OUTER HOUSE, COURT OF SESSION

[2018] CSOH 98

CA11/18

OPINION OF LORD DOHERTY

In the cause

WEST REG. STREET (PROPERTY) LIMITED

Pursuer

against

CENTRAL DEMOLITION LIMITED

Defender

Pursuer: Lord Davidson of Glen Clova QC; DAC Beachcroft Scotland LLP
Defender: Barne QC; Pinsent Masons LLP

12 October 2018

Introduction

[1] The pursuer carries on business as a property developer. The defender is a demolition contractor. In 2016 they entered into a contract for the defender to demolish three adjacent buildings (a 1960s building, a Victorian building, and a Georgian building with a Venetian façade ("the Venetian building")) at 28-52 West Register Street and 15-19 South St Andrew Street, Edinburgh. During the course of the demolition the 1960s building and the Victorian building were found to contain asbestos. The parties are in dispute as to who should bear the cost of the removal of that asbestos.

[2] In this action the pursuer seeks declarator that the defender is obliged to remove and dispose of any asbestos encountered during demolition without the need for any variation to be instructed and without any additional payment being made in respect of that removal and disposal. The defender maintains that such asbestos removal and disposal is outwith the scope of the work which it contracted to perform, and that a variation requires to be instructed and paid for. The matter came before me for a proof before answer on the commercial roll.

[3] The pursuer led evidence from two witnesses, Scott Castle and Ian Rodger. The defender called three witnesses, Allan Bell, Colin Peat and John Hunter. Mr Castle, Mr Bell and Mr Peat prepared signed witness statements and Mr Rodger and Mr Hunter prepared reports (Mr Rodger's being 6/2 of process and Mr Hunter's 7/20 of process). The witness's statement or report was treated as being the substance of his evidence-in-chief (subject to each party reserving the right to object to the admissibility of certain of the contents of each report).

[4] Mr Castle is a quantity surveyor and project manager who is employed as a director of the firm of Thomas & Adamson ("T & A"). In terms of the contract T & A were the Contract Administrator, Quantity Surveyor and CDM Co-ordinator. Mr Castle was in overall charge of the project for T & A. His evidence was mainly directed to discussions which took place with representatives of the defender during August 2016 when proposed amendments to the standard contract conditions were being negotiated. He also spoke to subsequent events.

[5] Mr Peat is a director of the defender. His evidence focussed on the discussion which took place with Mr Bell and Mr Castle about the inclusion in the contract of clauses 2.1C and 2.1D.

[6] Mr Bell is the defender's contracts manager. He gave evidence as to the background to the contract; the discussions with Mr Castle about the inclusion of clauses 2.1C and 2.1D; contract instructions 5 and 6; and subsequent events.

[7] Mr Rodger and Mr Hunter are both chartered surveyors with considerable experience of construction contracts, including demolition contracts. Their reports and their oral evidence concentrated on the Standard Method of Measurement of Building Works (7th ed) ("SMM7") and its bearing on the contract.

[8] In terms of a joint minute of admissions (no 20 of process) certain matters were agreed, including a chronology of events. In addition, much of the evidence was not the subject of any material disagreement. It is unnecessary to rehearse the various sources of that evidence. It is sufficient simply to narrate my findings in relation to it.

[9] The most contentious evidence concerned the discussion between Mr Castle, Mr Bell and Mr Peat about incorporation of clauses 2.1C and 2.1D. There was also some disagreement between Mr Rodger and Mr Hunter about SMM7's role and significance in the contract.

The background to the contract

[10] In April 2015 T & A asked the defender to provide an informal budget price for proposed asbestos removal works, demolition, and façade retention at 28-52 West Register Street and 15-19 South St Andrew Street ("the combined works"). The defender was provided with a bill of quantities for the proposed works which included a bill item C21:

> "C21 TOXIC / HAZARDOUS MATERIAL REMOVAL
> Site generally
> Remove and dispose of all asbestos material
> identified in the Asbestos Survey reports 15-17 (*sic*)
> South St Andrews Street ref HLAD34033/010R and

28-52 West Register Street ref FYAD32786/001R
generally ITEM"

The defender was given copies of the aforementioned survey reports. The report relating to 28-52 West Register Street (ref FYAD32786/001R) set out the findings of an intrusive refurbishment/demolition survey which had been carried out by RPS Consultants ("RPS") between 10 and 20 November 2014. It indicated that certain asbestos containing materials ("ACM") had been identified or were assumed to be present. It specified the relevant locations. It noted certain areas which had not been accessed. The report for 15-19 South St Andrew Street (ref HLAD34033/010R) set out the results of a non-intrusive pre-demolition survey which had been carried out by RPS on 17 and 18 November 2014. It indicated that certain ACM had been identified or were assumed to be present. It specified the relevant locations. It highlighted that certain areas had not been accessed and that intrusive investigation into the building fabric had not been possible. It concluded that all areas should be subject to a fully intrusive demolition survey prior to any works commencing. Each of the reports contained the caveat:

> "Whilst the surveyors made every reasonable effort, RPS Consultants cannot guarantee that all ACM had been identified, hence some ACM could be present in the building that may only be discovered when the building is demolished or is subject to major refurbishment."

The defender submitted an informal budget quotation for the combined works.

[11] In June or July 2015 T & A asked the defender to submit a tender for asbestos removal and soft strip work only (ie not including demolition). Bill no 2 in that tender document repeated the C21 item which had been contained in the tender bill for the combined works. The defender tendered for the work but its tender was not accepted. The contract was awarded to another contractor, GCM Services.

[12] On 22 and 24 July 2015 RPS revisited 28-52 West Register Street and prepared an updated asbestos report (ref FYAD32786/002R). The same caveat as was in the earlier reports was repeated. It seems that the defender was not provided with that report.

[13] In early January 2016 the defender was asked by T & A to tender for demolition work at 28-52 West Register Street and 15-19 South St Andrew Street. The contract was to be on the terms and conditions of the SBCC Standard Building Contract without quantities for use in Scotland (SBC/XQ/Scot), 2011 edition, incorporating the JCT New Rules of Measurement Update, August 2012. Although the contract was to be a without quantities contract, the draft tender documentation prepared by the pursuer contained three documents which were in the form of bills of quantities. Bill no 1 dealt with preliminaries. Bill no 2 dealt with demolition work. Bill no 3 related to temporary works. The Pre-construction Information issued to tenderers was a revised version of the Pre-construction Information which had previously been prepared for a proposed tender for the combined works.

[14] The defender put prices against the items 'A54 Provisional Work/Items' and 'A55 Dayworks' in Bill no 1. In Bill no 2 it inserted a single global figure of £360,000 for all of the listed demolition items for the Victorian building and a single global figure of £540,000 for all of the listed demolition items for the 1960s building. It priced Bill no 3 at £60,000.

[15] On 9 March 2016 T & A emailed the defender's Mr Bell and asked him to confirm *inter alia* the following matters (shown in ordinary font below). The following day Mr Bell replied by annotating the email of 9 March 2016 in red (shown in bold below):

> "...
> 2. Confirmation that leaving the asbestos felt and roof tiles on the 1960s and venetian buildings (currently included in GCM Services ongoing soft strip and asbestos removal contract) can be included within your works and have nil cost or

> programme impact. If not please advise on cost and/or programme impact. **There will be a cost of £6,000 but the programme will not be affected.**
> 3. A recent intrusive survey to satisfy ourselves that there is no asbestos materials within the external wall build-up of the 1960s building has identified very minor asbestos residue above the window heads in the new section of this building (as per the attached photo). It is believed that this is the result of some asbestos overspray to the steel beams. I attach a couple of photographs which hopefully helps to identify the residue in question (note - the area in question is restricted to the brickwork immediately above the steel plate as confirmed by the asbestos analyst). We have agreed with GCMS that the best option for dealing with this is to infill these areas with expanding foam to encapsulate the asbestos residue within a matrix of expanding foam for future removal. I seek confirmation that the removal of this expanding foam can be included within your works and have nil cost or programme impact. If not please advise on cost and/or programme impact. **There will be a cost of £5,000 but programme will not be affected**.
> ..."

[16] On 18 May 2016 Coal Consultants carried out a refurbishment and demolition survey of the buildings for T & A. The survey took place after completion of the soft strip and asbestos removal contract by GCM Services. The survey noted small quantities of asbestos in two locations. None of the other representative samples taken from any of the other locations included asbestos. The report recommended (para 5.2) that further inspection, sampling and testing be carried out in areas which had not been covered by the inspection work. It highlighted areas excluded from the survey (para 5.3). The report contained a number of other caveats. For example, paras 1.17 and 6.0 - 6.1 provided:

> "**Representative Sampling**
> 1.17 Every attempt has been made to ensure that representative samples of materials suspected of containing asbestos have been recovered for testing purposes. Nevertheless, where the laboratory results of analysis indicate that no asbestos has been detected, caution should be exercised in extrapolating the same conclusion to the parent material. Where doubt remains, further sampling and testing should be carried out.
> ...
> **6.0 Caveats**
> 6.1 All reasonable steps have been taken to ensure that the contents and findings of this report are true and accurate. Though as stated below, further undetected ACM's may still be present within the premises. The client should therefore be aware of his responsibilities for identifying, locating, removing and/or managing all ACM's within the premises, and

> for notifying the appropriate authorities where necessary."

The report was provided to Mr Bell by T & A on 14 June 2016.

[17] The defender carried out work on the contract for a number of months before the contract was signed by either party. T & A issued contract instructions 1, 2 and 3 to the defender on 19 April 2016, 13 June 2016 and 16 June 2016. On 1 August 2016 Mr Peat signed the contract on behalf of the defender. However, at that stage the parties were still in discussion as to the contents of a schedule of proposed amendments to the standard contract terms and conditions. On 12 August 2016 a meeting took place between Mr Castle, Mr Peat and Mr Bell. At the meeting all of the proposed amendments were agreed apart from proposed clauses 2.1C and 2.1D. There is a dispute as to what Mr Castle said at that meeting. There was further discussion of those clauses during a telephone conference call on 17 August 2016 between Mr Castle and a solicitor acting for the pursuer on the one hand and Mr Bell on the other hand. At the end of that call Mr Bell indicated he was content with the clauses but he would have to obtain confirmation from Mr Peat and Mr Ross Craig (another director of the defender). By email to Mr Castle of 19 August 2016 Mr Bell confirmed the defender's acceptance of the clauses:

> "Scott,
>
> Confirmation that we will accept the clauses as written for this contract mainly due to the fact that we are not removing or disturbing the basement but will require alteration for the ISG contract if or when they get signed up.
> ..."

It was anticipated that ISG were to be contractors in a follow on contract. On 23 August 2016 T & A issued contract instruction no 4 to the defender. The schedule of contract amendments was signed by both parties on 26 August 2016. The contract was signed on behalf of the pursuer on 2 September 2016.

The contract

[18] An explanatory note at the beginning of the printed standard form indicated that it is appropriate:

> "for larger works designed and/or detailed by or on behalf of the Employer, where detailed contract provisions are necessary and the Employer is to provide the Contractor with drawings; and with either a specification or work Schedule to define adequately the scope and quality of the work and where the degree of complexity is not such as to require bills of quantities".

[19] The Articles of Agreement included the following Recitals and Articles:

> "**Recitals**
>
> **Whereas**
>
> **First** the Employer wishes to have the following work carried out:
>
> Complete demolition of the 1960s building to existing basement level. Complete demolition of the Victorian building to existing basement level. Venetian building temporary infill works and left standing in a protected state. Existing sub-station to be protected and remain live.
>
> at 28-52 West Register Street and 15-19 South St Andrew Street, Edinburgh ('the Works') and has had drawings and either a specification or work Schedule prepared which show and describe the work to be done.
>
> **Second** the drawings are numbered/listed in Part 9 of the Schedule annexed to this Contract ('the Contract Drawings')...
>
> ...
>
> **Third** the Contractor .... :
>
> ...
>
> (B) has stated the sum he will require for carrying out the Works shown on the Contract Drawings and described in the Specification, that sum being the Contract Sum stated in Article 2, and has supplied to the Employer a Contract Sum Analysis or a Schedule of Rates on which that sum is based ('the Priced Document')...
>
> ...
>
> **Articles**
>
> **Now it is hereby agreed as follows**

Article 1: Contractor's obligations
The Contractor shall carry out and complete the Works in accordance with, and the rights and duties of the Employer and the Contractor shall be regulated by, these Articles of Agreement together with the contract particulars forming part of this Agreement (the 'Contract Particulars') and the schedule annexed hereto (the 'Schedule') including, without limitation, the Contract Documents as defined in the conditions bound in with this Agreement at Pages 20 to 74 (inclusive) (the 'Conditions') and listed in the Schedule Part 9 all of which Contract Documents are hereby incorporated in and form part of this Agreement.

Article 2: Contract Sum
The Employer shall pay the Contractor at the times and in the manner specified in the Conditions the VAT- exclusive sum of ... £1,010,795.63 ... ('the Contract Sum') or such other sum as shall become payable under this Contract.
...

Article 11: Modifications – Amendments to Contract
This Contract shall be interpreted subject to the terms of the amendments set out in Schedule Part 10 as annexed as relative hereto ('the Schedule'), and the provisions of this Contract and the Conditions are hereby modified accordingly."

[20] The Contract Particulars and the Conditions provided:

"Contract Particulars

Part 1: General
...
Third Recital The Pricing Option that applies is ... Pricing Option B

The Priced Document is ... the Contract Sum Analysis
...

Conditions

Section 1 Definitions and Interpretation

Definitions

1.1 Unless the context otherwise requires or the Agreement or these Conditions or the Schedule specifically provide otherwise, the following words and phrases, where they appear in capitalised form in the Agreement or these Conditions or the Schedule, shall have the meanings stated or referred to below:

Word or phrase	*Meaning*
...	
Agreement:	the Articles of Agreement consisting of the Recitals, the Articles and the Contract Particulars all as amended by Schedule 10 as annexed hereto.
...	
Contract Documents:	the Contract Drawings, the Agreement, Schedule and these Conditions and any other Contract Documents referred to in the Schedule of Contract Documents forming part of the Schedule to include: (where applicable) the Employer's Requirements, the Contractor's Proposals and the CDP Analysis; ... (where Pricing Option B applies) the Specification;
...	
Site:	the site comprising the Works at 28-52 West Register Street and 15-19 South St Andrew Square, (*sic*) Edinburgh
...	
Works:	the works briefly described in the **First Recital** (including, where applicable, the CDP Works), as more particularly shown, described or referred to in the Contract Documents, including any changes made to those works in accordance with this Contract.

...

Interpretation

Reference to clauses etc.

...

Agreement etc. to be read as a whole

1.3 The Agreement, these Conditions and the Schedule are to be read as a whole but nothing contained in the Specification/Work Schedule or the CDP Documents, nor anything in any Framework Agreement, shall override or modify the Agreement or these Conditions or the Schedule. In the event of any conflict or ambiguity between the terms of the Conditions and /or the SBCC Standard Form (including the Schedule), as amended by Schedule Part 10, and any other provision of this Contract, the provisions of the Conditions and/or the SBCC Standard Form (including the Schedule), shall take precedence.

...

Section 2 Carrying out the Works

Contractor's Obligations

General obligations
2.1 The Contractor shall carry out and complete the Works in a proper and workmanlike manner and in compliance with the Contract Documents, the Construction Phase Plan and other Statutory Requirements, and shall give all notices required by the Statutory Requirements.
...
2.1C The Contractor has had full opportunity to inspect the physical and other conditions at or affecting the Site and shall be deemed to have satisfied himself that the Site is in all respects suitable for the carrying out of the Works thereon. As between the Contractor and the Employer the Contractor shall not be entitled to rely upon any survey report or other document prepared by or on behalf of the Employer in relation to such matters and the Employer makes no representation or warranty as to the accuracy or completeness of any such survey report or document.

2.1D Any adverse ground conditions, artificial obstructions or contamination encountered during the execution of the Works shall be the sole responsibility of the Contractor (whether or not the same could reasonably have been foreseen at the date of this Agreement by a contractor exercising the standard of skill care and diligence referred to in Clause 2.1A) and no adjustment shall be made to the Contract Sum or to the Date for Completion in respect of such matters.

2.1E The Contractor shall ensure that the carrying out of the Works does not result in pollution or contamination of the Site or of any land or water adjoining the site. The Contractor shall further take all practicable steps to prevent the risk of migration of existing pollutants or contaminants to or from the Site. The Contractor shall procure the delivery to the Employer of any environmental surveys or Phase 2 contamination reports it commissions in connection with the Works and/or the Site together with further copies of those surveys addressed to the Employer and such other parties as the Employer shall reasonably require or letter of reliance granted in favour of Employer and such other parties as the Employer shall reasonably require."

Clauses 2.13 to 2.15 provided:

"**Errors, Discrepancies and Divergences**

Preparation of Employer's Requirements
2.13 Subject to clause 2.17, the Contractor shall not be responsible for the contents of the Employer's Requirements or for verifying the adequacy of any design contained within them.
CDP Documents - errors and inadequacy
2.14 .1 If an inadequacy is found in any design in the Employer's Requirements in relation to which the Contractor under clause 2.13 is not responsible for verifying its adequacy, then, if or to the extent that inadequacy is not dealt with in the Contractor's Proposals, the Employer's Requirements shall be altered or modified accordingly and, subject to clause 2.17, that alteration or modification shall be treated as a Variation.

.2 Any error in description or in quantity in the Contractor's Proposals or in the CDP Analysis or any error consisting of an omission of items from them shall be corrected, but there shall be no addition to the Contract Sum in respect of that correction or in respect of any instruction requiring a Variation of work not comprised in the Contractor's Designed Portion that is necessitated by any such error or its correction.

Notice of discrepancies etc.

2.15 If the Contractor becomes aware of any such error, omission or inadequacy as is referred to in clause 2.14 or any other discrepancy or divergence in or between any of the following documents, namely:

.1 the Contract Drawings;
.2 the Specification/Work Schedule;
.3 any instruction issued by the Architect/Contract Administrator under these Conditions;
.4 any drawings or documents issued by the Architect/Contract Administrator under any of clauses 2.9 to 2.12; and
.5 (where applicable) the CDP Documents,

he shall immediately give notice with appropriate details to the Architect/Contract Administrator, who shall issue instructions in that regard. Notwithstanding the foregoing, the Contractor shall review all Contract Documents, drawings or other subsequent information produced to amplify the Contract Documents on receipt thereof and shall bring to the attention of the Architect/Contract Administrator any discrepancies, or requirements for further information arising from them as soon as practicable and on an ongoing basis (where applicable). Failure to reasonably comply with this obligation shall prevent the Contractor from being entitled to payment of any additional monies in respect of problems which would have been notified had this obligation been complied with."

Section 4 of the Conditions provided:

"Section 4 Payment

Contract Sum and Adjustments

Work included in Contract Sum

4.1 The quality and quantity of the work included in the Contract Sum shall, save insofar as quantities are given in the Specification or Work Schedule, be that set out in the Contract Documents taken together, provided that if work stated or shown on the Contract Drawings is inconsistent with the description (if any) of that work in the Specification or Work Schedule, then that stated or shown on the Contract Drawings shall prevail. Where quantities are given for any items in the Specification or Work Schedule, the quality and quantity of the work included in the Contract Sum for those items shall be that set out in the Specification or Work Schedule.

..."

Section 5 made provision for variations to the Works and their valuation. Clause 5.6 provided:

> **"Measurable Work**
> **5.6.1** To the extent that a Valuation relates to the execution of additional or substituted work which can properly be valued by measurement and subject to clause 5.8 in the case of CDP Works, such work shall be measured and shall be valued in accordance with the following rules:
> .1 where the work is of similar character to work included in the Contract Documents the Valuation shall be consistent with the relevant rates, prices or amounts for such work in the Priced Document and shall include a fair allowance for any change in the conditions under which the work is carried out and/or any significant change in the quantity of such work from that included in the Contract Documents;
> .2 where the work is not of similar character to work set out in the Contract Documents, it shall be valued at fair rates and prices.
>
> **5.6.2** To the extent that a Valuation relates to the omission of work set out in the Contract Documents and subject to clause 5.8 in the case of CDP Works, the valuation of the work omitted shall be in accordance with the rates, prices or amounts in the Priced Document.
>
> **5.6.3** In any valuation of work under clauses 5.6.1 and 5.6.2, allowance, where appropriate, shall be made for any addition to or reduction of preliminary items of the type referred to in the Standard Method of Measurement."

[21] Part 9 of the Schedule to the contract contained the "Schedule of Contract Documents". Part (viii) of the latter Schedule comprised the "Schedule of Other Contract Documents". That Schedule was made up of five sections, *viz.* 1. Drawings 2. Tender Document and Tender Addendums (*sic*) 3. Contractor's Proposals 4. Correspondence 5. Contract Amendments.

[22] The contract drawings showed the existing layout and dimensions of each floor of the buildings, of the external elevations, and of the roofs. The drawings did not specify the materials which were incorporated in the buildings.

[23] The Tender Document included Conditions of Tender and Bills nos 1, 2 and 3. The Conditions of Tender provided *inter alia*:

"A CLARIFICATION OF WORK SCHEDULE ITEMS: in the event that the tenderer is unclear as to the intention or exact meaning of any particular item he should contact the quantity surveyor and obtain clarification prior to submitting his tender. With regard to any sections of the work schedule where qualifications to SMM7 are made, the Contractor shall be deemed to have made all the necessary allowances within the relevant rates in respect of the qualifications concerned.

...

G PRE-CONSTRUCTION INFORMATION: This document accompanies the Invitation to Tender and the Principal Contractor shall be deemed to have taken full cognisance of the information contained therein when planning, resourcing and pricing his submission.

H CONSTRUCTION (DESIGN AND MANAGEMENT) REGULATIONS 2015: All matters arising are deemed to be included within the tender."

[24] In "Bill no 1 - Preliminaries" the entries followed the numbering of SMM7. Item A12 was headed "THE SITE/EXISTING BUILDINGS". Entries grouped under that heading included:

"240 **HEALTH AND SAFETY HAZARDS**

• General: The nature and condition of the site/building cannot be fully and certainly ascertained before it is opened up. However the following hazards are or may be present:

- As detailed in Pre-Construction Information...

• Information: The accuracy and sufficiency of this information is not guaranteed by the Employer or the Employer's representative. Ascertain if any additional information is required to ensure the safety of all persons and the Works.

• Site staff: Draw to the attention of all personnel working on the site the nature of any possible contamination and the need to take appropriate precautionary measures.

...

295 **ASBESTOS**

• A separate asbestos removal contract will be completed prior to demolition works. The Employer has, as far as possible, removed all known asbestos containing materials, however, cannot guarantee that all asbestos within the building has been identified.

..."

Item A13 was headed DESCRIPTION OF THE WORK. Entries grouped under that heading included:

"110 **PREPARATORY WORK BY OTHERS**

- Works: Carried out under a separate contract and completed before the start of work on site for this Contract.
- Description: Asbestos removal and soft strip.

120 **THE WORKS**

- Description: The works comprise the following:
  - Complete demolition of the 1960s building to existing basement level (basement floor slab to remain).
  - Complete demolition of the Victorian building to existing basement level (basement floor slab to remain).
  - The Venetian building is to be retained and left standing in a protected state.
  - Protection of the existing sub-station to be left in place at end of contract.
  - All associated temporary works.

..."

Item A30 was headed "TENDERING/SUBLETTING/SUPPLY". A sub-heading was "PRICING/SUBMISSION OF DOCUMENTS". Entries grouped under that sub-heading included:

"210 PRELIMINARIES IN THE SPECIFICATION

- The Preliminaries/General conditions sections (A10-A50 inclusive) have been prepared in accordance with SMM7...

...

310 TENDER

- General: Tenders must include for all work shown or described in the tender documents as a whole or clearly apparent as being necessary for the complete and proper execution of the Works.

..."

Item A34 was headed SECURITY/SAFETY/PROTECTION. A sub-heading was "PROTECT AGAINST THE FOLLOWING". Entries grouped under that sub-heading included:

"...

370 **ASBESTOS CONTAINING MATERIALS**

- Duty: Report immediately any suspected materials discovered during execution of the Works.
  - Do not disturb.
  - Agree methods for safe removal or encapsulation.

371 **DANGEROUS OR HAZARDOUS SUBSTANCES**

- Duty: Report immediately suspected materials discovered during execution of the Works.
  - Do not disturb.

– Agree methods for safe removal or remediation.

..."

Appendix 2 to Bill no 1 provided:

> **"Qualifications of the Rules of the SMM and Definition of Terms**
>
> **Standard Method of Measurement of Building Works: Seventh Edition; Incorporating Amendments 1, 2 & 3**
>
> 1. GENERALLY
>
> (1) The Code of Procedure for Measurement of Building Works (SMM7 Measurement Code) which accompanies SMM7 should be read in conjunction with SMM7.
>
> (2) Where measured items refer to specification clauses the Contractor will be deemed to have included for all matters given in the specification reference, unless there is a specific mention in the measured item that some matters that are listed in the specification reference are included elsewhere.
>
> ..."

There followed certain qualifications of the General Rules and further qualifications to certain of the specific rules including some of the rules grouped under the heading "C Demolition/Alteration/Renovation".

[25] Bill no 2 was headed "C EXISTING SITE/BUILDINGS/SERVICES." The sub-heading was "C20 Demolition". Under that sub-heading there were entries relating to the demolition of each of the buildings. The first entry was a note:

> "Note: The 1960s and Victorian building are to be demolished down to the existing basement level (basement floor slabs and retaining walls to be retained) and arisings removed from site; refer to Will Rudd Davidson drawings"

The Bill items relating to demolition were also preceded by the following narrative:

> **"**Demolition works; carefully dismantle and take down existing structures; maintain stability of frame at all times; provide temporary supports and bracing as necessary; break up and remove arisings off site".

For each of the Victorian and 1960s buildings there were then separate items for stripping the roof and each of the floors, for demolishing the external walls, and for processing and

clearing arisings. There were a smaller number of items relating to the Venetian building.

The following entry was towards the end of the Bill:

> "**Additional cost items**
> Contractor to include here any additional items that may be required in order to comply with the tender drawings and preliminaries
> 1. ITEM
> 2. ITEM
> 3. ITEM"

[26] The Tender Document also included Pre-construction Information (rev 3) dated 22 December 2015. Section 2.0 was headed "Description of the project". Paragraph 2.1 provided:

> "**2.1 Project description and programme details**
> This project is for the demolition of an existing office building and retail area with a section of listed building and facade being retained; prior to the construction of new office and retail building. This phase of the project is for Demolition only; full details of the works to be carried out are included within the project brief issued by the Client as part of the tender package and within the Demolition and Sequencing Plan issued by the project Structural Engineer.
>
> The scope of works includes but is not limited to;
> ...
> • Review existing asbestos register and liaise with the Project Manager to ensure any residual asbestos is identified prior to demolition and removed safely in accordance with Health and Safety Guidance.
> ...
> • Demolition and protection of buildings as identified on the scope of demolition works plan.
> **2.1.1 Demolition of existing buildings:**
> The Victorian stone built and 1960s steel framed buildings are to be demolished down to basement level and all excess arising's removed from site. Following detailed surveys a demolition strategy will be developed to ensure buildings are taken down in a safe manner in accordance with BS 6187-2011. Given the close proximity of the building being demolished and the Venetian building being retained to adjacent buildings, and, to ensure the safety of the public and site operatives, demolition works must be carefully planned and carried out complying with the Health and Safety at Work Act and all other legislation at all times.
> ...
> **2.1.4 Note:**
> * **Asbestos removal works will have been completed as part of the previous phase of works.** On projects of this nature the chance of finding additional asbestos during demolition is high; the PC must take this into account in their method statements

and risk assessments to ensure that operatives and local residents are not put at risk during demolition work.
...
2.6 Extent and location of existing records and plans
...
Asbestos Register/Surveys:
- Further asbestos survey and removal works are being carried out at the time of producing this Pre Construction Information. Updated asbestos information will be available from the Client prior to work commencing on site.

..."

[27] Section 4.0 of the Pre-construction Information was headed "4.0 Environmental restrictions and existing on-site risks (safety & health hazards)". Paragraphs 4.5, 4.6 and 4.7 provided:

"**4.5 Asbestos, including results of surveys (particularly where demolition involved)**
Prior to site start a full Asbestos Refurbishment and Demolition Survey was carried out and all known asbestos removed. If the Principal Contractor or Contractors find any material suspected to be asbestos whether or not they have been identified within an asbestos survey, work must stop and further asbestos survey work carried out to identify the suspected material. All asbestos materials must be removed in accordance with CAR 2012 and HSG264; operatives must be made aware of the above as part of their site induction.

4.6 Existing structures containing hazardous materials
The only hazard material contained in the building structure was asbestos which will all have been removed prior to the building being demolished.

4.7 Pollution control and waste management
The Principal Contractor should produce an environmental risk assessment as part of their construction phase plan and ensure that waste and pollution are avoided, carefully controlled and monitored. All waste leaving the site must have the relevant waste transfer notes; the Principal Contractor is responsible for carrying out relevant checks on waste carriers..."

Section 5.0 was headed "Significant design and construction hazards". Paragraph 5.4 provided:

"**5.4 Materials and operations requiring particular precautions via RAMS**
- Asbestos.

..."

RAMS is an acronym for Risk Assessment Method Statement. Section 6.0 was headed "The Health and Safety File". It provided:

> "Clients, Designers, Principal Contractors, other Contractors and Principal Designers each have legal duties in respect of the Health and Safety File:
> **6.1** Principal Contractors and the Principal Designer must prepare, review, amend or add to the file as the project progresses, and submit the file to the Client at the end of the project;
> ...
> **6.5** The contents of the Health and Safety File:
> ...
> b) any residual hazards which remain and how they have been dealt with (for example surveys or other information concerning asbestos; ...
>
> This information should be recorded as works proceed in order that the Client and team are made aware of anything not previously known.
> ..."

Section 9.0 was headed "Design Risk Management Information". It provided:

> "...
> **9.3 Asbestos Information**
> All known Asbestos will have been removed prior to the start of demolition; updated information will be provided prior to the commencement of work on site.
> ..."

[28] The Schedule of other Contract Documents also contained the Contractor's Proposals, which included the Bills as priced by the defender. In addition it contained correspondence, including the email exchange of 9 and 10 March 2016 already referred to. The Schedule of Contract Amendments appears to have been included both in the Schedule of other Contract Documents and as Part 10 of the Schedule to the Contract. Those amendments included the insertion of clauses 2.1C, 2.1D and 2.1E in the Contract Conditions.

SMM7

[29] General rules 1, 2, 10 and 11 of SMM7 state:

"**1. Introduction**

1.1 This Standard Method of Measurement provides a uniform basis for measuring building works and embodies the essentials of good practice. Bills of quantities shall fully describe and accurately represent the quantity and quality of the works to be carried out. More detailed information than is required by these rules shall be given where necessary in order to define the precise nature and extent of the required work.

1.2 The rules apply to measurement of proposed work and executed work.

2. Use of the tabulated rules

Generally
2.1 The rules in this document are set out in tables. Each section of the rules comprises information (to be) provided, classification tables and supplementary rules. …

2.2 Horizontal lines divide the classification table and supplementary rules into zones to which different rules apply...
...
10. Procedure where the drawn and specification information required by these rules is not available
...
10.2 Where work cannot be described and given in items in accordance with these rules it shall be given as a Provisional Sum and identified as for either defined or undefined work as appropriate.

10.3 A Provisional Sum for defined work is a sum provided for work which is not completely designed but for which the following information shall be provided:
(a) The nature and construction of the work.
(b) A statement of how and where the work is fixed to the building and what other work is to be fixed thereto.
(c) A quantity or quantities which indicate the scope and extent of the work.
(d) Any specific limitations and the like identified in Section A35.

10.4 Where Provisional Sums are given for defined work the Contractor will be deemed to have made due allowance in programming, planning and pricing Preliminaries. Any such allowance will only be subject to adjustment in those circumstances where a variation in respect of other work measured in detail in accordance with the rules would give rise to adjustment.

10.5 A Provisional Sum for undefined work is a sum provided for work where the information required in accordance with rule 10.3 cannot be given.

> 10.6 Where Provisional Sums are given for undefined work the Contractor will be deemed not to have made any allowance in programming, planning and pricing Preliminaries.
>
> **11. Work not covered**
> 11.1 Rules of measurement for work not covered by these rules shall be stated in a bill of quantities. Such rules shall, as far as possible, conform with those given in this document for similar work."

[30] Rule C of SMM7 is headed "Demolition/Alteration/Renovation". The first table relates to C10 Demolishing structures and C30 Shoring. For demolition of structures the Bill should give a description sufficient for identification of what is to be demolished, the levels to which they are to be demolished, and items showing "6 Toxic or other special waste." The second Table relates to C20 Alterations - spot items. The requirements are similar to those for C10/C30. The corresponding Bill item for toxic or other special waste is item 4.

Contract instructions 5 and 6

[31] On 31 August 2016 at T & A's request the defender obtained a quotation from another contractor, Enviraz, for the removal of asbestos from three specified areas. The total quoted cost was £13,020 excluding VAT. On 1 September 2016 T & A instructed the defender to proceed with that work (contract instruction 5).

[32] On 6 September 2016 at T & A's request the defender obtained a further quotation from Enviraz for more substantial asbestos work involving the removal and disposal of concrete façade panels and associated asbestos debris. The total quoted cost was £61,870 excluding VAT. On 8 September 2016 T & A instructed the defender to proceed with that work (contract instruction 6).

[33] The work instructed in each of those contract instructions was included in interim valuations certified by T & A. However, in November 2016 T & A decided that asbestos

removal work was included within the Works which the defender had contracted to perform and a pay less notice relating to the instructions was issued to the defender.

The material contentious matters of fact

What, if any, assurances were given by Mr Castle?

[34] As already indicated, the most contentious factual issue is the terms of the discussion between Mr Castle, Mr Peat and Mr Bell relating to the proposed incorporation of clauses 2.1C and 2.1D.

[35] Mr Castle indicated that at the meeting on 12 August 2016 Mr Bell and Mr Peat had been very concerned about the possibility of contamination below the sub-structure slab. The dialogue had been about contamination "in the broadest sense". It had not focussed on asbestos. Mr Castle believed he assuaged the concerns about contamination below the slab by pointing out that the Works did not involve breaking the slab. He recalled there also being a brief discussion about how any "new asbestos" would be treated contractually. He had said to Mr Bell and Mr Peat that in his opinion the matter would depend upon whether or not "contamination" in clause 2.1D included asbestos. If it did, the defender was at risk in that regard under the clause. If it did not, any asbestos removal would probably be treated as a variation. He had had no fixed view on the matter and he had not expressed any concluded opinion either way. He had not been authorised by the pursuer to express any such concluded view. He was clear that he did not confirm that asbestos removal would be paid for as a variation. On 17 August 2016 he had a telephone conference call with Mr Bell to discuss clauses 2.1C and 2.1D. At the end of the call Mr Bell indicated that the defender was content with the clauses but that he would have to confirm this with Mr Peat and another director. Mr Bell's email of 19 August had followed. That email had referred to

an understanding that the works did not include removing or disturbing the basement. There had been no mention in the email of any understanding that asbestos was not a contaminant or that if asbestos was discovered it would be a variation. There had been no mention of any such understanding at subsequent meetings with representatives of the defender, or in correspondence from the defender after the pay less notice.

[36] Mr Bell indicated that he and Mr Peat had been concerned that the acceptance of clause 2.1D should not make the defender responsible for contaminants in the ground or for asbestos. Mr Bell's main concern at the time had been the possible presence of oil or other hydrocarbons in the ground, but he had also raised the question of asbestos. Mr Castle had said that as the works did not involve breaking into the basement slab the risk to the defender was minimal. He had agreed with Mr Bell that asbestos was not "contamination" in terms of clause 2.1D, and he had said that any further asbestos found would be a variation. The defender had relied on these assurances in reaching its decision to agree to the clause 2.1C and clause 2.1D amendments.

[37] In his witness statement Mr Peat indicated that the discussion with Mr Castle had taken place on 26 August 2016 when Mr Peat had signed the schedule of contract amendments. In his oral evidence he accepted that he must be mistaken as to the date of the discussion. He and Mr Bell had been concerned that the defender would not become responsible for any hydrocarbons which might be in the ground. They also aired their view that the reference to "contamination" in clause 2.1D did not include any asbestos which might be discovered during demolition. Mr Castle said that the clause related to the possibility of ground contamination under the basement slab. He indicated that as the basement slab was not to be broken into by the defender and was to be left *in situ*, the defender was not at risk in relation to hydrocarbons. He also said that "contamination" did

not include asbestos. He confirmed that if the defender encountered asbestos during the demolition it would be treated as a variation. It had been because of Mr Castle's assurances that Mr Peat had signed the Schedule of Amendments to the contract on 26 August 2016.

Subsequent events

[38] Mr Castle indicated that at the time he issued contract instructions 5 and 6 he had not applied his mind to the provisions of the contract. His concern had been that progress should be made with the contract works so that there was no delay to completion or to the start date of the follow-on contract. However, when he did subsequently consider the matter and discuss it with colleagues he concluded that the asbestos removal work was indeed within the scope of the Works and was not a variation. Accordingly, the pay less notice had been issued.

The evidence of Mr Hunter and Mr Rodger

[39] Both witnesses agreed that the form of contract which had been used anticipated that it would be executed without the need for a fully itemised bill of quantities describing the work for which the agreed contract sum was payable. They concurred that SMM7 appeared to have been followed at least to some extent in Bill no 1 and Bill no 2. Both also agreed that in the JCT with quantities standard form contract compliance with SMM7 was mandatory unless the contract contained a stated departure from the rules (clause 2.13.1). Mr Rodger also explained that clause 2.14.1 of the with quantities standard form provides that where there is an unstated departure from SMM7 the departure or error is to be corrected, and clause 2.14.3 provides that the correction, alteration or modification shall be treated as a variation. Mr Hunter agreed with those two propositions in cross-examination. He

maintained, however, that when SMM7 was being used but there was a departure from it, it was normal practice to explain that expressly. Mr Rodger also noted that in the with quantities version the direct cost of such a variation would be recoverable by the contractor (clause 4.3.1.1), it would be a relevant event for the purposes of the award of an extension of time (clause 2.29.1), and it would be a relevant matter for the recovery of loss and expense (clause 4.24.1). In the without quantities version there was no obligation to use SMM7, and any unstated departure from SMM7 in a specification was not an error falling to be corrected. Mr Hunter agreed with Mr Rodger that the without quantities version of the standard form did not contain provisions which mirrored those of clauses 2.13.1, 2.14.1 and 2.14.3 of the with quantities version, but he pointed to the terms of clause 2.15 of the without quantities conditions which in his view might be relied upon by the contractor in similar circumstances.

[40] Both witnesses were at one that if SMM7 was applied and the removal of known defined quantities of asbestos was to be priced, an item for removal would be included as per the fourth column of C10 (where the contract was for demolition) or as per the fourth column of C20 (where the contract was for alterations or spot items). Where, on the other hand, what was to be priced was the removal of unknown asbestos which might be discovered during demolition, in terms of General Rule 10 of SMM7 the appropriate course would be to include a provisional sum item in the Bill.

[41] Mr Rodger's view was that demolition contracts were generally less complicated than construction contracts when it came to describing the work which had to be done. Mr Hunter did not accept that proposition.

[42] Whilst disavowing the intention of giving evidence on matters of law, both witnesses offered views as to the proper construction of the contract, in particular whether the

contract provided that SMM7 required to be used, the scope of the Works, and the meaning of the word "contamination" in clause 2.1D. On the latter point, each witness's view was premised on the ordinary meaning of the word. Neither suggested that the word had a special technical meaning.

Counsel for the pursuer's submissions

[43] Lord Davidson submitted that the contract was a lump sum contract. While the tender documents had included documents in the form of bills of quantities, it was a without quantities contract and the bills did not have all of the functions of bills in a with quantities contract. The Works included the "complete demolition" of the Victorian and 1960s buildings to existing basement levels. The lump sum price was an inclusive price for all work which was necessary to achieve that result (*Wilson* v *Wallace* (1859) 21D 507; *Hudson's Building and Civil Engineering Contracts* (11th ed.) at para 4-039 *et seq*; *Emden's Construction Law,* paras 8.14 - 8.15; *Keating on Construction Contracts* (10th ed.), para 4-044; *Stair Memorial Encyclopaedia, The Laws of Scotland,* vol 3, Building Contracts, para 34). The defender was aware of the risk that the buildings might contain unknown asbestos over and above the two particular known quantities it had been asked to price separately. That risk had been made clear in the contract documents and in the reports provided to the defender before the contract was concluded. On a fair reading of the contract as a whole a reasonable person in the position of the parties at the time of contracting would have understood that all known asbestos identified in the two RPS surveys (other than the asbestos referred to in the emails of 8 and 9 March 2016) would have been removed prior to the demolition work, but that the defender bore the risk of other unknown asbestos being discovered during demolition. Reference was made to *Oceanbulk Shipping & Trading SA* v *TMT Asia Ltd &*

Others [2011] BLR 1, per Lord Clarke JSC at paras 39-40. Such an understanding was plain even if no regard was had to the terms of clause 2.1D. Clause 2.1D put the matter beyond question. The word "contamination" in that clause had its ordinary meaning. Asbestos encountered during demolition of the buildings was "contamination encountered during the execution of the Works". It was a noxious and hazardous substance which required to be removed taking appropriate precautions.

[44] Counsel submitted that Mr Castle had impressed as a careful and measured professional. Where his evidence differed from the evidence of Mr Bell and Mr Peat, Mr Castle's account should be accepted as being more reliable. It was implausible that a careful professional like Mr Castle would have said that any asbestos discovered would be a variation to the contract, or that asbestos would not be contamination in terms of clause 2.1D. His account of events was more consistent with the contemporaneous documentation and with the defender's subsequent actings. Mr Bell's email of 19 August 2016 accepting the clauses made no reference to the statements which it was now claimed that Mr Castle had made. On the contrary, it explained that the defender was prepared to accept the clauses "mainly due to the fact that we are not removing or disturbing the basement". When the pay less notice had been served the defender had not contended that Mr Castle had made the disputed statements. There was no mention of the statements in a letter from the defender's agents to the pursuer's solicitors dated 20 January 2017. There was no mention of them by the defender at a meeting on 10 February 2017 to discuss the dispute (which was attended by representatives of the pursuer, the defender, and T & A). There was no mention of the statements in Mr Bell's witness statement. The matter had been introduced to the case by very late adjustment of the defences and by lodging the witness statement of Mr Peat (19 of process) days before the proof.

[45] Where the evidence of Mr Rodger and Mr Hunter differed, that of Mr Rodger should be preferred. He had been the fairer and more open of the two. He was content to answer questions on the basis of the hypotheses which were put to him. By contrast Mr Hunter was reluctant to do so and was generally more combative under cross-examination. It accorded with common sense that the description of the works in a demolition contract was usually more straightforward than the description of the works in a construction contract. The role of SMM7 in a without quantities lump sum contract was quite different from its role in a with quantities contract. In the former there was no formal measurement - there was only the lump sum.

Counsel for the defender's submissions

[46] Mr Barne submitted that the contract was a lump sum contract to perform defined work. Whereas in a with quantities contract the bills of quantities define the scope of the works, in a without quantities contract the contract documents taken together describe the quantity and quality of the work included in the contract sum (*Keating on Construction Contracts* (10th ed.), at para 20-036). In terms of condition 4.1:

> "The quality and quantity of the work included in the Contract Sum shall ... be that set out in the Contract Documents taken together..."

In this case the Works were defined by the Specification and the drawings. The Specification was the three bills which had been issued as part of the tender. The completed bills which the defender had returned were the Contract Sum Analysis. There was provision in the contract (clause 5 of the Conditions) for variation of the Works. The position was similar to that in *Mascareignes Sterling Co Ltd* v *Chang Cheng Esquares Co Ltd* [2016] BLR 512, [2016] UKPC 21. In that case, like the present, the contract was a lump sum contract but the

contract documents included priced bills of quantities. In delivering the judgment of the Board Lord Hodge observed at para 21:

> "... In the present case the lump sum was made up of elements set out in the fully priced bills of quantities which the arbitrator held were part of the contract. There was thus a definition of the works which were the subject of the lump sum, from which the existence of additional or substituted work could be identified."

Reference was also made to *Emden's Construction Law*, para 6.23 and *C Bryant & Son Ltd* v *Birmingham Hospital Saturday Fund* [1938] 1 All ER 503.

[47] In the bills the Works had been described and defined using SMM7, except where the application of SMM7 had been expressly qualified. In terms of SMM7 the removal of toxic or other special waste was to be described and measured as a separate item. In the event of it not being possible to do that, General Rule 10 directed that it be included as a provisional sum. At the end of the day Mr Hunter and Mr Rodger had not disagreed that that ought to be the result if SMM7 was applied. As Judge Thornton QC put it in *Demolition Services Ltd* v *Castle Vale Housing Action Trust* 79 Con. L.R. 55 at para 39:

> "9.3 *Standard method of measurement*
> 39. The overall purpose of SMM7 is stated to be a means of providing bills of quantities that fully describe and accurately represent the quantity and quality of the works to be carried out. The intention is that the bills of quantities should define the precise nature and extent of the required work. To this end, each item of work should be prepared in the way provided for in the rules which follow. Where a completed structure is to be demolished, the demolition of toxic or other special waste should be provided for in a separate item from any other work involved in that demolition. Where the available information does not enable the work to be fully described and accurately quantified, detailed provisions for the creation of provisional sums for such work are set out. The relevant rules provide that such provisional sum work is to be for either defined work or undefined work. Defined work is work that can be described so that the scope and extent of the work can be quantified and its location in the building can be provided for. The contractor is deemed to have made due allowance for such work in his programming and planning and in the pricing of his preliminaries. All other provisional sum work is to undefined work for which no such allowance is to have been made."

[48] In so far as Mr Rodger proffered views as to the proper construction of the contract and made comparison with the terms of the JCT with quantities contract, the objection taken to his evidence was insisted upon. In relation to the former matter he was usurping the function of the court, and in relation to the latter his evidence was entirely extraneous to the task which the court faced (*Kennedy* v *Cordia Services LLP* 2016 SC (UKSC) 59, in the joint judgment of Lord Reed JSC and Lord Hodge JSC at paras 38, 49 and 59).

[49] Since there was no specific item or provisional sum in the Specification for the removal of toxic or other special waste, there had been no item against which to price asbestos removal work or make allowance for the risk that unknown asbestos would be discovered during the Works. The asbestos removal was not part of the Works.

[50] In construing the contract the defender relied on the matrix of fact at the time of contracting including the use of SMM7; the provision which was made for the removal of two specific quantities of asbestos; the regulatory context (including the Control of Asbestos Regulations 2012 ("CAR"), the Construction (Design and Management) Regulations 2015 ("the CDM Regulations"), and the HSE's Guidance "Asbestos: The Survey Guide" (HSG264)); and the asbestos surveys which had been provided to the defender. A number of the entries relating to asbestos in the contract were explicable having regard to the regulatory context and the regulatory obligations incumbent upon the pursuer and the defender. Bill item A12/295 was an example. Those entries were directed towards establishing processes that ensured that the pursuer and the defender fulfilled their respective regulatory duties. On a proper construction of the contract those provisions did not enlarge the scope of the Works. At the time of tendering the defender had not been provided with the updated surveys following completion of the soft strip and asbestos removal works.

[51] The pursuer's construction of the contract flouted business common sense. It involved the defender gambling on the absence of further asbestos, running the risks of (i) having to undertake potentially costly and time-consuming work for which no allowance had been made in the bill items or the tender, and (ii) exposing itself to the risk of liability for substantial liquidate damages (*cf Demolition Services Ltd* v *Castle Vale Housing Action Trust, supra,* per Judge Thornton QC at para 42).

[52] In relation to clauses 2.1C and 2.1D, where their evidence differed the evidence of Mr Peat and Mr Bell should be preferred to that of Mr Castle. Mr Castle's issuing of contract instructions 5 and 6 was consistent with Mr Peat and Mr Bell's account of what was said. It tended to confirm that at the time of the meeting Mr Castle did indeed consider that asbestos removal would be a variation. It was implausible that the defender would have agreed to the inclusion of the clauses had they not been given the assurances which Mr Bell and Mr Peat say Mr Castle gave. In agreeing to the inclusion of the clauses the defender relied on what Mr Castle said about asbestos not being contamination and about further asbestos work being a variation. In those circumstances the pursuer was personally barred from relying on the clauses. The lateness of Mr Peat's witness statement was because it had been introduced once it became clear that the pursuer proposed to rely upon the clauses.

[53] In any case, neither clause assisted the pursuer. Clause 2.1C concerned the contract Works. It did not vary or extend the definition of the Works. It did not provide any basis for maintaining that asbestos removal works were not part of the Works (*cf Demolition Services Ltd* v *Castle Vale Housing Action Trust*, *supra*, per Judge Thornton QC at paras 44 - 47; *Linklaters Business Services* v *Sir Robert McAlpine Ltd* 133 Con LR 211, [2010] EWHC 2931 (TCC), per Akenhead J at paras 150-155). Moreover, the basis of the defender's claim in respect of asbestos work was not founded on reliance on any report provided to it by the

pursuer. Clause 2.1D was not relevant to the issue between the parties. Asbestos within the buildings was not "contamination". Contamination involved defilement, being sullied, tainted or infected by contact, especially with noxious substances (Oxford English Dictionary). In some circumstances asbestos could be contamination, eg when asbestos waste had been deposited on land, because then the land would be defiled. However the asbestos had not affected the buildings in that way. Besides, the contract dealt separately with asbestos and contamination. It was clear that they referred to different things, and that the latter did not include the former.

Decision and reasons

[54] It is convenient to begin by providing my assessment of the credibility and reliability of the witnesses. I am content that each of the witnesses was doing his best to assist the court and that no issues of credibility arise. However, as will be clear from what I say below, I am not satisfied that all of the evidence is reliable.

[55] At the meeting between Mr Castle, Mr Bell and Mr Peat the focus of the discussion was the possibility of hydrocarbons under the basement slabs. Asbestos was mentioned very much as a secondary matter. I am not satisfied from Mr Peat's witness statement or from his oral evidence that he has a clear recollection of precisely what was said during the discussion with Mr Castle, or that such recollection as he does have is reliable. It is difficult to reconcile Mr Peat's absolute conviction as to the correctness of his recollection with the content and manner of his evidence. His account in his witness statement of when the discussion took place was plainly wrong, and he accepted that during his oral evidence. In my view this cannot be dismissed as a mere slip as to the date on which the relevant discussion took place. In his witness statement he also indicated that the discussion and the

signing of the amendments took place on the same day. These errors reinforce my clear impression that Mr Peat had no real recollection of precisely what was said during the discussion. Mr Bell's recollection of matters seemed better than Mr Peat's. However, ultimately I am not convinced that I ought to accept his evidence on the disputed matters. Like Mr Peat, he expressed absolute conviction that his account of what Mr Castle had said was correct. He was not prepared to concede that there was any possibility of any degree of misunderstanding on his part. I find Mr Bell's certitude difficult to accept, particularly as the main focus of the meeting was on hydrocarbons and very little was said about asbestos. By contrast, Mr Castle impressed me as a careful and impressive witness. The manner and content of his evidence inspired confidence in its reliability. I find it implausible that he would have made the incautious and unqualified statements about asbestos which Mr Peat and Mr Bell say he did. It would have been surprising if a professional in his position had been prepared to say the things it is suggested that he said. His evidence seems more in keeping with the more guarded approach which I would have expected a professional person in his position to have taken in the circumstances. I think it likely that Mr Bell and Mr Peat's recollections of what was said have developed with the passage of time to their present certitude. While I do not doubt that they now truly believe that Mr Castle said that asbestos is not contamination and that if new asbestos was discovered it would be treated as a variation, I do not accept that that was what was said. In my view the contemporaneous documentary evidence – Mr Bell's email of 19 August 2016 - is more consistent with Mr Castle's account than with the accounts of Mr Bell and Mr Peat. If Mr Bell's account is correct and the suggested assurances were important and were given by Mr Castle, I find it surprising that there was no reference at all to them in Mr Bell's email. I also think it odd

that the suggested assurances were not raised by the defender when the pay less notice was served in November 2016, or in the discussions in January and February 2017.

[56] I am not persuaded that the issuing of contract instructions 5 and 6 undermines Mr Castle's reliability. I accept his account of the circumstances in which he gave the instructions, *viz* that his overriding concern at the time was for progress to be made and for deadlines to be met. I also accept that it was only later when he and his colleague applied their minds to the contract terms that he formed the view that the asbestos removal work was within the scope of the works and was not a variation. In my opinion, while ideally a considered view ought to have been taken at the time, it is not uncommon that work which has been treated as a variation in an interim valuation is later recovered as an overpayment when its true character is determined (see eg *Demolition Services Ltd* v *Castle Vale Housing Action Trust*, *supra*, at para 10).

[57] It follows that the defender has not established its case of personal bar.

[58] Both Mr Hunter and Mr Rodger sought to assist the court and to comply with their duties as skilled witnesses. However, I agree with Lord Davidson that Mr Rodger was the more open witness, and that he fairly accepted matters which ought to have been accepted on the hypotheses which were put to him. Mr Hunter was less ready to make appropriate concessions. Perhaps inevitably given the subject matter of the dispute, at times both witnesses slipped into offering evidence as to the meaning and effect of the contract. That evidence is inadmissible - the proper construction of the contract is a matter of law for the court to decide - and I sustain each party's objection to those parts of the evidence of its opponent's witness. However, Mr Barne's further objection that Mr Rodger's evidence as to the terms of the JCT with quantities standard form is inadmissible is not well founded in my view, and I repel it. The context in which that evidence was given was that Mr Hunter had

raised the issue of normal practice where SMM7 applied. In those circumstances it was legitimate for Mr Rodger to make the point that in with quantities JCT contracts the suggested normal practice is one which has a clear contractual foundation. I reject the contention that that evidence is entirely extraneous to the matters which the court has to decide.

[59] That brings me to the crux of the dispute - who bore the risk under the contract if additional unknown asbestos was discovered in the course of demolition? The answer depends upon how a reasonable person in the position of the parties at the time of contracting would have interpreted the contract's terms. Given the defender's signature of the contract on 1 August 2016, both parties signing of the Schedule of Amendments on 26 August 2016, and the parties' actings, I think that the relevant time is the period up to the latter date.

[60] The contract requires to be read as a whole (clause 1.3 of the Conditions). The Works are defined in clause 1.1 of the Conditions as being the works briefly described in the First Recital (which description includes "complete demolition" of the 1960s and Victorian buildings to basement level), as more particularly shown, described or referred to in the Contract Documents. In turn, the Contract Documents are defined as being the Contract Drawings, the Agreement, Schedule, Conditions and any other Contract Documents forming part of the Schedule including the Specification. The relevant definition of the Specification is the unpriced specification. I agree with Mr Barne that the unpriced tender bills are the Specification, and that the Contract Sum Analysis is the priced bills.

[61] The court's task is to ascertain the objective meaning of the language in which the parties have chosen to express their agreement. This is a unitary exercise involving an

iterative process (*Wood* v *Capita Insurance Services Ltd* [2017] AC 1173, per Lord Hodge JSC at paras 10-15).

[62] In my opinion, at the time of contracting a reasonable person in the position of the parties would have known that, notwithstanding the soft strip and asbestos removal, there remained a risk of further, unknown, asbestos being present within the buildings which were to be demolished. In my view that was clear from a fair reading of the Contract Documents as a whole. It was also clear from the terms of the surveys which the pursuer had provided to the defender. The reasonable person would also have understood that the scope of the work which the defender undertook to perform for a lump sum price included the removal of any presently unknown asbestos which might be encountered during demolition.

[63] The contract was a contract to perform the Works for a lump sum price. While the pursuer chose to set out the Specification in three documents which take the form of bills of quantities, they are not truly bills of quantities. The uncompleted bills provide a description of the contract works, but it is the Contract Documents as a whole which require to be considered. The completed bills (the Contract Sum Analysis) provide a breakdown of the lump sum to assist the pursuer to assess the lump sum tender, but they are not to be used to measure and value the work.

[64] The Works are described in Bill no 2 as including the complete demolition of the Victorian and 1960s buildings to basement level with all arisings being removed from the Site. In my opinion the ordinary and natural reading of that work description is that the buildings are to be demolished and all the demolished materials are to be removed from the Site. That reading is also consistent with the various provisions in the Contract Documents which highlight to the defender the risk of the presence of residual asbestos at the Site, and

the need for it to carry out inspection, survey and removal (see in particular paras 2.1 and 4.5 of the Pre-construction Information).

[65] I am not persuaded that the provisions in the Contract Documents which highlight the risk of residual asbestos are merely dealing with regulatory matters or that they have no bearing upon the scope of the works. When read as a whole, and taken together with the other provisions of the contract, I think it clear that they do not have the limited role which Mr Barne suggests.

[66] Nor do I think that the defender obtains any real assistance from the fact that separate specific provision was made for the removal of the asbestos referred to in the email exchange of 8 and 9 March 2015. That dealt with known asbestos which the tender documents had envisaged would be removed by the soft strip/asbestos removal contractors. It seems to me that unknown asbestos is a very different matter.

[67] Further, I am not convinced that SMM7 is as important to the interpretation of the contract as Mr Barne (and Mr Hunter) maintained. The contract conditions here do not include provision that compliance with SMM7 is mandatory unless the contract contains a stated departure from its rules. That is one of the respects in which the conditions differ from the with quantities version of the JCT standard form contract conditions (see clause 2.13.1 of the latter conditions). Clause 1.5 of the standard form conditions in *Demolition Services Ltd* v *Castle Vale Housing Action Trust, supra,* (JCT Intermediate Form (1984 edn.)) was similar to clause 2.13.1 of the JCT with quantities conditions (see para 18 of the judgment in that case). Where such provision is made in a contract the "normal practice" (which Mr Hunter suggested was followed when SMM7 was used) has a clear contractual basis. The context here is different. In my opinion it is necessary to bear that in

mind when considering the effect of such references to SMM7 as there are in the Contract Documents.

[68] It is common ground that Bill no 3 expressly states that it has not been prepared in accordance with SMM7. On the other hand, Bills nos 1 and 2 use SMM7 headings and numbering. Bill no 1 states that items A10 - A50 have been prepared in accordance with SMM7. Appendix 2 to that Bill sets out qualifications of the Rules of SMM7. Those qualifications include some qualifications of the General Rules and of Rule C. Bill no 2 itself contains no express reference to SMM7. The reasonable inference is that SMM7 has been used to prepare items A10 - A50 in Bill no 1 and the items in Bill no 2, but not the remaining items in Bill no 1.

[69] In my view it is of no significance that no item for removal of hazardous material was included in the C20 bill items in Bill no 2. Such an item would only have been appropriate if known asbestos which could be properly described was being included within the Works. The asbestos we are concerned with was unknown and could not be specified at the time of contracting.

[70] If the contract had provided that SMM7 applied in respect of provisional sums listed in A54 of Bill no 1 unless (and to the extent that) it was expressly excluded, there would have been greater scope for arguing that unknown asbestos was not included within the work described in the Bill. On that scenario it could have been maintained that if unknown and undefined asbestos removal was within the scope of the work a provisional sum for it ought to have been included. The difficulty for the defender is that the contract did not so provide. Indeed, as already indicated, in my view the correct inference from the express provision that SMM7 has been used to prepare items A10 - A50 in Bill no 1 is that it has not been used to prepare the remaining items in that Bill.

[71] I do not accept Mr Hunter's evidence that there is a normal practice in the terms he described where, as here, the contract is a without quantities one. Neither am I satisfied that the reasonable person in the position of the parties at the time of contracting would have understood the position to be as Mr Hunter maintained it to be. Nor am I persuaded by Mr Hunter's (rather tentative) suggestion that clause 2.15 of the contract conditions might provide similar redress for a contractor as clauses 2.13.1, 2.14.1 and 2.14.3 of the with quantities conditions. In my opinion it is clear that it does not. The difference of view as to whether demolition contracts are generally more straightforward than construction contracts seems to me to be unimportant to the determination of the issue I have to decide, but I incline to the opinion that Mr Rodger's view accords with common sense and is to be preferred. For what it is worth, the introductory note to the without quantities standard form indicates its suitability where the degree of complexity is not such as to require bills of quantities.

[72] Clause 2.1D also points strongly towards the pursuer's suggested construction of the contract. In my opinion a reasonable person in the position of the parties would have understood "contamination" to include asbestos in the buildings. I am not persuaded that the contract treats the presence of asbestos and the presence of contamination as being mutually exclusive matters. Whether or not the asbestos had been an integral part of the design of the buildings, the question is whether its presence constitutes contamination. The reasonable person would have known that asbestos is a highly noxious substance; and that if it was present in the buildings it would require to be disturbed and removed for the buildings to be demolished. The asbestos would present a serious hazard to the health of those in the vicinity of the demolition work unless appropriate precautions were taken. As a matter of ordinary, everyday language a building which is to be demolished but which

contains asbestos is a contaminated building (*cf New Ingliston Limited* v *The City of Edinburgh Council* [2017] CSOH 37, per Lord Tyre at paras 30 and 31). Asbestos within such a building is one of the sorts of contamination issues which I would expect an environmental risk assessment (see para 4.7 of the Pre-construction Information) or a Phase 2 contamination report (see clause 2.1E of the Conditions) to refer to. Moreover, the risk of the presence of asbestos was one of the health and safety hazards flagged up in the Pre-construction Information. In Bill no 1 those health and safety hazards were referred to in item "A12 240 Health and Safety Hazards". I think it is not without significance that the item goes on to direct that the nature of any possible "contamination" and the need to take appropriate precautionary measures should be drawn to the attention of Site staff. In my view the contamination there referred to includes asbestos contamination.

[73] In the whole circumstances I am satisfied that the scope of the Works includes the removal and disposal of asbestos whose existence was unknown at the time of contracting. I am not persuaded that at that time reasonable people in the position of the parties would have considered that it would flout commercial common sense for the defender to include any such work within the lump sum price. It involved the defender taking a commercial risk - but the risk was informed by its experience in demolition work including asbestos removal, by the survey reports which were provided, and by the full opportunity that it accepted it had had (in terms of clause 2.1C) to inspect the physical and other conditions at or affecting the Site.

Disposal

[74] I shall put the case out by order to discuss (i) an appropriate interlocutor to give effect to my decision; (ii) any questions relating to expenses which may arise.