Neutral Citation Number: [2020] EWHC 3389 (TCC)

Case No: G50MA009

IN THE COUNTY COURT AT MANCHESTER
BUSINESS AND PROPERTY WORK
TECHNOLOGY AND CONSTRUCTION COURT

Manchester Civil Justice Centre
Bridge Street, Manchester M60 9DJ

Date: 11 December 2020

Before His Honour Judge Stephen Davies

Between :

OPTIMUS BUILD LIMITED	**Claimant**
- and -	
(1) MATTHEW SOUTHALL **(2) JADE McMANUS**	**Defendants**

- -

Simon Whitfield (instructed by **Gunnercooke LLP, Manchester**) for the **claimant**
Simon Arnold (instructed by **JMW Solicitors LLP, Manchester**) for the **defendants**

Hearing dates: 24, 25 November, 2 December 2020

Draft judgment circulated on 4 December 2020

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The date and time for hand-down is deemed to be 10 a.m. on Friday 11 December 2020.
I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies :

1. This is a dispute about a contract for building works at a residential property in Worsley, Manchester where the parties are unable to agree as to the basis of the contract and as to who was responsible for the termination of the contract before the works had been completed. The claimant building company contends that the defendant houseowners wrongfully repudiated the contract and that it is entitled to the balance of the contract price for the works undertaken and its loss of profit on the remaining works. The defendants contend that the claimant wrongfully repudiated, that the claimant's claim for the balance is made on the wrong contractual basis and overstated, that it is not entitled to claim for loss of profit and that instead they are entitled to their delay related losses flowing from the repudiation. There had also been a pleaded issue as to whether or not the second defendant, Ms McManus, was a party to the contract but, sensibly given the evidence, that defence was not pursued at trial.

2. I heard evidence over two days from five witnesses of fact called by the claimant. The two principal witnesses called by the claimant were Mr Paul McSorley, its primary director, and Mr Paul Adams, its consultant quantity surveyor. It also called Mrs Nicola McSorley, who is also a director and who is married to Mr McSorley, and Mr Stephen Roberts and Mr Michael Higson, representatives respectively of steelwork and roof truss suppliers with whom the claimant had placed orders. I then heard from both defendants. There was also written evidence from Mr Rigby of Tozer Gallagher a jointly instructed quantity surveyor expert witness.

3. The evidence having taken the full two days allotted through no fault of counsel and due, in part, to the technical difficulties due to the hearing being held remotely, I adjourned to hear closing submissions on day three and then produced this judgment. I am grateful to both counsel for their capable conduct of the case and their clear and persuasive arguments.

4. It is necessary to go in some detail into the relevant events. Before I do so I will identify the relevant legal principles, record my view as to the credibility of the witnesses and, having done so, I shall address the relevant events and proceed to determine the issues.

Legal principles

5. The contract is one which was formed during the course of a series of meetings and documentary exchanges. The documents included various iterations of what was described as a budget estimate as well as a number of emails. What each of the parties intended or understood by their written and spoken communications is irrelevant unless that intention or understanding was shared with and agreed or accepted by the other party.

6. I must apply well-established principles of contractual construction to ascertain the meaning of the words used, both in written and in spoken form, which, as summarised by O'Farrell J in *Entertain Video Ltd v Sony DADC Europe Ltd* [2020] EWHC 972 (TCC) at [221] in relation to written contracts, are as follows:

   "When interpreting a written contract, the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It does so, having regard to the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of:
   (i) the natural and ordinary meaning of the clause;
   (ii) any other relevant provisions of the contract;
   (iii) the overall purpose of the clause and the contract;

(iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and
(v) commercial common sense; but
(vi) disregarding subjective evidence of any party's intentions.
See: *Arnold v Britton* [2015] UKSC 36 per Lord Neuberger at paras. [15] to [23]; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 per Lord Hodge at paras. [8] to [15]."

7. Moreover, whilst I should not treat the defendants as having the same detailed knowledge of building contract procurement and the terms commonly used in by those experienced in the construction industry as did Mr Adams as an experienced quantity surveyor, the terms used must be construed by reference to the meaning they would convey to a reasonably well-informed reader. Whilst the defendants were not particularly familiar with building projects, Mr Southall is involved in the professional football business and it is apparent from the way in which he and Ms McManus expressed themselves, both at the time and at trial, that they are intelligent people with good business acumen. There is no pleaded or other basis for any contention that the claimant in any way mispresented the effect of the terms used in the documents or that it was under a duty to explain their effect to the defendants.

8. The paradigm definition of a building contract, as stated by Lord Diplock in *Modern Engineering v Gilbert-Ash* [1974] A.C. 689 at 717, HL and as cited in the current (10th) edition of *Keating on Construction Contracts* at [1-001], is "an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work is done."

9. However, as the authors observe, the law applicable to construction contracts is the general law of contract and it follows that the parties may agree to enter into a building contract which is not an entire contract or which is not a lump sum price contract or (save where statute intervenes) which does not contain provision for payment by instalments. As the authors of *Keating* observe at [4-027] and following, the manner of payment can be arranged in a variety of ways, such as (as particularly relevant here): (a) a contract to do a whole work in consideration of the payment of different sums for different parts of the work; or (b) a measurement and value contract, whereby the work when completed (either at the end of the whole works or at the end of a defined period) is measured and valued according to the agreement.

10. One example of the latter is a "cost plus percentage contract" (commonly abbreviated to a "cost plus contract"), under which the contractor is entitled to the actual cost honestly and properly expended in carrying out the works together with a percentage, either agreed in advance or a reasonable percentage, for overheads and profit ("OHP"). As to such a contract, as the authors of *Keating* suggest at [4-029] and I agree: "the contractor is not, it is submitted, disentitled from such cost merely because it exceeds what was anticipated. But it is thought that there would normally be an implied term that the contractor would carry out the works with reasonable economy so that expenditure in excess of what was reasonable would be irrecoverable. It would be a question of fact and degree in each case".

11. It is also necessary to consider whether the use of the word "estimate" - or more specifically in this case - the term "budget estimate" has any particular legal effect when compared with the use of words such as "quotation" or "tender". The latter would usually be understood as a firm offer to undertake works for the specified price stated in the quotation or tender. The status of an estimate however may vary according to the circumstances. It may simply be a preliminary indication of the contractor's opinion of the likely cost of undertaking works which is not on an objective construction intended as being an offer capable of being

accepted so as to result in a contract. Alternatively, it may be an offer to undertake works on the basis of a reasonable cost which is estimated to be in the region of the figure specified but subject to measurement and valuation in due course, either on a cost plus or some other basis. Alternatively, it may be regarded as equivalent in all respects to a fixed price quotation, where the use of the word estimate does not on an objective construction differ in any material way from the effect of the use of the word quotation. See generally *Keating* at [2-103] and the decision of the Court of Appeal there referred to in *Sykes & Anr v Packham t/a Bathroom Specialist* [2011] EWCA Civ 608 where Gross LJ observed at [23]:

"Secondly, I am amply persuaded that the estimate did not give rise to a fixed price contract. In this connection, I do not think that there is any "magic" in the label "estimate"; certainly in the present case, I do not regard that label as a term of art. However, I do regard both the context and language of the estimate as pointing decisively against this being a fixed price contract …"

12. Turning next to the issue of repudiation, it is common ground that there is no right at common law to suspend performance for non-payment of an interim payment so that where – as here – there was no express nor statutory implied[1] contractual right to do so the claimant would not lawfully be entitled to suspend work in such circumstances, even if the defendants were themselves in breach of contract in not paying what was properly due under an interim valuation.

13. However, a wrongful suspension of performance does not in itself necessarily amount to a repudiatory breach of the building contract such as would justify the other party as treating itself as discharged from any further obligation to perform its obligations under the contract.

14. As the authors of *Keating* observe at [6-114] an absolute refusal by a contractor to carry out the work or an abandonment of the work before it is substantially completed, without any lawful excuse, is a repudiation. However it must be shown by reference to all of the circumstances that the character of the refusal or abandonment is such as to be repudiatory.

15. For example it is also well-established, see the discussion in *Keating* at [6-100], that although there may be a repudiation where a party intends to fulfil a contract but is determined to do so only in a manner substantially inconsistent with his obligations and not in any other way, such conduct is not necessarily and of itself repudiatory and it is often necessary to pay proper regard to the impact of the party's conduct on the other party.

16. In that respect Mr Whitfield referred me to the decision of Ramsey J. in an appeal from an arbitrator, *Mayhaven Healthcare v Bothma* [2009] EWHC 2634 (TCC). Ramsey J was asked to decide whether, if a contractor under a construction contract breaches a contract by wrongfully suspending the works, such conduct amounts to a repudiatory breach of contract. At [23] – [32] he held inter alia that: (a) "whether such a suspension and a consequent breach does amount to a repudiation depends on the breach and the facts and circumstances of the case"; (b) such conduct would not necessarily amount to an "absolute refusal to carry out the work or an abandonment of the work before it is substantially completed, without any lawful excuse"; (c) the arbitrator was entitled to take into account a willingness by the party wrongfully suspending to return to site and complete the work even if only on the basis of an

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[1] Construction contracts with a residential occupier are excluded from the ambit of Housing Grants, Construction and Regeneration Act 1996.

erroneous demand that it would only do so if it was paid what it erroneously believed was due; (d) subsequent correspondence may be relevant to considering whether the conduct should be viewed as an absolute refusal or a repudiatory act.

17. As a gloss on point (d) Mr Arnold submitted, and I agree, that such correspondence would normally only be relevant if it pre-dated the date of purported communication by the innocent party of its acceptance of the other party's conduct as discharging it from any further obligation to perform its obligations under the contract.

18. Finally, no particular issues of law arise in relation to the claimant's final account valuation claim. So far as the claimant's loss of OHP is concerned it is common ground and well established that if the defendants wrongfully repudiated the contract then the claimant is entitled to recover its loss of contribution to general (or head office) overheads and its loss of profit on the works which it was deprived of the opportunity of earning by the defendants' breach. To do so it needs to prove by sufficient evidence what OHP it would have earned on such works which, in a case such as the present, entails an enquiry as to what OHP was included in its offer as accepted and a further enquiry as to whether or not it would have in fact recovered that OHP had it been permitted to undertake the works.

The witnesses and their credibility

19. I am satisfied this is not a case where any of the witnesses were consciously untruthful.

20. The case has clearly provoked strong feelings in Mr McSorley and in both defendants. Mr Adams seemed to me to be rather more detached than the core participants, perhaps because of his status as a consultant to the claimant company rather than as director or shareholder with a direct personal interest. Mr McSorley and Mr Adams genuinely believe, I am satisfied, that the defendants sought to renegotiate the contract midway through its performance to save money and subsequently sought to use the content of Mr Adams' email dated 5 October 2018 to justify replacing the claimant with cheaper contractors without paying it in full for the work already done. The defendants genuinely believe, I am also satisfied, that Mr McSorley and Mr Adams exerted unfair pressure to force them into agreeing to paying on the basis of a fixed price when that was not what had been agreed and was too expensive and, when the defendants objected, wrongly walked away from the contract. Given the strength of feelings on both sides it would be unwise in my view to place much reliance on their oral evidence where it conflicts with the contemporaneous documents in relation to these key issues. I am more inclined to accept Mr Adams' witness evidence as reliable. Where the contemporaneous documents do not provide a clear guide I will make findings on an issue by issue basis.

21. Mrs McSorley's evidence was limited to hearing a telephone call between her husband and Mr Southall on 8 October 2018 at a time when I am satisfied that his feelings were running high. It was apparent from Mr Southall's evidence generally that he could be capable of expressing himself forcefully when crossed or contradicted and I accept her account that he did so on that occasion. As he said at one point in cross-examination, "you only get one chance with me" and it is clear to me that once he saw Mr Adams' email of 5 October 2018 he believed that the claimant had blown that chance.

22. Mr Stephen Roberts and Mr Michael Higson were obviously truthful when they both said that they had only been instructed to pause their subcontracts rather than to cancel them.

23. Mr Rigby the single joint expert produced a report and answered questions submitted by both parties.

24. Neither party requested that he attend court for cross-examination, This notwithstanding the defendants did not accept his opinions on key issues and sought to persuade me to reject those opinions. I accept that the court is not bound to adopt the views of any expert if sufficient reasons exist for not doing so and I will consider the defendants' objections on their merits at the appropriate time.

Relevant events

25. The claimants purchased the property in March 2017 and, having decided to undertake wide-ranging improvements, including a three-storey extension and extensive structural and other alterations, instructed architects to produce drawings with which they were able to obtain planning permission in January 2018.

26. They entered into a contract with a building company to undertake the works on the basis, according to Mr Southall, of payment of the contract price in three instalments, the first upon commencement of the works, the second half way through the works, and the third upon completion. However by April 2018, when the building company asked for the second payment, the defendants took the view that the works were nowhere near half complete and refused to make the second payment with the result that the building company left site, leaving the defendants in some difficulty.

27. Mr Southall approached a long-standing friend of his, a property developer known as Mr Ainscough, for advice and he introduced them to the claimant who had previously done building work for him to his satisfaction. According to Mr Southall, Mr Ainscough explained that the claimant had worked for him on a "cost plus" basis in the past and recommended that he approach the claimant to work on the same basis. The claimant denies that it had previously worked for Mr Ainscough on a cost plus basis as opposed to a fixed price basis. There was no evidence from Mr Ainscough, who did not wish to get involved in this dispute. Nor did the claimant make disclosure of its previous contracts with Mr Ainscough or the defendants seek to compel it to do so and in the circumstances of this case I do not consider it appropriate to draw an adverse inference against the claimant resulting from that non-disclosure. In the circumstances it is not possible for me to form any clear opinion one way or another on that point, although I would have thought it relatively unusual for a property developer to choose to enter into building contracts on a cost plus basis if he had the choice of a fixed price contract, given the final cost out-turn uncertainty inherent in contracting on cost plus terms.

Contract formation

28. It is common ground that Mr Paul McSorley met with Mr Southall and Mr Ainscough on site on 4 May 2018 for Mr Ainscough to introduce the two men to each other and to discuss the works. It is also common ground that the options of the claimant working on a cost plus or on a fixed price basis were discussed. According to Mr McSorley, Mr Southall wanted to proceed on a fixed price basis so that the defendants could budget accordingly and the claimant was happy to proceed on that basis. According to Mr Southall, he made it clear and Mr McSorley agreed that the defendants did not want to proceed on a fixed price basis with monies paid up front and expected the claimant to work on a cost plus basis, with the claimant to provide an estimate of the works it planned to do in each month and, at the end of the month, to provide a breakdown of the works it had done and the costs, which the defendants would then agree and pay. It is not possible to determine this conflict of evidence without reference to subsequent events, however for reasons which will be apparent from my subsequent findings I have no doubt that the claimant's version of events is to be preferred as

being far more consistent with the subsequent correspondence and conduct as well as the inherent probabilities.

29. I am quite prepared to accept that the defendants would not have wanted to enter into a contract on the same terms as they had done with the previous contractor and would have made it clear that they were only prepared to pay as works progressed for work which had actually been done, but I am satisfied that there was no discussion or agreement that the work was to be identified and agreed in advance or that it was agreed that it was to be paid for on a cost plus basis.

30. Mr Southall does not say that a specific figure for OHP was even mentioned, let alone agreed, at the meeting. He says that he believed, based on his discussions with Mr Ainscough, that a 10% profit uplift would have been reasonable. He does not suggest that there was any discussion about whether or not this would include or exclude head office overheads. Whilst it would be possible for parties to agree to proceed on the basis of cost plus a reasonable allowance for OHP, the absence of express agreement either on that basis or on the basis of a specific figure does tend to indicate that there was no express agreement at that point to proceed on a cost plus basis. Although Ms McManus suggested in cross-examination that she recalled discussions about 10%, in her witness statement she had simply confirmed Mr Southall's witness statement who had not mentioned this and I do not accept her recollection in cross-examination for the first time as reliable.

31. There was then a second meeting on 10 May 2018 at which Mr Adams and Ms McManus joined Mr McSorley and Mr Southall. Mr Adams' evidence was that at the meeting Mr Southall said that the defendants were speaking to other contractors and that they wanted a fixed price so that they knew what their financial commitment would be. He also recalls Mr McSorley explaining that the claimant would most likely not be the cheapest contractor but that it had the appropriate experience to complete a difficult, partially complete project such as this. Again I accept Mr Adams' evidence on this point. It was agreed that the claimant should produce a written proposal, to use a neutral word.

32. On 21 May 2018 the claimant did so. The proposal described itself as a "budget estimate". The covering email stated "Please find attached our estimate for the completion of the works in accordance with the architects drawings and our discussions on site with Matt a week or so ago. With a further meeting we believe savings could be made against this price". The budget estimate was divided into 11 separate sections, each sub-divided into subsections, with a price against each section but not against each subsection. The total amounted to £207,556.52, excluding VAT.

33. The first 10 sections described various works elements, beginning with item 1.0 "demolition, enabling and alteration works" at £28,210.29, continuing with item 2.0 "extension" for £46,275.03 and ending with item 10.0 "drainage and external works" for £998.75. Some of the individual work sections were said to be entirely provisional allowances (e.g. item 9.0 "electrical installations" at £8,812.50). Others had provisional allowances against individual work subsections although the amount was not separately itemised (e.g. item 6.0 "miscellaneous" identified a new staircase on three levels as provisional, but did not specify the amount). In addition, works section 7.0 "fixtures and fittings" had "nil" against it on the basis that the only subsection comprised within it, "kitchen units" were to be "by client direct". The final section, section 11, was headed "preliminaries/running costs" and included a number of typical site specific costs such as scaffolding. There was no separate section or reference to general or head office overheads or to profit.

34. Finally, there was a section headed "notes" which contained a number of assumptions, qualifications and exclusions typically found in builders' estimates or quotations, such as "(i) the price assumes all existing foundations are suitable for the new works" and "(iii) painting and decoration by client".

35. The description of this document as a "budget estimate" clearly indicates that, as was plain from its content to which I have referred above, this was not being put forward as a fixed price quotation which was fixed in every respect. However, the fact that the total price and the individual section prices comprised precise figures, coupled with the reference both in the covering email and in the notes to the "price", strongly indicate in my view that it was not being put forward purely as a non-binding estimate of general cost. The fact that individual sections or subsections are described as provisional prices is a powerful signifier that the remaining sections and subsections were intended to be fixed prices. The reference in one section and in a number of subsections that the work item in question was for supply by the client would also help to explain why the document was described as a budget estimate. The assumptions, qualifications and exclusions in the section headed notes are also consistent with the total figure and the individual figures being put forward as fixed, subject to those specific matters. The reference in the covering email to the claimant believing that savings could be made against the price is also consistent with it being put forward as a fixed price, because otherwise it would not matter that reductions were not identified and agreed before agreement was reached. The absence of any reference to the figures being put forwards as "estimated costs" and the absence of any reference to an additional specified add-on for overheads and/or profit is also consistent with it being put forward as a fixed price.

36. Furthermore, it is very difficult if not impossible to understand why an experienced quantity surveyor such as Mr Adams should have produced a document in these terms if it had been agreed that the claimant was to produce a proposal for the claimant to perform the works on a cost plus basis with a monthly scope of works being agreed in advance and those works only being paid for once completed. In such a case there would have been little incentive for Mr Adams to spend time and effort to cost the works so as to put together this detailed estimate if the claimant was always going to be working on a cost plus basis.

37. I am more prepared to accept that the defendants might mistakenly have believed that it was a cost plus type contact because it was headed "budget estimate". However, that does not really detract from the point that the claimant, as the more experienced operator, would not have produced something like this if cost plus had clearly been agreed. Furthermore, on the defendants' version of events they ought surely to have noticed and queried that the budget estimate did not specify the claimant's percentage addition for profit. They do not suggest that they ever queried this, which is surprising if their motive for insisting on a cost plus contract was to avoid getting their fingers burned for a second time by agreeing a fixed price with a replacement contractor. In cross-examination Mr Southall said that he assumed that the costs were inclusive of profit. However that explanation, in my view, is wholly inconsistent with the case which the defendants are putting forward and would surely have prompted him to enquire what profit level was included.

38. Mr Adams' evidence, which I accept as consistent with the claimant's disclosed internal estimate build-up, is that in producing the budget estimate he added 17.5% for OHP onto each of the separate sections, so that the figure specified against each was inclusive of that allowance. However, the claimant does not suggest that this figure was disclosed to the defendants. Indeed, the defendants point to the fact that in August 2018 the claimant produced an estimate for the cost of the works required to fill in a secret basement discovered

during the course of the works which included 10% for "overheads". Mr Adams' evidence, which I accept, is that it did not include for profit because the claimant was prepared to undertake this additional work at cost in circumstances where the need for this work could not reasonably have been anticipated by the defendants or their designers.

39. There was then a further meeting on 25 May 2018 to discuss the budget estimate followed, in close succession, by a revised budget estimate and another revised version after further discussions, in both of which the price was reduced, on the second occasion down to £170,070.68, by reducing the scope of work which the claimant would be required to undertake. Again the point is worth making that it is unlikely that the claimant would have gone to this time and effort to identify specific savings so as to reduce the overall price down quite significantly to a specific figure if it had agreed to work on a cost plus basis from the outset.

40. The covering email from Mr Adams to the 8 June 2018 budget estimate also made the first reference to stage payments, stating: "the cash flow / stage payment situation would be roughly spread over five months and would typically work out as follows - at the end of month one would be about £20,000, month two about £25,000, month three £40,000, month four £50,000 and month five £35,000. Don't forget these figures are approximate". In his witness statement Mr Southall had said that at around this time he had insisted that the works would be separated into separate tranches to allow the costs to be cross-referred and monies paid only on completion of each tranche. In my view the content of this email is inconsistent with the agreement as contended for by the defendants, even though again I am prepared to accept that this might not have been quite so obvious to the defendants at the time. If there had been such an agreement Mr Adams would surely have mentioned it in his email or the defendants would have picked up the absence of such a reference in his email.

Works commencement

41. It is common ground that the defendants were happy with the revised budget estimate and instructed the claimant to proceed on the basis of the documents referred to above. It was agreed that work should start on 2 July 2018. Mr Southall stated that the instruction was only in relation to the outer shell of the property. However the claimant did not produce a schedule of the work planned for that month relating to the outer shell, which is what would have happened on the defendants' version of events, and there is no documentary evidence of them asking for one to be provided.

42. Unfortunately work had to be stopped straight away because the building inspector arrived and immediately condemned the foundations installed by the previous contractor. It was agreed that the defendants would have to obtain further advice from a structural engineer and an architect and it became apparent that additional costs would be involved. There was a discussion about reducing the scope again to save costs but the defendants decided to proceed with the claimant providing, as requested, a breakdown of the additional cost items and promising to provide a programme of works. Both were provided on 9 July 2018 under cover of an email which added that the claimant "would like to discuss contract and payment terms with you before we commence". The programme was in the form of a simple bar chart programme which divided the work into 17 separate sections and indicated completion w/c 24 December 2018.

43. There was then an exchange of emails which is relied upon by both parties. On 10 July 2018 Mr Adams emailed attaching a cash flow with stage payment dates for the defendants' agreement and proposing a meeting on 16 July. On 11 July 2018 Ms McManus replied

asking for "a breakdown of what work will be completed within each month for each invoice to be due" on the basis that "having been stung before when agreeing to pay funds on certain dates, we discussed with Paul McSorley that we need to split the job into trenches[2] and when each invoice is due we would like to walk around the house and ensure that we can tick off the tasks that were expected to have been completed by that date". Mr Adams replied that "the items on the programme at the relevant payment dates will need to have been done for the payment to be made in full. If we haven't done all of the items shown then the payment may be reduced accordingly. We can discuss this in more detail on Monday".

44. There has been much debate about the true meaning of these exchanges. In my judgment the emails from Mr Adams convey the clear meaning that the claimant would be entitled to stage payments on the basis of full payment against fully completed items and part payment against partially completed items. That is consistent with the usual approach by which a contractor is entitled to interim payment on a percentage valuation basis. I agree with Mr McSorley that any discussions with him about tranches would only have been about the standard procedure for monthly valuations, with the claimant only being paid for the work done in that month, which would have been programmed and discussed in advance. The email from Ms McManus is less clear but in my judgment only differs from Mr Adams' emails in appearing to ask the claimant to provide some advance detail of the works it expected to complete each month and in stating that the claimant would only be entitled to payment for completed work items. Mr Adams' response did not accept either of these requests. In the absence of any objection by the defendants (not least when, as duly occurred, the interim valuations followed this percentage approach without objection from the defendants) in my view they must be deemed to have accepted the claimant's proposals.

45. It is common ground that there was a meeting on the Monday and that as a result it was agreed that work should start again, as it did on 23 July 2018, after Mr Southall had provided evidence from his bank that the defendants were in a position to fund the works. The claimant's evidence, which I accept, is that there was no discussion or agreement that the claimant should proceed on any other basis that a fixed price basis for the whole of the works as shown on the updated budget estimate with stage payments based on monthly valuations.

46. On 23 July 2018 Mr Adams produced yet another revised budget estimate which, as he explained in his covering email, had been adjusted to remove items which the defendants were going to do themselves. The budget estimate included specific figures for these omitted works. In cross-examination Mr Adams accepted that he had only deducted the cost element of these works without also deducting the internal 17.5% OHP addition and that he had not informed the defendants that this is what he had done.

47. The defendants contend that the claimant agreed, or at least never objected, to their being entitled to choose which works they wished the claimant to undertake and which works they wished to procure themselves. They point to this revised budget estimate as an example of this working in practice. In evidence, Mr Southall described the budget estimate as like a menu which the defendants were entitled to pick and choose from as they wished, whereas the claimant's case and evidence was that whilst certain items were shown in the budget estimate as being for the client to provide there was no right for the defendants to pick and choose as between the others without its agreement, not least because it would never have

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[2] It is common ground that this was intended to and understood as a reference to "tranches".

agreed to the defendants being able to omit at will substantial structural or other programme-critical work items.

48. I have no doubt that there was never any express agreement to the effect that the defendants had a right to omit work without the claimant's consent. What clearly happened in my judgment was that the defendants did decide that they would undertake some items themselves and the claimant was willing to accommodate this by omitting the items, which were not structural or programme-critical, and crediting the cost as discussed above. There was no wider agreement. Nor in my judgment was there any implied right to do so if, as I find, this was a fixed price lump sum contract. As a matter of general law, leaving aside the specific items identified in the budget estimate as for the defendants to supply, there is no general right for an employer under a building contract to take work away from the contractor and procure it directly, even in relation to provisional sum items. I agree with Mr Arnold that Mr Adams ought to have made clear that the allowance from the budget estimate for the omitted works was not inclusive of any allowance for OHP and that it is not impressive that he did not do so, however there is no suggestion that he made a positive representation that it was inclusive of OHP.

49. On receipt of the revised budget estimate Ms McManus asked Mr Adams for a new schedule of works and dates and estimated amount of payment dates. On 25 July 2018 Mr Adams provided an updated cashflow and programme with key dates added. The programme had been amended to show the estimated amounts payable at each month end, which is entirely consistent in my view with the approach outlined by Mr Adams in his email of 11 July 2018. It is inconsistent in my judgment with the defendants' case that in his email in response of 26 July 2018 Mr Southall did not say that this updated and expanded programme still did not comply with – on the defendants' case – the agreement to provide in advance a schedule of work to be undertaken the following month.

Interim valuations 1 and 2

50. The first two month end valuations for July and August 2018 were duly submitted and paid without objection, although valuation 2 was paid in instalments rather than in one payment. They were in the form of the budget estimate with additional columns added showing the percentage completion against each work subsection with a composite value against each work section. Mr Adams explained, and I accept, that he valued the individual work subsections on the basis of his site inspections and discussions with Mr McSorley and the site agent and information provided as to expenditure such as timesheets and invoices so as to arrive at a cost for each such subsection. Mr Arnold complained that his approach, which Mr Adams explained as being to value the percentage cost incurred in relation to each subsection, was contrary to the agreement which was to ascertain the value of each subsection. However it seems to me that in practical terms this is really a distinction without a difference, since the percentage completed value of an item will usually be the same as the aggregate of the material and labour cost expended on that item to that point and applicable OHP. Mr Adams also explained that he then added the 17.5% OHP to the individual costs to arrive at the composite section value.

51. There was a curiosity in that after section 11.0 there was a row titled "overhead and profit" but, consistent with Mr Adams' evidence above, no separate value was placed against that entry. It seems to me that this was simply a reflection of the way in which Mr Adams had used the internal pricing form to produce his valuation. It could not have conveyed the impression to the recipient that the contract was priced and payment claimed on a cost plus basis, since there was no separate additional amount claimed for OHP as comprising the

"plus". Nor could the statement in the covering email asking the defendants to say if they had any "issues" with the second valuation reasonably have conveyed the impression that the right to payment was conditional on agreement, as opposed to conveying the natural hope that there would be no disagreement about the valuation. On receipt of the second valuation Ms McManus asked for an itemised valuation with more detailed costs, but there is no indication that one was provided and, as I say, the defendants were willing to pay it in full without demanding one.

The falling out over the third interim valuation

52. The trigger for the falling out between the parties was the submission of the third interim valuation. It was submitted on 26 September 2018 in the same format as the previous valuations and showed a gross valuation of £77,602.42 which, less the previous gross valuation of £36,916.55, meant that £40,685.87 plus VAT was being claimed. On the same day Mr Southall responded asking for a breakdown into each individual item. Mr Adams' evidence was that at a site meeting the following day he was able, by accessing his internal build up on his laptop, to write the individual amounts claimed against each subsection on the defendants' copy of the valuation. Although this was disputed by Mr Southall I am satisfied that Mr Adams did do this since there is no other obvious reason for Mr Adams to have handwritten these amounts onto the valuation as he plainly did by reference to the copy disclosed, especially since his reference in his email of 1 October 2018 to having provided sufficient information to enable the defendants to pay the valuation is consistent with this evidence.

53. It is also clear that by the same date the defendants were able to use this information to challenge the reasonableness of some of the individual claims made. Thus, on 1 October 2018 Mr Southall emailed Mr Adams with a number of queries on the valuation. It is fair to say that these queries appear to be reasonable in content and in tenor.

54. There was then a meeting on 3 October 2018 on site to discuss matters. Mr Adams was quite happy to provide a more detailed breakdown of the valuation and to address the issues raised. However, according to Mr McSorley and Mr Adams, the meeting became contentious because the defendants were insistent that the value of a number of items should be reduced from the prices shown in the agreed budget estimates and asked, for the first time, for the works to be valued on a cost plus basis, which the claimant refused to do. The defendants offered to pay £20,000 on account of the valuation pending a satisfactory resolution of their concerns and it is common ground that they did so. The defendants do not dispute that they asked for the work to be valued on a cost plus basis since, as I have said, their case has always been that this is what was agreed. I am prepared to accept that this was not a cynical tactic by the defendants and that they genuinely, albeit mistakenly in my judgment, believed that this is what the contract entitled them to do. Mr Southall also says that he made it clear at the meeting that they required an itemised breakdown of the next month's work before any further work was to be carried out.

55. Mr McSorley and Mr Adams decided that in the circumstances the claimant would put on hold their orders for the delivery of the further steelwork and the manufacture and delivery of the roof trusses required for the next stage of work. Although there was a dispute as to whether or not he had cancelled the orders it is clear that he had not done so. It appears to me that the dispute as to whether or not he had informed the defendants that he had cancelled the orders was most likely simply a misunderstanding and what he had actually said was only that he had cancelled the deliveries for next week. This decision was not surprising, given Mr Southall's own evidence as to what he said at the meeting about requiring an itemised

breakdown before work could resume, and particularly in the circumstances that the site was to some extent (but by no means fully, I am satisfied) demobilised on the Friday 5 October 2018, given that the works had reached a natural pause and the claimant did not have permission at that stage to proceed further.

The email of 5 October 2018

56. Late afternoon on 5 October 2020 Ms McManus emailed Mr Adams asking for the revised amount of the remaining balance and itemised cost estimate and also expressing the defendants' hope that matters could be resolved. Later that evening Mr Adams replied with an important email which requires careful consideration. Initially, he addressed the queries raised by Mr Southall in the email of 1 October 2018 and agreed to make one reduction but otherwise stood by his valuation. Secondly, he provided as asked a further breakdown of the budget estimate both as at 9 July 2018 and as at the current time based on his understanding of the defendants' current requirements. Thirdly, however, he ended the email in these terms:

"The meeting on Wednesday was extremely concerning and left us feeling like you were trying to reduce our price retrospectively without foundation. Our Valuation 3 remains our assessment of the value of works up to the end of September 2018. We have subsequently carried out a further weeks work since then and see no reason why the Valuation cannot be payed (sic) in full subject to the reduction mentioned above. We genuinely wish to complete our works on this project but due to our uneasy feeling following the meeting on Wednesday we believe the way to move forward on this project should be under the following circumstances:
(a) Valuation 3 is paid as described above.
(b) The full scope of our remaining works is established.
(c) A payment plan is put in place to cover the remaining works that is mutually acceptable.
We would suggest a meeting as soon as possible to try and agree a way forward and will be happy to meet to try and come to an acceptable resolution. Until we feel comfortable with the situation we will not be carrying out any further works on the project. We hope this adequately clarifies our position."

57. The defendants' case is that this email amounted to a repudiatory breach of the contract since (as I have said is common ground) the claimant had no contractual right to suspend the works for non-payment of the third valuation or otherwise, and since according to the defendants its demand for immediate payment of the third valuation in full whilst there remained a genuine dispute as to its amount and also its demand for an agreed payment plan were both unjustified from a contractual perspective. The defendants also emphasise that this email was sent in the context that the claimant had already taken steps to demobilise from site and had put the delivery of materials necessary to restart work on indefinite hold.

58. In closing submissions Mr Whitfield suggested that the email did not in fact purport to suspend the works and that such was not Mr Adams' intention, however: (a) his intention is irrelevant and; (b) I am satisfied that there was a purported suspension, albeit conditional and qualified as I find below.

59. Mr Whitfield's better submission in my view was that the email was not repudiatory because, even though the claimant did not have a contractual right to suspend the works, the concerns which it raised were justified in the context of the terms of the contract and the defendants' approach to the contract and its continued performance and in the further context that unless matters were resolved it could not proceed with the works anyway, given the uncertainty as to what works it was required to undertake and given the defendants' statement at the meeting.

Further, and fundamentally, the claimant's case is that it was not saying that it would not restart work unless and until the defendants capitulated and accepted the three stated conditions. Instead, it was saying that there should be a meeting as soon as possible to reach an agreement acceptable to both going forward but until that had happened the claimant was suspending work. The claimant's case is that, in the circumstances present at that time, suspending works until a meeting could be held and agreement reached could not be considered as conduct which was repudiatory in accordance with the legal principles identified above. The claimant emphasises that there was no impediment to having a meeting over the weekend or on the Monday and that this short suspension would have had no material effect on progress if agreement could be reached at the meeting.

60. I accept these submissions. The claimant was justified in complaining that the defendants were not entitled to refuse to pay interim valuation three in full since even assuming that the individual complaints had substance the amount paid of £20,000 was significantly less than the undisputed amount. The claimant was also justified in complaining that the defendants were seeking to renegotiate the agreed terms of the contract so as to force the claimant into reducing the agreed price of a number of items. The claimant was entitled to be apprehensive that the defendants would seek to remove some or all of the remaining works from the scope of the contract even without its agreement. The claimant was also entitled to be apprehensive that the defendants did not have the means to fund the remainder of the works and that if it simply carried on with the works without resolving these issues it would not be paid for the work it undertook going forwards. The claimant had been informed by Mr Southall, without contractual justification, that it should not continue with the works unless and until a programme for the following month was produced and agreed with the defendants.

61. Moreover whilst its three stipulations were in such circumstances entirely justified the key point is that the claimant was not saying that unless and until they were agreed and satisfied it would not carry out any further work. It was asking, entirely reasonably in the circumstances, for an early meeting to seek to resolve these issues. It was not saying that it was not prepared to negotiate away from these three stipulations. There was no basis for the defendants to conclude that the offer of a meeting was entirely empty. Thus, it was not open to the defendants to treat the email as repudiatory. The claimant was not in repudiatory conduct when it was making it plain its willingness to meet and seek to resolve the issues which divided the parties with a view to completing the project.

62. I should say that although Mr Arnold submitted that the claimant was bound by its pleaded case that this email did indeed amount as a suspension until the interim valuation was paid, I do not consider that the claimant can be bound by a plainly erroneous pleaded case as to the true meaning of a document or, in any event, that it would be unjust to the defendants to permit the claimant to argue the contrary given that the claimant had clearly flagged up its case as run at trial in its witness evidence and its opening submissions.

The defendants' response and the termination of the contract

63. Regrettably, however, it is clear that - as Mr Southall said in cross-examination - the defendants believed that by this email the claimant was putting a metaphorical gun to their heads, seeking to force them into paying the disputed valuation in full and agreeing to allow it to complete the works but only on its terms, on the basis that if not they would have no chance of moving in before Christmas as they were hoping with their newly born first child. Having reached that view, the defendants decided that they would have nothing further to do with the claimant. The defendants had already begun the process of having the remaining works costed by other contractors and, according to Mr Southall in cross-examination, had

discovered that the claimant's prices were more expensive. As Mr Southall said, he believed that the claimant had blown its one chance in their email of 5 October and he was not prepared to give it another chance.

64. The first reaction to the email was in a telephone call from Mr Southall to Mr McSorley. In summary Mr McSorley, supported by his wife, says that Mr Southall was aggressive in his tenor, accusing the claimant of walking off site, trying to get him to admit that this is what the claimant had done, and rejecting his explanation that the claimant wanted to finish the contract and still wanted to have a meeting to resolve the financial and other issues which had arisen. Mr Southall did not address this conversation in his witness statement and I have no doubt that the recollection of Mr McSorley, supported by his wife as to its tone, is accurate. It is clear that Mr McSorley and his wife suspected that Mr Southall was recording the call with a view to seeking to obtain confirmation that the claimant had indeed walked off site. It is unnecessary for me to make a finding on that point although if I had to I would agree, given that it emerged in cross-examination that Mr Southall appeared to believe that a verbal statement made in a conversation which was not separately proved by other evidence had no evidential status.

65. Mr McSorley's evidence is also consistent with the tenor of the email sent by Mr McSorley the following day in which he expressed himself in the most emollient of terms as follows:

"Hi Matt and Jade, It is sad that matters got heated but without payment I feared I would be unable to pay the suppliers and subcontractors but I have now got over that hurdle. Where we are is that I think we need to meet up to discuss matters with a view to working together to complete the project that we agreed. The roof trusses are still available and we will schedule those shortly, but in the meantime the scaffolders will be on site before the end of the week and our steel man will come to site to measure as planned. So please let me know when you are free to meet?"

66. Ms McManus's response later that day was restrained and pleasant in tone but nonetheless was a clear rebuff to the claimant's proposal, saying that due to the claimant's conduct the defendants had been "left with no choice but to seek alternative arrangements" and requesting the claimant to arrange for the scaffolders to remove the scaffolding urgently. She said that their plan was to appoint an independent quantity surveyor to inspect and that they would contact the claimant for a meeting once he had reported. She concluded "we did not expect you to walk off site and refuse to come back, however you have left us in this most unexpected position."

67. It is most unfortunate that the defendants so badly misread the email of 5 October 2018 and were not prepared to reconsider once it became clear that the claimant was ready, willing and able to see if matters could be resolved and the job finished.

68. There is no need to prolong this judgment by referring to the subsequent exchanges since I accept Mr Arnold's submission that Ms McManus' email of 9 October 2018 amounted to a clear communication of acceptance of the claimant's alleged repudiation. Thus, whilst the claimant repeated its emollient stance in emails over the following two days the defendants also maintained their stance in response, both in emails and in WhatsApp or text messages. By 12 October 2018 it was clear that the defendants were not prepared to reconsider and in an email sent that day the claimant stated that by refusing to meet and by insisting that the claimant remove its remaining equipment from site and not return the defendants were in repudiatory breach and that was accepted by the claimant, which would proceed to prepare and submit its final account, which is what it did on 16 November 2020. That was plainly a

communication of acceptance of the defendants' conduct since 5 October 2020 as repudiatory which, in the circumstances, it plainly was.

69. It follows that the claimant has proved its case as regards liability and the defendants have failed in their defence and (it follows) their counterclaim.

Valuation of the claimant's claims

70. The claimant advances two pleaded claims, namely: (a) the value of works undertaken in the sum of £87,696.94 plus VAT, less payments made; and (b) the loss of profit consequent upon the defendants' repudiation in the sum of £18,048.34.

The claim for the value of the works undertaken by the claimant pre-termination

71. The final account was produced by Mr Adams and verified albeit only in general terms in his witness statement. It substantially followed the format of the previous monthly valuations based on the budget estimate of 9 July 2018, although it also disclosed the price of each subsection which had been omitted from the budget estimate and the previous valuations.

72. In his principal report the single joint expert Mr Rigby valued the final account on the basis of the claimant's case as to the contract terms, which is the case which I have accepted, in the sum of £78,467.37 plus VAT, based on his assessment of the value of the percentage of completion of the work items as at the date of the final account. In producing his valuation he stated that he had had regard to the photographic evidence provided by the claimant and that he had also noted a valuation prepared by Mr Baldwin, a well-known local quantity surveyor, on the instructions of the defendants following an inspection on 4 December 2018 and the comments within it.

73. Mr Arnold submitted that I should prefer the conclusions reached by Mr Baldwin in his valuation on the basis that it was undertaken much closer in time to the date of termination than that of Mr Rigby. Mr Whitfield objected to the defendants relying on the Baldwin valuation on the basis that it was opinion evidence from an expert for which permission had not been given. He also made the point that it would be unfair to prefer the Baldwin valuation to that of Mr Rigby in circumstances where the defendants had not put questions to Mr Rigby about the Baldwin valuation nor asked for permission for Mr Rigby to give evidence so that he could be cross-examined on the Baldwin valuation. These are all powerful points. I can, in my view, have regard to the Baldwin valuation insofar as it contains hearsay evidence of what he observed during his inspection. However I cannot have regard to his opinion as to valuation and, even if I could, I am satisfied that it does not detract from Mr Rigby's valuation, given that Mr Rigby had regard to it and was not asked about his reasons for differing from it.

74. Mr Arnold also submitted that Mr Rigby's valuation was unsound because he had decided to rely on photographs taken by the claimant showing a later stage of completion than those taken by Mr Southall, notwithstanding that Mr Southall had verified his photographs in his witness statement whereas Mr McSorley and Mr Adams had not. However those witnesses had been asked about the photographs and confirmed they had been taken on the dates stated in the schedule and there is no reason in my view to disbelieve that evidence. Moreover, as Mr Whitfield submitted, if they had not done so then it followed that they had gone back to site after the defendants had engaged remedial contractors and taken photographs of their work and sought to pass it off as their own. I have no hesitation in acquitting them of such a serious charge. Further, although the photographs had not been formally disclosed as they should, they had been disclosed in preparation for being submitted in electronic form as part

of the joint instructions to the expert and, as Mr Whitfield submitted, it would have been possible for the defendants to have checked the metadata to see if they had been taken on the date claimed. Whilst it is possible for metadata to be altered, again this involves a degree of blatant and premeditated dishonesty on the part of Mr McSorley and Mr Adams which I have no hesitation in rejecting. Whilst it is true that Mr Southall was not cross-examined on his evidence about his photographs, he said very little in his witness statement about them and nor (it appears) were they shown to Mr Baldwin when he produced his valuation.

75. Mr Arnold also submitted that Mr Rigby's valuation was open to doubt as a result of Mr Adam's evidence that he had valued on a cost as opposed to value basis and that he had retained the OHP element in the omitted work. However, as Mr Whitfield submitted: (a) the first point is immaterial since – as stated – Mr Rigby had undertaken his own valuation which was significantly less than that of Mr Adams and since he had stated in his report the basis of his valuation which was not said to be erroneous; and (b) the second point is likewise immaterial since: (i) on my findings the claimant was entitled to retain OHP so long as the claimant did not misrepresent the position to the defendants; and (ii) there is no basis for considering that the retention of OHP on omitted work has any relevance to the valuation of the completed work.

76. In his supplemental report Mr Rigby addressed the question asked by the claimant as to whether or not the claimant was entitled to recover the additional costs of the structural steelwork, which was a matter he had not addressed in his principal report. He noted, correctly, that it was for the court to decide if the adjustment to the steelwork pricing was correct from a legal perspective, but went on to express his opinion that from a quantity surveying perspective there ought to be a remeasurement and revaluation and that, having done so, that increased the final account valuation from £78,467.37 to £84,757.86 (see p.5). His reasoning (as relevant) was that: (a) the email attaching the original estimate stated that it was "in accordance with the architects drawings"; (b) The note on the architect's drawings stated that they must be read in conjunction with the structural engineer's design, which was not available at that time; (c) although the structural engineer's design drawings are only dated "July 2018" it is unlikely that they were available when the 9 July 2018 budget estimate was prepared so that, assuming that this was the relevant contractual document, it was reasonable for the steelwork to be remeasured and revalued once the full extent of the steelwork required was known. Having reached this conclusion, he then remeasured by reference to documents and information provided by the claimant with its question.

77. However in my view there are a number of difficulties with this approach. The first is that none of the budget estimates contained any express provision to the effect that all allowances for steelwork were provisional and subject to remeasurement on receipt of structural engineering design drawings. Instead, there was only note (xvi) which stated that items 1.9 and 1.10 (the new bay window and porch/landing constructions) were subject to the structural engineer's details. There were a number of other subsections which referred to the structural engineer design but they were not identified as being subject to that design or as being provisional sums.

78. In my judgment the claimant cannot have it both ways. If this was, as I have found, a fixed price quotation then there has to be a proper contractual basis for a revaluation. It would have been open to the claimant to identify and claim a revaluation of items 1.9 and 1.10 by showing what had been allowed before and what was required by the structural engineer design, but that is not what the claimant has done. The claimant has sought to undertake a general remeasurement of the quantity of steelwork required. Thus, in his email sending his

second valuation Mr Adams simply stated that the structural engineer's design for the steelwork involved more steel than envisaged. In the valuations the claimant identified and subtracted the asserted original allowance for steelwork and then added back the asserted actual costs but gave no further details. Mr Adams does not explain matters in his witness statement and such information as was provided with the questions to Mr Rigby is both unverified and lacking in any attempt to clarify the legal basis for asserting an entitlement to remeasurement. In closing submissions, Mr Whitfield submitted that it was sufficient that throughout the course of the project there was a general discussion and acceptance by the defendants that the additional steelwork costs resulting from the involvement of the structural engineer would be recoverable, but I am unable to accept that this is sufficient from a contractual perspective.

79. In the circumstances I am not satisfied that the claimant has made out its entitlement to this additional element of its claim for the value of works undertaken which remains therefore at £78,467.37 and, if my figures are correct, plus VAT at 5%, total £82,390.74, less payments made of £58,762.38[3], total due (inclusive of VAT) £23,628.36.

The claim for loss of profit

80. In his witness statement Mr Adams explained that he calculated the claim on the basis of the 17.5% OHP that the claimant expected to make from the project less the amount claimed within the final account for OHP. It may be seen from the calculation attached to the final account claim that this was produced simply by deducting the 17.5% OHP addition from the final account from the 17.5% OHP addition intrinsic within the 9 July 2018 budget estimate.

81. In his principal report Mr Rigby stated that he was unable to offer an opinion as to this claim due to a lack of evidence in a number of identified respects. He did however state that he considered that a claim for 17.5% OHP on a project such as this was not unreasonable.

82. He was asked to revisit his opinion in his answers to questions. When he produced his principal report he had been provided with documentation in relation to a number of other projects undertaken by the claimant but considered that the lack of evidence in relation to these other projects did not enable him to express any opinion in relation to them. However, in his supplemental report he referred at pp.6-7 to further information provided by the claimant in relation to these projects and concluded that, if reliable, it demonstrated that historically the claimant had earned 20.75% OHP on such projects.

83. He was also asked to consider, taking into account the evidence in relation to other projects and also: (i) his review of the claimant's performance on this project in terms of costs incurred as against its tendered prices; and (ii) his assessment as to the likely profitability of the tendered prices for the works which were still to be completed as at the date of termination, whether the claimant would have recovered 17.5% OHP in respect of the remaining works.

84. Although his review of OHP earned on the work undertaken is skewed by his acceptance of the claim for remeasurement of the additional steelwork his assessment of likely profitability is pertinent. He stated that having undertaken an additional review of a selection of the prices for the outstanding works on a budget estimate basis it was his opinion that they were reasonably priced and on balance could be expected to result in the recovery of 17.5% OHP.

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[3] This is taken from the final account claim and I assume is gross of VAT.

85. In my judgment this analysis supports the evidence of Mr Adams and demonstrates to my satisfaction on the balance of probabilities that the claimant would have recovered 17.5% OHP on the remaining works had the defendants not wrongfully repudiated. This conclusion is also consistent with the evidence during trial to the effect that the project had been a difficult one over the summer, due to the successive discovery of the previous contractor's unsatisfactory work, the need to instruct the structural engineer to redesign the foundations and steelwork and the discovery of the hidden basement, but that by September things were proceeding more smoothly so that there was no reason to believe that the project could not have been successfully completed subsequently.

86. On that basis I am satisfied that the claimant is entitled to recover the sum of £19,422.96 in respect of loss of OHP recovery as calculated in section G.23 of Mr Rigby's principal report.

87. During closing submissions I asked whether the claimant was entitled to add VAT to its claim for loss of profits, as had been done in the November 2018 final account without explanation. The conventional view has always been that VAT is not chargeable on damages for compensation for breach of contract. However Mr Whitfield, with impressive up-to-date knowledge, referred me to a September 2020 update from HMRC which, to summarise, indicates that its view following recent CJEU case law is that compensation payments relating to commercial payments, including early termination payments, will be subject to VAT. Given the modest amount in issue and the lack of opportunity to counsel investigate further at that stage it was sensibly agreed that I should order that any amount awarded as damages for loss of profit should be subject to VAT at the applicable rate in the event that the claimant was required to and did account to HMRC for such VAT.

Summary

88. It follows in my judgment that the claimant is entitled to judgment on the claim in the amount of £23,628.36 for work done (inclusive of VAT at 5%) and £19,422.96 for damages for breach of contract, together with VAT at the applicable rate on £19,422.96 in the event that the claimant is required to and does account to HMRC for VAT on such sum.

The counterclaim

89. There is no need for me to address the quantification of the counterclaim, given my conclusions on liability. However I should explain briefly why in my opinion the defendants had failed to make any serious attempt to prove their counterclaim so that, even had I found that the claimant and not they had wrongfully repudiated, I would not have awarded them anything on the counterclaim.

90. The only evidential foundation for the counterclaim was 3 brief paragraphs in Mr Southall's witness statement where he said in summary that the defendants had appointed a number of individual contractors to complete the works, that it took a further 6 months to complete from the anticipated end date of late December 2018 and that (paragraph 38):

"This delay lead to us incurring significant costs. While we were awaiting completion of the works at the Property were living in a rental accommodation, at a cost of £2,500 per month, and paying finance of 1% on a loan of £250,000. This loan expired in April 2019 and, with the Property unmortgageable due to its incomplete state, we had to take out a bridging loan that incurred included 6 months interest at £20,377.50, £10,725 in broker fees and £1,560 in legal fees."

91. The defendants had produced no documentary evidence as to the contracts they had entered into with other contractors, the payments which they had made, or the date of completion or

moving into the property. Whilst the defendants had produced a copy of the assured shorthold tenancy of the rental accommodation they had not produced any evidence as to its extension or as to the payments made during the alleged period of delay. They had produced an unsigned loan agreement but, leaving aside the objections made by Mr Whitfield as to the absence of any signature and the fact that it appeared to include a declaration which Mr Southall must have known was false had he read it, there were the more fundamental objections that the defendants had failed to disclose the original loan agreement or why it could not simply be renewed. This was significant because the new loan agreement was for an increased amount. If the true reason for the new loan agreement was that the defendants needed more money and that had nothing to do with the claimant causing delay or extra costs (and the defendants have not pleaded or pursued a claim for the extra costs to complete) then there would have been no causative effect between the delay said to be the claimant's responsibility and the losses associated with the new loan agreement.

92. Although Mr Arnold submitted, rightly as a matter of general principle, that the court ought not to insist on the same degree of particularity in a small claim as might be expected of a multi-million pound claim, nonetheless a party who wishes to persuade a court to award him a five figure sum in damages is under a duty to comply with the duty to disclose the documents reasonably necessary to prove the claim and to provide the other party and the court with sufficient information to subject the detail of the claim to reasonable scrutiny. Here the defendants have manifestly failed to do so, and the claim is by no means so obvious or straightforward that the court can make the necessary assumptions in its favour without the need for corroborative evidence.