3 The excavation to the road to both dig out & repair the subsidence & construct the manhole was commenced on 30 January 2006 and completed on 22 February.**
 - 9.4 Whilst not confirmed by the Corporation of London, I would estimate that setting up site & excavating the subsided area would have taken between 4 to 5 days from 30 January 2006, which would have allowed the manhole to be commenced from 3rd February 2006.**
 - 9.5 The construction of the manhole finished on 18th February 2006.**
 - 9.6 The work involved the site set-up, excavation of subsided area, construction of a new manhole, construction of the new connection (part of the manhole) & re-constructing the roadway. This was commenced on 30 January 2006 and completed on the 22 February 2006.**

- 9.7 The road was closed on 23rd January and only reopened on 22 February 2006.
- 9.8 Deliveries to the Site recommenced on 22 February 2006. It was the works needed to remedy the damage caused by the flood which caused the road to remain closed throughout this period.
10. I considered that the contractor's proposal for the construction of a manhole was the correct option to rectify the Works and issued the Contract Instruction as required under the Contract . This was as requested by Craftbuild on 13 February 2006 and agreed to on 22nd February 2006, after the finishing of the construction of the manhole. This was the usual method of instructing work under the contract.
11. ABC used the correct contractual provision, as the cause of the delay was the flood and therefore a Specified Peril as defined under the Contract at Clause 1.3. This entitles the Contractor to an extension of time pursuant to Clause 25.4.3 of the Contract and payment of its costs in remedying the physical loss and damage although in this case the work was actually done by the Corporation of London.

Colin Dixon

3 September 2006

Document 7

**WESTWOOD ESTATES
25 SOUTH STREET
CONTRACT INSTRUCTION**

SITE ADDRESS :

**Craftbuild 25 South
Street, London WC15
2JQ**

DESCRIPTION of WORK :

**Redevelopment of 25 South
Street, WC15**

CONTRACTOR/ADDRESS :

**Craftbuild
Contractors Ltd
Temple Hill
Selsdon, Surrey**

JOB REF:

2110

ISSUE DATE:

22 February 2006

No.

22 - pt/55

SHEET:

1 of 1

Further to your letter of 13 February 2006, regarding the remedial work to the 25 South Street
carriageway,
I confirm that the additional cost of £17,625.00 is acceptable.

Please proceed against the enclosed recommendation.

SIGNATURE of CONTRACT ADMINISTRATOR .

**CONTRACTOR-Craftbuild
PROJECT MANAGER-ABC
EMPLOYER-Westwood
M&E CONSULTANT- Jones Partnership
ARCHITECT - XYZ**

**FILE
PLANNING SUPERVISOR - ABC
QUANTITY SURVEYOR - ABC
STRUCTURAL ENGINEER - Weston**

SPECIAL