Neutral Citation Number: [2021] EWHC 1905 (TCC)

Case No: HT-2019-MAN-000033

**IN THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION**
**TECHNOLOGY AND CONSTRUCTION COURT**

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ

Date: 16th July 2021

**Before**:

**HH JUDGE EYRE QC**

- - - - - - - - - - - - - - - - - - - - -

**Between:**

| | |
|---|---|
| **TIMBERBROOK LIMITED (in liquidation)** | **Claimant** |
| **- and -** | |
| **GRANT LEISURE GROUP LIMITED** | **Defendant** |

- - - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - - -

**Nicholas D.K. Jackson** (instructed by **Stripes Solicitors**) for the **Claimant**
**Sebastian J.B. Clegg** (instructed by **Blackhurst Budd**) for the **Defendant**

Hearing dates: 22nd, 23rd, 24th, and 25th June 2021

- - - - - - - - - - - - - - - - - - - - -

# JUDGMENT

I direct that pursuant to CPR PD 39A para 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.

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down was 2.00pm on 16th July 2021.

**HH Judge Eyre QC:**

## Introduction.

1. The Defendant owns and operates Blackpool Zoo. The Claimant formerly traded as Zootech and as such it installed and fitted out animal enclosures and related facilities at zoos, wildlife parks, and similar institutions. In January 2013 the Defendant engaged the Claimant to demolish the existing orang-utan facility at Blackpool Zoo and to install a new one in its place for the sum of £508,576 net of VAT. That engagement was terminated by the Defendant's letter of 12th June 2013. The Claimant had entered a company voluntary arrangement in 2012. Following the termination it was placed in administration and it went into liquidation in January 2014.

2. The current proceedings were commenced on 10th June 2019 and at that stage there were three elements to the claim. First, £38,058 plus VAT was claimed as the value of work completed to the date of termination. Second, £45,902.80 plus VAT was sought in respect of variations and/or additional works performed at the Defendant's request and as set out in nine invoices. It was later accepted that the invoice for £8,000 relating to the costs of an asbestos survey and of the consequent removal of asbestos had been paid and so the sum claimed in this regard became £37,902.80 plus VAT. Finally, the Claimant sought £63,428 as damages on the footing that the performance of the works had been delayed by breaches of contract on the part of the Defendant and that the Claimant had suffered loss because of this prolongation of the works. That element of the claim was abandoned in the course of the trial. The Defendant counterclaimed the VAT-inclusive sum of £453,739.20 as damages which were said to have been caused by delay in the performance of the works; by deficiencies in the work done by the Claimant; and by the need to engage a different contractor to complete the installation. The Defendant accepted that in the light of the Claimant's liquidation the Counterclaim would operate only as a set off and that even if successful it could not result in a monetary judgment in the Defendant's favour.

## The Factual Background.

3. Much of the background to the dispute was uncontentious. However, the witnesses' recollection of the details of their dealings was hampered by the passage of time. The proceedings were commenced 5 years and 363 days after the Defendant's termination letter and, as will be seen, this was not a case where there had been regular correspondence in the intervening period. At the trial in June 2021 the witnesses were giving evidence about events in late 2012 and the first half of 2013. The difficulties inevitably resulting from that passage of time were compounded in this case. First, there were gaps in the paper trail. Darren Webster, the Defendant's Zoo Director for Blackpool Zoo, explained that the Defendant did not have large IT storage facilities and that he and his colleagues had been repeatedly urged to delete old emails to free up the Defendant's electronic storage capacity. The Defendant is not to be criticised for that approach in a case where it was not put on notice at an early stage of the likelihood of proceedings. In addition life had moved on for the Claimant's witnesses. Shortly after the termination of the Claimant's engagement Fred Pearson, the Claimant's Managing Director, had become seriously ill and

thereafter in recovery for about two years. Malcolm Mycock, the Claimant's site manager for this project, had changed career. He had moved from the construction of animal enclosures to the ordained ministry of the Church of England. Mr. Mycock said that he had not given the matter any thought between June or July 2013 and September 2020 when he was approached for a witness statement. Mr. Mycock believed that he had been received an email from Mr. Pearson in about 2016 asking for his recollection but at that stage he had replied saying that he could not really remember anything of these matters. However, Mr. Mycock had sat in court during a full day of evidence before he gave his own evidence and said that this had brought some matters back to his recollection. As will be seen the invoices which form a central part of the Claimant's case were compiled by Paul Birch who was the Claimant's operations manager at the time of the project. Mr. Jackson explained that the Claimant had approached Mr. Birch to give evidence in this case but that he had declined to cooperate and the Claimant had chosen not to compel his attendance at court. I was not asked to and do not draw any inference adverse to the Claimant from the absence of Mr. Birch but that absence does mean that the court did not have any evidence from the compiler of the invoices on which the claim was founded.

4. Mr. Mycock had worked for nineteen years as a zookeeper and had then gone into business as a fencing contractor. After a couple of years as a fencing contractor he combined the skills and experience which he had gained in those fields by operating as Zootech to build animal enclosures for zoos and similar institutions. The Claimant was incorporated in September 2008 and Mr. Pearson came into the company at the end of 2009 bringing business and construction experience.

5. In the course of its life up to 2012 the Claimant had undertaken a lot of work at Blackpool Zoo for the Defendant. Mr. Webster estimated that the Claimant had undertaken 90% of the major construction projects at the zoo from 2008 or 2009 onwards. That estimate was not disputed and in general terms accorded with the impression of the relationship given by the Claimant's witnesses. Relations were good between the officers of the Claimant and Mr. Webster and his colleagues. There had been a degree of flexibility in the operation of the earlier projects which the Claimant had undertaken for the Defendant. Mr. Pearson said that when in the past the Claimant had undertaken works for the Defendant on the basis of fixed price contracts there had been a "sensible recognition that if things went wrong [the Claimant] would be dealt with fairly" by which he meant that there had been an upwards revision of the fixed price when unforeseen problems had arisen. Mr. Mycock described a history in which that flexibility had worked both ways. He explained that in the nature of doing work at a zoo unforeseen problems could arise. If a project had turned out to be more expensive for the Claimant than had been anticipated then the Claimant had "worked things through" with Mr. Webster. Sometimes this had resulted in an extra payment to the Claimant. On other occasions the issue had been addressed by the promise of an engagement for further works on what appeared to be something of a "swings and roundabouts" arrangement (though Mr. Mycock did not describe it in those terms). Conversely there had been occasions when the Claimant had been prepared to undertake extra works without making further

charge because there had been sufficient "wiggle room" for the Claimant to do so and still make a profit on the project in question. For the Defendant Mr. Webster characterised matters in a similar way saying that in the past "where issues had arisen as the project had progressed, the parties had always been able to agree a way to work out any issues and agree any revisions to the contracts/specifications".

6. Mr. Webster said that on the previous engagements the Claimant had undertaken all the preliminary work. He explained that the Defendant had engaged the Claimant because of the latter's particular combination of experience in construction work and in performing that work in zoos. Mr. Webster had said that the Defendant had not had that kind of construction expertise and had relied on the Claimant for input on such matters. There were some aspects of Mr. Webster's evidence which were unsatisfactory. In particular he was unwilling to concede matters which were now inconvenient for the Defendant's case. Thus he said that he could not recall having received correspondence from the Claimant in December 2012 which I find it is highly likely that he did receive. Similarly, in addressing the question of responsibility for the delay in starting the works Mr. Webster sought to attach an unrealistic and artificial meaning to the references in the minutes of the site meetings to "animal waste". I do, however, find that Mr. Webster's characterisation of the general nature of the relationship between the parties in the period before the Contract was accurate. It is consistent with the picture which emerged from the Claimant's evidence and with the parties' respective areas of expertise. Accordingly, I accept that in the previous projects at the zoo undertaking the necessary preliminary works had been seen as the Claimant's responsibility without those works necessarily being spelt out in detail. That is not determinative of the effect of the agreement reached in January 2013 but is indicative of the background and of the nature of the relationship which formed part of the context of that engagement.

7. By late 2012 the Claimant was encountering financial difficulties. It had entered a company voluntary arrangement in August 2012. In February 2013 Mr. Pearson prepared a file note for discussion with Mr. Mycock and Mr. Birch in which he said that the Claimant had been suffering losses of more than £10,000 per month in the period since entry into the voluntary arrangement. Mr. Pearson attributed the poor financial situation to historic losses on past projects; excessive overhead costs; and insufficient work to cover the overhead costs. In his evidence at the trial Mr. Pearson was reluctant to accept that there had been continuing financial difficulties at the time of this engagement and he had referred to the funds which he had introduced into the company. However, he was prepared to accept that it was a struggle for the Claimant to continue in operation. I find that the file note demonstrates that the Claimant's financial position in late 2012 and early 2013 was more perilous than Mr. Pearson was prepared now readily to concede and that the Claimant was in real difficulties with a pressing need for further work.

8. The replacement of the orang-utan house had been in mind since mid-2011 and the Claimant had been engaged in obtaining costings and initial design work since then. In March 2012 the Defendant's Spanish parent company authorised

further consideration of the project and it was then that negotiation about the price began in earnest. The parties ultimately entered a written contract dated 14th January 2013 ("the Contract") which provided for the Claimant to undertake the works for a fixed price of £508,576.

9. The project had initially had a costing of £725,000 (albeit for a markedly larger scheme than was ultimately undertaken) and in the period from March 2012 onwards the Defendant had been pressing the Claimant to put forward a lower figure. The price of £508,576 was the outcome of that pressure. At that price the Claimant's margin was cut to the bare minimum. In his file note of February 2013 Mr. Pearson had said that the price meant that there was "no margin to cover for mistakes or unidentified problems". As Mr. Mycock put it there was "no wiggle room" for the Claimant when undertaking the project at that price. The Claimant's difficult financial position and the limited profit which could be made on the project also appear from Mr. Pearson's letters of 17th December and 19th December 2012 to Mr. Webster. In the former Mr. Pearson said that the Claimant's margin had been set to "the bare minimum". In the latter he asked for payment on a fourteen day basis rather than at intervals of thirty days. Mr. Pearson also asked that the Claimant be given an opportunity to undertake "whatever additional work … might be available at the zoo" at the same time as the works on the orang-utan house, even if these were small projects of maintenance work, with a view to spreading the overhead cost of being on site. It is also relevant when considering the Claimant's approach to this project to note that Mr. Mycock's evidence indicated that not only was it the largest project which the Claimant had undertaken at Blackpool Zoo but that it was a large project in comparison to other projects undertaken by the Claimant.

10. I find that the Claimant agreed to undertake the works for a low fixed price because of its poor financial circumstances in the latter part of 2012 and its pressing need for funds to meet its overhead costs. It also did so because it was hopeful that undertaking these works would give it a good prospect of being engaged to install a new penguin enclosure at Bournemouth Oceanarium which was operated by a company connected to the Defendant. In his file note of February 2013 Mr. Pearson said that "the most crucial objective" for the Claimant was "to do everything possible to secure the Bournemouth project" because that was a project potentially worth just under £1,0000,000 to the Claimant and at a price which appeared to give scope for a significant degree of profit to be made.

11. The Claimant's need for funds and its desire to be appointed as contractor on the Bournemouth project caused the Claimant to agree to demolish and rebuild the orang-utan house for a low fixed price. In addition those factors influenced the Claimant's approach to the risk that the cost to it of undertaking the works would be increased by difficulties occurring in or by unforeseen problems being encountered during the course of the works. In short the Claimant was prepared to leave the possibility of that risk out of account in the pricing of the project and when agreeing to perform the works for the fixed sum of £508,576 because of its pressing need for work and because of the hope that if such problems arose it would be able to agree an increase in the price with the Defendant as had happened in their previous dealings.

12. I am satisfied that this was a deliberate approach on the part of the Claimant. In cross-examination Mr. Pearson described his approach thus:

> "When you are in a competitive tendering position you are not able to take account of the unforeseen happening you have to price on what you know on the basis you will be treated fairly by your client if something unforeseen happens."

13. In his letter of 19th December 2012 Mr. Pearson had said:

> "… there remain a small number of risk areas with which we have some concern. We have not included any sum of money against these risks but, given that the price now contains no contingency, they remain problems which need discussion and resolution."

14. Mr. Pearson identified four such risk areas in that letter. The first was the presence of asbestos. The second was "the nature of the ground beneath the existing slab". Mr. Pearson said that he had no reason to believe that there would be a problem with the load-bearing capacity of the underlying ground and that the Claimant had not included any sum against that risk because it believed the risk to be low. Then Mr. Pearson said that the ability of the existing services to supply the new facility was a risk area. Finally, he referred to the "provision of a continuous electricity supply to the Gorillas throughout the demolition and construction phases". That was a reference to the fact that the zoo's existing gorilla facility adjoined the orang-utan enclosure and shared an electricity supply. Mr. Pearson said that the Claimant had not included in the price for providing this although he understood it would be needed and said that the Claimant was trying to determine what the costs of this would be.

15. In his letter Mr. Pearson suggested that those matters be discussed and "hopefully resolved[d]" at a meeting to be held on 20th December 2012. It does appear that there was such a meeting but it is not said that, save in respect of the asbestos, there was either an increase in the fixed price to take account of these matters or an acceptance by the Defendant that an additional sum would be payable if the risk eventuated.

16. Having noted in his February 2013 file note that there was "no margin to cover for mistakes or unidentified problems" Mr. Pearson had gone on to say that these "of course remain a risk" while noting that the Defendant had accepted that it was bearing the risk of further costs resulting from the discovery of asbestos.

17. The Contract was dated 14th January 2013 but was not released by the Defendant until the end of that month. It recited that:

> "The [Claimant] has agreed with [the Defendant] to provide materials and construction services in relation to the construction of a Orang-utan facility and other associated external works at Blackpool Zoo… for the price stated and in accordance with the specifications and timescales set out in the schedule to this agreement."

18. The Project was defined as the "project as described in the Project Plan" and the Project Plan and Project Specification were defined as the plan and specification annexed at Schedule 2. The Services were defined as:

> "the construction services and supply of materials services to be provided by [the Claimant] under this agreement as set out in the Project Plan and [the Claimant's] obligations under this agreement together with any other services which [the Defendant] agrees to take from [the Claimant]".

19. Schedule 2 referred back to Schedule 1 and each of those contained detailed drawings with the latter also containing specifications and the Contract Construction Programme.

20. Clause 3 addressed the commencement and duration of the agreement with clause 3.3 providing for a weekly penalty if the Claimant failed to meet the termination date agreed in the Project Plan.

21. Clause 4.1 required the Claimant to "manage and complete the Services in accordance with the Project Plan and Project Specification" and to "allocate sufficient resources to the Project to enable it to comply with this obligation". Clause 4.2 provided that:

> "[The Claimant] shall meet (and time is of the essence) any performance dates or Project Milestones specified in the Project Plan … If [the Claimant] fails to do so, [the Defendant] may (without prejudice to any rights it may have) at its own discretion:
>
> a) terminate this agreement in whole or in part without liability to [the Claimant];
>
> b) refuse to accept any subsequent performance of the Services which [the Claimant] attempts to make;
>
> c) purchase substitute services elsewhere at [the Claimant's] costs;
>
> d) hold [the Claimant] accountable for any loss and additional costs incurred;
>
> e) withhold from the outstanding invoices the amount of the penalties referred to in clause 3.3 of the present agreement."

22. At clause 4.5 (a) the Claimant acknowledged and agreed that the Defendant had entered the Contract on the basis of the Project Plan and that the Project Plan was accurate and complete.

23. The Defendant's obligations were set out at clause 5 which in part required the Defendant to:

> "a) cooperate with [the Claimant] in all matters relating to the Services and appoint [the Defendant's] Manager in relation to the Services, who shall have the authority contractually to bind [the Defendant] on matters relating to the Services;
>
> b) provide such access to [the Defendant's] premises and site and such office accommodation and other facilities as may reasonably be required by [the Claimant] and agreed with [the Defendant] in advance for the purposes of the Services; and
>
> c) provide such information as [the Claimant] may reasonably request and [the Defendant] considers reasonably necessary, in order to carry out the Services, in a timely manner, and ensure that it is accurate in all material respects.

…."

24. Clause 6 set out a mechanism for changes in the "scope or execution of the Services".

25. Clause 7.1 recorded that the Services were being "provided for a fixed price, the total price for the Services shall be the amount set out in the Project Plan" and went on to provide that:

> "The total price shall be paid to [the Claimant] in instalments, as identified in the cash flow forecast at schedule 3, with each instalment being conditional on [the Claimant] achieving the corresponding progress against the forecast dates including materials off site where appropriate".

26. At clause 7.4 the Contract stated:

> "Claims for payment in respect of materials purchased by or services provided to [sic] [the Claimant], or for reimbursement of expenses, shall be payable by [the Defendant] only if accompanied by relevant receipts."

27. Clause 7.5 provided that:

> "[The Claimant] shall maintain complete and accurate records of the time spent and materials used by [the Claimant] in providing the Services in such form as [the Defendant] shall approve. [The Claimant] shall allow [the Defendant] to inspect such records at all reasonable times on request".

28. Clause 10.1 (a) and (b) dealt with termination thus:

> "Without prejudice to any other rights or remedies which [the Defendant] may have, [the Defendant] may terminate this agreement without liability to [the Claimant] on giving [the Claimant] not less than four weeks written notice to [the Claimant] if:
>
> a) the performance of the Services is delayed, hindered, or prevented by circumstances beyond [the Claimant's] reasonable control; or
>
> b) [the Claimant] commits a material breach of any of the terms of this agreement and fails to remedy that breach within 28 days of being notified in writing of the breach, or"

29. Clause 10.1 (c) – (h) gave the Defendant a right of termination if the Claimant's solvency or continued trading ability became an issue in various ways and clause 10.1 (i) gave such a right in the event of a change in the control of the Claimant.

30. Clause 10.2 stated that:

> "Termination of this agreement, however, it arises, shall not affect or prejudice the accrued rights of the parties as at termination or the continuation of any provision expressly stated to survive, or implicitly surviving, termination."

31. Clause 13 addressed variation in these terms:

> "Subject to condition 6, no variation of this agreement or of any of the documents referred to in them [sic] shall be valid unless it is in writing and signed by or on behalf of each of the parties."

32. The Defendant's purchase order was dated 31st January 2013 and identified the work to be provided as "construction of new internal orang-utan facility and other associated external works as per contract dated 14th Jan 2013". Despatch of that document followed Mr. Webster's email of 30th January 2013 in which he said that he had received confirmation that the Defendant's orang-utans could be accommodated at Chester Zoo and that he would as a consequence be able to issue the Contract.

33. From an early stage there was disagreement as to the progress of the works and as to the responsibility for delay in that regard and I will return to this below.

34. Difficulties also arose at an early stage about payment for allegedly additional items of work and variations in the agreed works. Thus on 19th February 2013 Mr. Mycock emailed Mr. Webster attaching "three notifications of variations of work". It was said that these were not invoices but "recognise work undertaken by [the Claimant] which we believe not to be covered under the contract". The attachments to that email were not in evidence and they had been compiled by Mr. Birch rather than Mr. Mycock. Mr. Webster replied sixty-one minutes after that email was sent denying that any further payment was due. He said that Mr. Mycock and Mr. Birch had been made aware of the need for the particular work at the meeting in December 2012. Mr. Webster then added that Mr. Mycock and Mr. Pearson were "fully aware that the agreed project cost total in the contract was for all associated works for this project" and that "everything that has been done to date is associated with getting this project started". That response does not appear to have been challenged at the time by the Claimant.

35. The Claimant's financial situation deteriorated as the works progressed. It seems that this was in part the result of the works taking longer than had been anticipated (with a consequent increase in the period during which the Claimant had to bear the site overheads). However, it was also the result of the tight margins under which the Claimant was operating and the difficulties caused to the Claimant by having to address unforeseen problems. On 11th April 2013 Mr. Pearson emailed Messrs Mycock and Birch with notes in advance of a meeting to be held the following week. It seems that the meeting was to consider the Claimant's financial position and the notes addressed that and considered potential action to improve matters. Reference was made to the project at Blackpool Zoo and Mr. Pearson said that he agreed that the order for the steel frame should be placed as soon as Mr. Birch and Mr. Mycock felt it necessary. The copy of the email in the bundle contains a manuscript note which Mr. Birch had added saying:

> "Previously Fred [sc Mr. Pearson] said do not place order ie Thurs 4th April as he did not know if the company was going to still trade & I did not want to be compromised."

36. Mr. Pearson was cross-examined about that note. He said that he did not believe that he had told Mr. Birch not to order the frame because of doubts as to the Claimant's future. Mr. Pearson denied that the Claimant's financial standing caused any delay in ordering the frame and said that he could not explain why Mr. Birch had written such a note. I cannot accept Mr. Pearson's evidence in that regard. The only realistic explanation as to why Mr. Birch wrote that note

is that he believed Mr. Pearson had told him not to order the frame because of concern as to whether the Claimant would be able to continue trading. In turn the only plausible source of such a belief must have been comments made by Mr. Pearson to the general effect recorded by Mr. Birch. In the light of that I find that in early April 2013 the Claimant's finances were in sufficiently poor a state for there to be a serious issue as to whether the Claimant would be able to continue to trade.

37. Difficulties developed in the course of the Claimant's performance of the work leading ultimately to a breakdown in relations. In large part the problems stemmed from the delays which were encountered in progressing the project. The parties disagree as to the responsibility for and cause of the delays but it is clear that the project was falling seriously behind time. The delay jeopardised the Defendant's desire to have the new orang-utan facility open for at least part of the busy summer period. It also contributed to the Claimant's worsening financial difficulties because of the cost of maintaining its presence on site.

38. There were meetings on 1st and 24th May 2013 and the bundle contains Mr. Pearson's note prepared in advance of the first meeting together with his letters of 2nd and 23rd May 2013 and a file note prepared after the meeting of 24th May 2013. In the first letter Mr. Pearson said that the Claimant was "facing substantial losses" and in the latter he characterised the position thus:

> "The underlying problem of the current Blackpool project is that the price has been driven down so much that any small delay or change immediately presents as a cost difficulty for [the Claimant] – this makes for a very inflexible way of working."

39. It is common ground that the meeting of 24th May 2013 was unproductive. As Mr. Pearson's note records "discussion of `who said what, to who and when' failed to produce any meaningful result". The Claimant was seeking an increase in the contract price. The Defendant had agreed to an extension of the programme and had agreed to cover the cost of the work relating to asbestos but it would not agree to an increase in the price although it was prepared to consider a form of completion bonus if there were to be earlier completion.

40. There were further email exchanges and at least one meeting after 24th May 2013 but the parties' differences were not resolved. The contemporaneous documents confirm Mr. Webster's assessment that although in the period from 1st May 2013 both sides had tried to salvage the project by early June they had both concluded that "there was no practical way forward and the contract would need to be terminated". It was agreed that the Claimant would maintain a limited presence on site for CDM purposes until the steel frame had been installed but other than that the Claimant's involvement would cease.

41. On 12th June 2013 Mr. Webster sent the Defendant's letter terminating the Contract. The letter began by explaining that the Defendant felt it had "no option but to terminate the contract currently in place". There was then a recital of the Defendant's position including the contention that no further payments remained due under the Contract. Mr. Webster then said:

> "In line with the terms of the contract and clause (10.1) I hereby give you four weeks written notice although it has already been agreed in past correspondence that your remaining work force will leave site at the end of the steel frame erection (estimated to be 14th June)…"

42. Mr. Pearson replied on 13th June 2013 confirming that the Claimant would vacate the site by 17th June 2013.

43. On 27th June 2013 Mr. Mycock sent Mr. Webster a set of invoices. Nine of these made claims for payment in respect of additional work. A further invoice sought payment for costs incurred after 28th May 2013. Then the sum of £57,458 plus VAT was sought as being "delay costs". That was superseded by the Claimant's damages claim which was abandoned in the course of the trial. Finally, there were two invoices seeking stage payments which I will consider when addressing the Claimant's claim for the value of work done to the date of termination and which had replaced the contention that money was due on the basis of those invoices. Although sent by Mr. Mycock the invoices had been compiled by Mr. Birch.

44. The Claimant was placed in administration on 4th July 2013. On 12th July 2013 Mr. Pearson wrote to the Defendant challenging Mr. Webster's account of the history; attributing the difficulties to the low price on which the Defendant had insisted and to the delays caused by the Defendant; saying that the sums claimed in the invoices were "reasonable and justified"; and inviting Mr. Webster to engage in a discussion about the invoices. There were further exchanges culminating in Mr. Webster's email of 9th August 2013 confirming that payment was being made in respect of the costs of asbestos removal and for the limited attendance for CDM purposes but denying any further liability.

45. By 31st January 2014 the Claimant had entered liquidation and on that date debt recovery agents appointed by the liquidators of the Claimant wrote to the Defendant seeking payment of the sums set out in the invoices. Mr. Webster replied denying liability for the sums claimed. Matters rested there until March 2018 when a quantity surveyor instructed by the liquidators sought information about the figures. Mr. Webster replied after some chasing and once more denied liability. There was no further correspondence until the issue of the claim form on 10th June 2019 followed by service of the Particulars of Claim in October 2019.

## The Claim for the Value of Work performed before Termination.

46. Invoice ZO441 was in the VAT-exclusive sum of £19,891 which was described as "Payment 5 orang-utan development: Contract Sum". Invoice ZO442 in the VAT-exclusive sum of £18,077 was said to be the "Contract sum" in respect of "Payment 6 orang-utan development". It follows that the invoices were rendered on the footing that the Claimant was entitled to the sums in question as debts due pursuant to the Contract.

47. The claim was put on a different basis in these proceedings. At [9] the Particulars of Claim assert that after credit had been given for interim payments already made "the Claimant had [at the date of termination] completed work to a value of £38,058 plus vat as particularised" in invoices Z0441 and 442. Mr.

Jackson summarised the position as being that the Claimant was not saying that it was entitled to that sum for having reached a particular stage in the contract works. It was, however, contending that it was entitled to be paid a reasonable sum for the value of the work done to termination to the extent that such work had not already been remunerated. That reasonable sum was to be calculated either on an objective basis as a reasonable sum for labour and materials or by reference to the rates payable under the Contract.

48. I do not accept that the Claimant has an entitlement to such payment in the circumstances here. Clause 7.1 was clear that payment was to be made in instalments with the right to payment of any given instalment being conditional upon the requisite progress against the forecast dates having been made. Despite the language used by Mr. Birch in invoices ZO441 and 442 the Claimant did not contend that it was contractually entitled to the invoiced sums by virtue of having reached a stage at which a particular stage payment in those amounts was due. It was right to do so. As explained below I am satisfied that the termination was effected under clause 10.1 of the Contract. Clause 10.2 provided that such termination should not prejudice "accrued rights of the parties as at termination". However, the Claimant had no accrued right to payment in these sums because the requisite stage for payment had not been reached (and it is not now contended that it had been).

49. The Contract contained no express provision to the effect that on a termination whether under clause 10.1 or otherwise the Claimant should acquire a right to payment for work done to the date of termination whether on a *quantum meruit* or by way of a proportion of the contract price.

50. Mr. Jackson argued that the Claimant did have such an entitlement either as a matter of general law outside the scope of the Contract or by way of the implication of a term into the Contract. He said that such an entitlement was necessary as a matter of public policy to prevent the injustice which the Claimant would suffer if it were not to be remunerated for this work. As a related contention he said that the absence of such a right operated as a penalty and as such should be subject to the common law prohibition of penalty clauses. Mr. Jackson also said that the situation should be characterised as one where the Defendant had prevented the Claimant from performing under the Contract and that the Claimant was to be compensated for the effects of the Claimant's action in that regard. I do not accept those contentions.

51. The starting point is that the Contract made express provision, in clause 7.1, for when payment would be due. It then proceeded, at clause 10.1, to provide for termination on four weeks' notice in defined circumstances. Clause 10.2 made express provision for the preservation of accrued rights. It would have been possible for provision to be made at that point for a right to a pro rata payment of the kind for which Mr. Jackson contends but the parties chose not to do so. There is no basis either on the ground of necessity or obviousness for the implication of a term to that effect. The situation here is wholly different from that of a party who prevents another party from performing the task which will entitle the latter to payment in circumstances where a term precluding such prohibition is to be implied into the contract. Such a term is to be implied by reference to necessity or obviousness but there is no scope for such implication

here where the Contract contains express provisions such as those in clause 10. The analogy which Mr. Jackson was seeking to make with the implication of such terms would require the implication of a term into the Contract precluding the exercise of the Defendant's express rights under clause 10.1 where the exercise of those rights would prevent the Claimant from reaching a stage in the works at which a payment would be due. There is no scope for such an implication in the face of the express terms here. Indeed, Mr. Jackson was arguing for the implication not of a term precluding such a use of the termination power but for a rather different term providing for the payment of a reasonable sum for unremunerated work in such circumstances. The difficulties facing Mr. Jackson's argument are further illustrated by the fact that it cannot be said with confidence whether the right to be implied would be one to an objectively reasonable sum for labour and materials or to some form of proportionate allocation of the contract price. Depending on whether the contract in question was a good bargain for the client or for the contractor an objectively reasonable sum could result in the contractor receiving either more or less than would have been paid if the contract in question had continued.

52. I do not accept Mr. Jackson's argument based on public policy or his related invocation of the law's antipathy to penalties. It is neither a penalty nor contrary to public policy for the parties to a contract to agree that the right to payment will only arise once a particular stage of the works has been reached and for a contractor to have to take the risk of not receiving a particular payment if that stage is not reached. Indeed the policy of the law is contrary to Mr. Jackson's proposition because the starting point is that complete performance of an entire obligation is necessary before any payment in respect of that obligation can be made. The effect of clause 7.1 in the Contract is that performance of each particular stage of the works was an entire obligation with payment not being due in respect of any stage until it was completed.

53. It is right that the Defendant's action in terminating the Contract prevented the Claimant from performing further (or at least doing so after the expiry of the four weeks' notice) and so obtaining the right to further payment but the significant factor is that in doing so the Defendant was exercising an express contractual right. It was not acting wrongfully but was exercising a right expressly provided for in the Contract. It was, moreover, exercising a right which could only be exercised in particular circumstances; which was subject to the giving of four weeks' notice; and which was on terms that accrued rights were preserved. There is nothing contrary to public policy in such an arrangement nor does it impose a penalty on the Claimant and as already explained there is no basis for implying a term precluding the exercise of that express right or providing for a *quantum meruit* or a proportionate payment if it is exercised.

54. Even if I am wrong in the foregoing analysis and payment is due the Claimant has not established what, if any, sum is to be paid and that failure is fatal to this part of the claim. The onus would be on the Claimant to show the work which had been done over and above that which had been remunerated under the Contract by the payment made by reference to 26th April 2013 (the last stage which it was accepted the Claimant had achieved and in respect of which

payment was made in May 2013) and to establish the sum due either by reference to a reasonable sum for labour and materials or as a proportion of the contract price. The Claimant's evidence wholly failed to establish this.

55. At one point Mr. Jackson was driven to contend that the court should take account of the fact that in compiling the invoices Mr. Birch is to be assumed to have believed that the sums in question were due. Mr. Jackson refined the position to point to the submission of payment schedules by Mr. Birch on behalf of the Claimant and to contend that in combination with that the invoices were to be seen as showing the Claimant's contemporaneous assessment of the value of the work done. That, however, cannot be sufficient to show a right to payment now in a particular sum.

56. Mr. Jackson undertook an elaborate exercise in analysis of the various revisions and proposed revisions of the construction programme and payment schedules in an attempt to establish the work that had been done and the value to be attributed to it. Impressive though this exercise was it ultimately could not avail in circumstances where:

i) Invoices ZO441 and 442 had been advanced on the basis of a contractual entitlement because a particular stage entitling the Claimant to payment had been reached – a wholly different basis from that now advanced.

ii) There was no evidence from Mr. Birch before the court.

iii) As explained below both Mr. Mycock and Mr. Pearson accepted that they had no more than minimal knowledge of the basis of the invoices. Indeed in his letter of 12th July 2013 Mr. Pearson referred to the invoices which had been rendered and said that they dealt with three heads of claim: the costs of work additional to that provided for in the Contract; costs associated with delays; and the cost of the Claimant continuing to perform the principal contractor function for CDM purposes until the steel frame was installed. This part of the claim does not fall into any of those categories and it is apparent that Mr. Pearson did not have this formulation of claim in mind. In his witness statement Mr. Mycock had referred to the construction programme and payment schedule attached to his email of 16th May 2013 and had said that particular works had been completed and were the subject matter of invoices ZO441 and 442. When Mr. Mycock gave his oral evidence it was apparent that the statement went rather further than was truly within his knowledge and he accepted that "other than by reading the invoice" he could not comment on these matters.

iv) Not only were the invoices in the shortest of terms and unaccompanied by any supporting paperwork but there is no documentation before me other than the proposed revised construction programmes and payment schedules to show the work which was done let alone to quantify its value.

v) It is also of note that the last site meeting was site meeting 11 on 24th April 2013 which was before the date by reference to which the

> Defendant has made payment. The tenor of the correspondence thereafter supports the Defendant's position which was that in reality only minimal work was being done during May 2013 when the parties were engaging in their ultimately unsuccessful attempt to salvage the Contract. That contention was supported by Mr. Clegg's analysis of the construction programme and payment schedules which led, he said, to the conclusion that there had in reality been payment for the bulk of the work that had been done. It suffices for present purposes to note that this demonstrated that Mr. Jackson's interpretation of the sundry iterations of the programme and the payment schedules was not self-evidently correct.

57. In those circumstances this element of the claim fails.

**The Variations Claim.**

58. This part of the claim is now for the sum of £37,902.80 plus VAT as set out in eight invoices. Each of those invoices will have to be considered separately but there are a number of points of general application.

59. In order to establish an entitlement to payment for allegedly additional work the Claimant has to show that the work was performed; that it was additional to that which the Claimant was required to do under the Contract; and either that the Defendant agreed to the work being performed for a particular sum in addition to the payment due under the Contract or that the Defendant agreed to the work being performed knowing that it was additional to the Contract works and was not being undertaken gratuitously in which case the Claimant would be entitled to a reasonable sum for labour and materials in respect of the work. If the Claimant's entitlement is to a reasonable sum for labour and materials in relation to a particular item of work then the Claimant must establish what that reasonable sum is.

60. Each invoice was compiled by Mr. Birch and neither Mr. Mycock nor Mr. Pearson had any involvement in that exercise. Mr. Mycock said that he believed that he had been asked to send the invoices by Mr. Birch because he, Mr. Mycock, was responsible for liaising with Mr. Webster. Mr. Mycock said that it was possible that he had been asked about the invoices in advance but that he could not recall that and could not remember who had done the work to which the invoices related. Similarly Mr. Pearson had not been involved in the preparation of the invoices and was unable to give any detail of the particular items of work to which they related. His contention that the sums claimed were properly payable was based on his belief that the Claimant's employees on site were competent and would have recorded what was happening on site.

61. The Claimant does not assert that there was agreement in advance that any of these items of work be performed for an agreed additional sum and it follows that in respect of each the claim must be for payment on a *quantum meruit* basis. Each invoice begins with a reference back to previous correspondence and then describes the item of work in a single sentence of narrative which is followed by the assertion "we confirm the costs incurred to be…" and the net of VAT figure is then given. None of the invoices contains a breakdown of how the

figure claimed was calculated and none was accompanied by any paperwork showing how the figure had been reached or identifying the labour employed or materials used in performing the task in question. No such documentation has been provided in this case. There are no daywork records and no invoices or purchase orders in respect of the materials used in performing the work. The Defendant does not dispute the contention that the Claimant performed work which in general terms met the description in the invoices but it does not admit how much work was done or that the sum claimed is a reasonable sum for labour or materials. It is again to be noted that the Claimant does not assert that the particular amounts were agreed in advance of the works being performed.

62. Mr. Jackson invited me to proceed on the basis that the sums claimed in each invoice were reasonable. However, he had difficulty in showing any proper basis on which I could come to such a conclusion on the state of the evidence before me. Mr. Jackson contended that I should take account of Mr. Pearson's belief that the figures were reasonable but while I accept that was Mr. Pearson's belief it cannot be the basis for a finding as to the reasonableness of the figures. Next, Mr. Jackson drew attention to the fact that the Claimant was undertaking the contract works for a low price and invited me to conclude from this that the sums claimed in the invoices are likely to have been reasonable. I accept that the contract price meant that the Claimant was undertaking the contract works for a sum which gave it little margin. It does not necessarily follow from that that the Claimant was performing the contract works for an objectively reasonable sum although I accept that is likely to have been the position. However, it does not follow in turn that the sums claimed for additional works were reasonable. Finally, Mr. Jackson sought to rely on the specialist nature of the Technology and Construction Court which meant, he contended, that the court was able to reach its own conclusion on whether the sums claimed were reasonable. That submission misunderstands the nature of the court's expertise. The Technology and Construction Court is a specialist court and its judges are to be taken as having a degree of expertise in trying cases of this kind. It is also correct that ultimately where there is a dispute as to the reasonableness of sums claimed for particular work the court has to reach a conclusion on that issue. Mr. Jackson was, however, inviting the court to perform that task not only without the assistance of quantity surveying evidence assessing the figures but more significantly without knowing the elements which had gone into calculating the amount claimed and without any of the material by way of time sheets, records of materials used, and the like on which a quantity surveyor would have based his or her assessment of value. The burden was on the Claimant to prove that the sums claimed were reasonable in respect of labour and materials but in reality the claim on the invoices amounted to a bare assertion of the reasonableness of the figures.

63. In determining the claim for payment for allegedly additional work and the legitimacy of the sums claimed in the invoices I have also had regard to the nature of the Contract and to the Claimant's stance on entering the Contract together with the purpose of the invoices.

64. The Contract was, as Mr. Mycock accepted, a design and build contract for a fixed sum. The Claimant had chosen to enter the Contract at a low price

knowing that there was no margin to deal with the risk of unforeseen problems arising. The Claimant had done this because of its pressing need for work and in the hope of being engaged in due course to install the new penguin enclosure at Bournemouth Oceanarium but it had done so knowing that it was taking a risk. I have already noted at [9] above that Mr. Pearson's file note of February 2013 recorded that "mistakes or unidentified problems" remained a risk and it is apparent that, save in respect of a potential asbestos problem, he was saying that they posed a risk to the Claimant. The Claimant had chosen to take a risk in not making provision for unforeseen circumstances in the hope that if such matters arose additional payment would be obtained by negotiation.

65. Against that background Mr. Pearson's characterisation of the purpose of these invoices was telling. When he was cross-examined Mr. Pearson said that he believed that the invoices were "fair and reasonable in the context" but added that he had "always believed that there were elements of negotiation in those invoices". The meaning of the latter phrase appeared when Mr. Pearson said that the purpose of the invoices had been to send documents which would be fair and reasonable in relation to the costs which had been incurred but which "would then be subject to debate leading to a resolution". That characterisation is borne out by the contemporaneous correspondence. Thus the exchanges in May 2013 were to the effect that the Claimant had incurred additional expense (which was principally attributed to delay) and a negotiated further payment was being sought. It was not being said that the Claimant was owed money as a matter of entitlement for additional works. This was the position even after the Contract had been terminated and after the invoices had been rendered. On 12th July 2013 Mr. Pearson wrote to Mr. Webster. In that letter Mr. Pearson described these invoices as being in relation to "costs associated with additional works to those agreed at the time of finalising the contract sum". He said that he believed the claim in respect of them was "reasonable and justified" and invited Mr. Webster to engage in a discussion about them. This was an invitation to a negotiation about an additional payment for the Claimant to reflect additional costs which had been incurred rather than an assertion of a legal entitlement to the amounts invoiced.

66. The foregoing matters pose difficulties in respect of the claim for additional work generally and I will not repeat them in detail when addressing as I now do the separate claims for additional sums as set out in the invoices.

67. Invoice Z0449 is in the VAT-exclusive sum of £1,675 for works described as "to assist Blackpool Zoo our operatives installed electrical supplies to Gorilla and external locations". The invoice is said to have been "further to previous correspondence dated 15/02/03" but the only document of that date is an email from Mr. Mycock to Miss. Foster, the Defendant's Health and Safety Officer, which does not relate to this. It is possible that this work may have been part of the work referred to in the email of 19th February 2013 and in respect of which Mr. Webster denied liability at the time characterising the work as associated work included in the Contract price.

68. It is apparent from the minutes of site meeting 02 and the Claimant's attendance note of 14th February 2013 that the Claimant's employees or sub-contractors did undertake this work. However, I find that the Defendant is correct to

characterise the work as part of setting up of the site for the demolition and replacement of the existing orang-utan facility. As such it was work which the Claimant was to perform for the contract price and no additional payment is due. Mr. Webster explained that the facilities for the gorillas and orang-utans were connected and shared a power supply. The demolition of the orang-utan house would remove the power supply to that of the gorillas and Mr. Webster characterised the provision of a replacement supply as part and parcel of enabling the demolition and rebuilding works to be performed. This analysis is supported by Mr. Pearson's letter of 19th December 2012 where he identifies "the provision of a continuous electricity supply to the Gorillas throughout the demolition and construction phases" as a risk area. Mr. Pearson said that the Claimant had not allowed in the price "for making this provision which I understand will be needed." No alteration was made to the price after that letter and it follows that the Claimant entered the Contract knowing that this work would have to be performed and knowing that it had made no separate provision in respect of it. This impression is reinforced by items 4.08 – 4.10 of the minutes of site meeting 01 where this work is clearly seen as being an obligation of the Claimant as part of getting the site ready for the demolition work to commence. In that regard I reject as unrealistic and artificial the contention which Mr. Jackson advanced in cross-examination that preparing the site for demolition included the cutting of the power supply to the gorilla house but did not include the provision of an alternative supply.

69. This claim falls on that ground but would in any event fail on the basis that the Claimant has failed to show that the sum claimed is a reasonable sum for labour and materials in relation to this work.

70. Invoice Z0450 is in the VAT-exclusive sum of £547.20 and the work performed is described as being that in order "to assist Blackpool Zoo our operatives installed temporary water supply from the Penguins to the Gorillas". As with the preceding invoice this refers to correspondence of 15th February 2013 but there is no correspondence of that date relating to this item although as with the preceding invoice it may well have been part of the subject-matter of the exchanges on 19th February 2013.

71. The Claimant's attendance note of 13th February 2013 indicates that the Claimant's site foreman, "Skinner", was digging a trench for the temporary water supply although it also notes that he was being assisted by a member of the Defendant's maintenance staff. Item 4.07 of the minutes of site meeting 01 also confirms that this work was being done by the Claimant. However, I accept the Defendant's contention that this work was part of the process of getting the site ready for the demolition work to start and that as such it was work which the Claimant was obliged to perform for the contract price. In my judgement Mr. Webster was right to describe it as analogous to the electricity supply to the gorillas. Both the water and the electricity were shared between the facilities for the gorillas and the orang-utans and the demolition of the orang-utan facility would inevitably involve cutting the supply to the gorillas. In those circumstances preparing the site for the works, as the Claimant was required to do for the contract price, necessarily entailed not only cutting the water supply to the gorillas but providing an alternative supply.

72. This claim falls on that ground but would in any event fail on the basis that the Claimant has failed to show that the sum claimed is a reasonable sum for labour and materials in relation to this work.

73. Invoice Z0451 is in the VAT-exclusive sum of £1,046.40. The works are described as "to assist Blackpool Zoo our operatives constructed 2no partitions to the Kitchen/Corridor". This also refers to correspondence of 15th February 2013 but again there is no correspondence of that date relating to this item and it may well have been part of the subject-matter of the exchanges on 19th February 2013.

74. The Claimant's attendance note of 13th February 2013 records that the Claimant's staff were fitting a door to the "gorilla passageway" and the note of 14th February 2013 records those staff as installing hoarding to separate the orang-utan and gorilla facilities and to create a temporary kitchen area. It appears that this was the work to which the invoice was referring and on that basis I find that it was part of preparing the site for the demolition works and as such part of the works which were to be performed for the contract price. Preparing the site for the demolition of the orang-utan house necessarily included partitioning off the linked gorilla house.

75. The note of 14th February 2013 also records that the Claimant had been asked by Mr. Christophides, the Defendant's maintenance manager, to fit a door to access the temporary kitchen from the gorilla viewing passage. It is not clear whether this is also work to which the invoice relates. In any event the note records that this was not the Claimant's responsibility but that Mr. Mycock had nonetheless instructed the site foreman to fit the door so as "not hold the demolition work up". In my judgement the effect of that was that the Claimant was agreeing to perform that work without additional payment in order to progress the works.

76. It follows that this claim fails because the work involved was either part of the work which the Claimant was to undertake for the contract price or was additional work which the Claimant agreed to undertake without additional payment. As with the preceding invoices the Claimant has also failed to establish that the sum claimed is a reasonable sum for labour and materials.

77. It is to be noted that in his witness statement Mr. Mycock said that invoices 449, 450, 451, and 452 were for "additional items of work which we were instructed to undertake and are all referenced in the minutes of various site meetings. They were variations which were agreed and completed and were not included in the set up costs." It became apparent in the course of his oral evidence that Mr. Mycock's recollection did not actually extend this far. When he was cross-examined he said that he could not remember if there was any agreement that the Claimant would be paid extra for the provision of electricity and water to the gorillas or for the kitchen partitions but that he "would not be surprised if there had been such an agreement."

78. Invoice Z0452 is in the VAT-exclusive sum of £3,510 for works described as being "to install additional foundations all as drawing no 90014217-07-1635 to timber ramp location". The invoice is said to be "further to previous

correspondence dated 1/03/2013". Mr. Mycock's invoice of that date attached a revision to the construction programme and a schedule of materials for the ramp and steel frame. In the email Mr. Mycock sought that payment be made for these materials on their delivery to site.

79. The claim in respect of this sum is almost wholly unparticularised. The only reference to it in the evidence is the passage in Mr. Mycock's witness statement which I have quoted in [77] above and which went further than he could in reality remember. It was common ground and confirmed by the minutes of the site meetings that the ramp was built out of the originally planned order. There was a delay before the demolition work could start and in order to use the time constructively work on building the ramp began earlier than was planned. However, the bundle contains nothing to suggest that additional work was undertaken let alone to show agreement on the Defendant's part that additional payment was due. As Mr. Clegg rightly said the ramp which was built was the ramp which the Claimant had been engaged to install and which the Claimant had undertaken to install. To the extent that additional foundations were required because of the ground conditions that was a risk which was being borne by the Claimant for the reasons I will explain when considering the claim in relation to invoice ZO454. There is again no particularisation of the work actually done. It follows that this claim fails.

80. Invoice Z0454 is in the VAT-exclusive sum of £20,574 and is said to be for "associated costs: to install the additional foundations, to carry out re-design and calculation checks". It is said to be "further to correspondence dated 17/06/2013" but that appears to be a reference to the date of the invoice itself.

81. This relates to the circumstances which came to light after the existing orang-utan facility had been demolished and excavation of the foundations had begun. It was discovered that the existing paddock wall and the ground conditions were such that the steel frame for the new facility could not be based on the wall and the foundations had to be redesigned. It is apparent that the Claimant had been aware on entering the Contract that there was a risk that this would happen but had believed that the risk was unlikely to eventuate and had chosen to enter the Contract taking that risk. The redesign of the foundations was necessary in order to perform the contractual works of installing the new orang-utan facility and as such was part of the works which the Claimant had contracted to perform for the contract price. The Claimant had assumed that the redesign would not be necessary but has to bear the consequences of its assumption being wrong and in those circumstances there is no entitlement to an additional payment for this work.

82. That position is apparent from the correspondence before the Contract was concluded and from Mr. Pearson's approach after the difficulty was discovered.

83. I have noted at [13] above that in his letter of 19th December 2012 Mr. Pearson had identified a number of risk areas against which the Claimant had not included any sums of money in the price of £508,576. The "nature of the ground beneath the existing slab" was one of these and in that regard Mr. Pearson had said "we have no reason to believe that a problem will exist here and although we have not included any sum of money against that risk we believe it to be

low". Although that letter was followed by a meeting between Mr. Pearson and Mr. Webster it did not lead in this respect either to an increase in the price or to an agreement that the sum payable would be increased if this risk came to fruition.

84. Similarly in his note of February 2013 Mr. Pearson noted that there was no margin in the contract price to cover mistakes or "unidentified problems" and that those remained a risk.

85. The note which Mr. Pearson prepared in advance of the meeting on 1st May 2013 addressed the matter thus:

> "It was assumed that no redesign would be required due to foundation problems associated with the old building, in particular the separating wall with the paddock. (No investigation was possible against this wall in the central portion and the assumption was made that the wall was of consistent design throughout its whole length enabling the steel frame to sit on top of the wall). It was recognised that there was a risk area in the wall and this was noted on Drawing 100—010 — the extent of the problem to be determined on site.
>
> …
>
> On excavation for foundations (by 15 April 2013) it was discovered that the central portion of the paddock wall was not founded adequately to allow the frame to be founded on the wall and there would have to be a redesign of the foundations. the keepers' walkway and the frame thus delaying the order for the steel frame."

86. In the letter he wrote on 2nd May 2013 following the meeting Mr. Pearson said:

> "The most recent delays to the Orang-utan project have been caused through identification of inadequate foundations along the wall line of the new building where it abuts the external paddock. We advised you in December 2012 that we could not be certain of the actual ground conditions beneath the old building and that no costs had been included in our price in this regard should problems he found. Notice was also given via contract Drawing No 1000-01D dated December 2012 that foundation and frame details in this area would have to be examined after excavation to determine if the assumptions made for the purpose of the Contract and to underpin the Contract Sum were valid or whether changed design was needed. Examination before the work commenced was not practical, the animals were present in this area and the old building was founding on the wall.
>
> The true conditions on and surrounding the paddock wall were therefore first determined on completion of the excavation in the area following demolition of the old building. Unfortunately, the assumptions made at the time of completing our Contract were not borne out by the conditions identified and this has required consequent redesign of foundations and frame details in this area. In turn this. together with changes to doorways etc following your assessment of the internal layout of the building, has required reappraisal of frame connection, bracing and other details by our steel frame sub-contractor. There are direct costs associated with these changes and these are being evaluated and will be notified to you in due course…"

87. Later in the letter Mr. Pearson summarised the position thus:

> "We advised you at the conclusion of our negotiation on price for this Project that because of your reduction in budget (by over £100K from our previously agreed estimate the only way we could take on this work was by accepting that effectively the project would deliver no return to TBL. We advised you that it would be a project carried out at a cost price, which included no margin or contingency. We advised you of the assumptions we had made in deriving our Contract Price, where the risk areas lay for matters excluded from the price and also what might be done to help TBL accept the reduction in price to bring it closer to your revised budget.
>
> I believe that we both moved forward into this project in full knowledge of the above matters.
>
> We now have to face the reality that both of us are embarked on a project which, through no fault of TBL's, has been subject to the series of delays and/or changes as set out above all of which have added to and are continuing to add significantly to TBL costs. On a project without contingency or margin this leaves us in a position where we are now facing substantial losses. I have advised in the past we are not in a position to contract for any works at a loss.
>
> We believe and trust that it was never your intent to place us in this situation and we also believe that it is in all our m interests to work together quickly to find an acceptable (to all) resolution to what is now becoming a very serious problem.
>
> I believe that the best way to initiate this resolution is to meet together to determine the most appropriate way forward."

88. Mr. Pearson was right to say that the Defendant had been informed of the assumptions which the Claimant had made when agreeing to the contract price. However, as I have just noted the letter of 19th December 2012 had not been followed by any alteration to the price nor by any agreement on the Defendant's part that the price would be revised if the Claimant's assumptions were proved wrong. It follows that the Claimant had no right to an additional payment because of the need to install additional foundations. Indeed, Mr. Pearson did not in the exchanges in May 2013 assert such a right but instead sought to use the Defendant's knowledge of those assumptions as an argument in favour of a renegotiation of the price.

89. This claim also fails and here again the Claimant has failed to establish that the sum claimed is a reasonable sum for labour and materials for these works.

90. The final three invoices can be dealt with together. Invoice Z0455 is for the VAT-exclusive sum of £4,200 which is said to be for work "to complete the design all as drawings 300-014 and SK-022 as requested." It also refers to "previous correspondence dated 17/06/2013" which is the date of the invoice. Invoice ZO456 is in the VAT-exclusive sum of £3,350 for "structural steel frame re-design and re-calculation checks due to changes all as requested". It is dated 27th June 2013 and is said to be "further to previous correspondence dated 24/06/2013" but there is no earlier correspondence bearing that date in the bundle. Finally, invoice ZO457 is in the VAT-exclusive sum of £3,000. The narrative records that "the design development has now been completed. Drawings and schematic for the mechanical and electrical installation". This

invoice also refers back to correspondence "dated 24/06/2013" which is not before me.

91. The Claimant's case appears to be that these invoices relate to design work undertaken after January 2013 because at that stage there had been no mechanical and electrical drawings and the internal design had not been finalised. The minutes of the site meetings show that the designs and drawings were compiled in the course of the works. The minutes show that the process involved the Defendant explaining what it wanted to achieve; meetings involving both sides to discuss the design; the provision of designs and drawings by the Claimant for the Defendant's approval; and modification of the drafts to address points made by the Defendant. It is to be noted that it is only in the minutes of site meeting 11 that there was any express reference to the drawings being altered in response to a request from the Defendant although the minutes of meeting 08 do refer to the reissue of drawings.

92. The claim for additional payment in this regard is not made out. It was common ground that this was a design and build contract with the designs being produced by the Claimant's sub-contractors, Merebrook Consulting Ltd. That position was reflected by the Contract Construction Programme. The first section of that was entitled "Design and Contract" and the first two elements in that section were "complete final design" and "design development internals". As Mr. Webster said "this was a design and build contract and it was the Claimant's responsibility to get the drawings done." The process I have described in the preceding paragraph is the normal process of developing a design in conjunction with the client and well within the scope of the work which the Claimant had agreed to perform for the contract price.

93. There would have been potential scope for design work giving rise to a claim for additional payment if the Claimant had shown that the Defendant had made changes in the course of the works requiring additional design work after designs had been prepared. However, the evidence does not come close to establishing that. To the extent that the steel frame was re-designed and recalculation was needed this appears to have been the result of the discovery of the inadequacy of the wall and the foundations to bear the steel frame but as already explained the risk of that discovery was one which was being borne by the Claimant. The contemporaneous documents by way of the minutes of the site meeting and the correspondence show the Claimant contending that delay was being caused by the Defendant's failure to finalise its position as to the desired internal layout of the new orang-utan house. Mr. Webster denied that this caused any delay but the point of relevance here is that the criticism advanced by the Claimant was of delay increasing the period for which the Claimant had to bear overhead costs rather than of change necessitating additional design work.

94. As with the other elements of the claim for additional sums the Claimant has produced no evidence from which the court can conclude that the sums claimed are reasonable in respect of labour and materials.

## The Counterclaim.

95. The Counterclaim seeks £453,739.20 as the additional cost of completing the works pursuant to clause 4.2 of the Contract. Alternatively the same sum is sought as damages caused by the Claimant's alleged breaches of the terms of the Contract by reason of a failure to complete the works to time; of delay in performance; and of a failure to perform the works to the requisite standard.

96. The Defendant chose to terminate the Contract using the power given by clause 10.1. I am satisfied that this was an election between potential alternative rights and that having made that election the Defendant cannot now seek to invoke clause 4.2.

97. Mr. Webster explained that he had referred to clause 10 in the termination letter believing that he had to do that because clause 10 appeared under the heading "Termination" in the Contract. I accept that this was Mr. Webster's personal reasoning process and that he had not given any conscious thought to the distinction between the effects of a termination under clause 4.2 (a) and a termination under clause 10.1. Indeed I find that Mr. Webster summed up his state of mind at the time accurately by saying that his principal concern was the need to move on from the engagement with the Claimant which had broken down. However, the effect of the termination letter is to be determined objectively without regard to the Defendant's uncommunicated belief or understanding. When that is done it operated as an election between the different ways of termination provided for in the Contract.

98. The Contract provided two different ways in which the Defendant could have terminated the Claimant's engagement. Clause 4.2(a) provided for termination in the event of the Claimant failing to meet a performance date and did not specify a necessary period of notice. Clause 10.1 provided that the Defendant was entitled to terminate on four weeks' notice in particular circumstances.

99. In his letter of 12th June 2013 Mr. Webster not only referred expressly to clause 10.1 but he stated that the Claimant was being given four weeks' notice of termination. That is to be seen as an exercise of the power to terminate provided by clause 10.1 (a). None of the circumstances provided for in clause 10.1 (c) – (i) applied and it was not being asserted that the Claimant had failed to remedy a breach within twenty-eight days of being notified in writing so as to bring clause 10.1 (b) into play.

100. The Defendant could have sought to terminate the Contract under clause 4.2 (a) or clause 10.1(a) and chose to use the latter power. By terminating on that basis the Defendant was accepting that the performance of the works had been "delayed, hindered, or prevented by circumstances beyond [the Claimant's] reasonable control". There were sensible and pragmatic reasons for adopting that course. It avoided any dispute as to whether the Claimant had been in breach of the terms of the Contract and so removed the risk of a finding that the termination had been wrongful if the Claimant were found not to have been in breach of the terms of the Contract.

101. Moreover, a termination under clause 10.1 (a) accorded with the choice which the Defendant had offered to the Claimant in the discussions where both sides had been trying to salvage the arrangement. Mr. Pearson's note of the 24th May 2013 meeting records that the Claimant was offered a choice between completing the works by the newly revised date of 2nd August 2013 for the contract price together with £8,000 in relation to the asbestos work or completing by 19th July 2013 in which case the Defendant would consider making additional incentive payments to the sub-contractors. Mr. Pearson's note then states he was told:

> "Unless one of these options was accepted by [the Claimant] then a `shake hands and walk away' position would be reached after the installation of the steel frame."

102. The Contract was accordingly terminated under clause 10.1 (a) on the footing that the delays had been caused by circumstances beyond the Claimant's control.

103. Clause 10.2 provided that termination howsoever arising did not affect accrued rights at the date of termination. A claim to the cost of remedying defects in the work done by the Claimant would be such a right and would remain unaffected by the termination. In that regard Mr. Jackson accepted that the Claimant was not realistically able to counter the contention that defects in the Claimant's work had caused the Defendant loss in the sum of £7,241.96. That flowed from the fact that in February 2014 Read Construction Holdings Ltd had identified that sum as the cost of removing the drainage and re-laying it at the correct levels and of addressing deficiencies in the foundations. I find that the Defendant was caused loss in that sum by reason of defective work on the Claimant's part and that in the event that the claim had otherwise succeeded the Defendant would have been entitled to set off that sum against the Claimant's entitlement.

104. I have considered whether the Defendant's potential claim for damages flowing from delay on the Claimant's part was an accrued right as at the date of termination. I am satisfied that if such a breach had been established then the claim in respect of it would have been an accrued right surviving termination. However, pursuit of such a claim is precluded by the fact that the Defendant elected to terminate the Contract under clause 10.1 (a). The Defendant chose to terminate exercising that power on the footing that the delay had been the result of matters outside the Claimant's control. The Claimant had accepted the termination on that basis as validly ending the Contract. In those circumstances it is not now open to the Defendant to contend that the delays were the responsibility of the Claimant and to claim damages in respect of them.

105. Much of the evidence at the trial was concerned with the question of which party was responsible for the delays in the performance of the works. That question became academic in the light of the Claimant's abandonment of its damages claim and of the finding I have just made that it is not now open to the Defendant to contend that the Claimant was responsible for the delay.

## Conclusion.

106. It follows that the claim fails and although the Defendant would have been entitled to set the sum of £7,241.96 against any successful claim there can, in the light of the Claimant's liquidation, be no judgment for the Defendant on the Counterclaim.