Neutral Citation Number: [2022] EWHC 29 (TCC)

Case No: G50MA008

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

Manchester Civil Justice Centre
Date handed down: 10 January 2022

Before His Honour Judge Stephen Davies

Between :

THE SKY'S THE LIMIT TRANSFORMATIONS LTD	**Claimant**
- and -	
DR MOHAMED MIRZA	**Defendant**

Philip Byrne (instructed by **Berry Smith LLP, Cardiff**) for the **Claimant**
Joe-Han Ho (instructed direct) for the **Defendant**

Hearing dates: 29 November - 3 December 2021
Date draft judgment handed down: 20 December 2021

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APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII. The date and time for hand-down is deemed to be ... am on 10 January 2022.
I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

A. Introduction and summary of decision

1. This is a claim arising out of a building contract for alterations to a residential property known as Redthorne, Princess Road, Lostock, Bolton entered into between the claimant building contractor and the defendant houseowner. The building contract came to an end in April 2017 in acrimonious circumstances before the works had been completed. In December 2019 the claimant issued proceedings claiming payment for outstanding invoices and damages for loss of profit on the remaining works. The defendant defended on the basis that nothing was due, taking into account such matters as the true entitlement to payment in respect of the work done, the cost of completing the works and the cost of remedying alleged defects.

2. The case was transferred into the Manchester TCC where in September 2020 the then TCC District Judge gave directions down to a trial in July 2021. He was persuaded, because the parties had already instructed experts in these disciplines, to grant permission to each party to rely on expert evidence from a building surveyor, a mechanical engineer, an electrical engineer and a quantity surveyor. At the pre-trial review held in June 2021 I was forced to adjourn the trial to November 2021, due to witness ill-health and difficulties with expert evidence. I directed the parties to engage in a mediation which, regrettably, did not result in a settlement.

3. Thus, the trial proceeded and took place over 5 days. The first day was given to the claimant's factual evidence, the second to the defendant's factual evidence, the third to the evidence, given concurrently, of the mechanical engineers, electrical engineers and building surveyors, the fourth to

the evidence, also given concurrently, of the quantity surveyors, and the fifth to oral closing submissions.

4. It was a fairly challenging timetable to run on a traditional basis, given the volume of evidence and disputed issues. Leaving aside contract formation and terms and termination there were a large number of disputes regarding variations, unfinished and defective works (the Scott Schedule runs to 160 items). I am extremely grateful to counsel for their hard work and discipline in ensuring that the case ran to time, leaving me to produce this judgment subsequently. I suggested that the parties might consider further settlement discussions after the evidence and submissions had closed. Again, that resulted in no settlement.

5. It is a great shame that the parties have been unable to resolve their dispute out of court, given the amount of time, effort, stress and cost the whole process has taken for the individuals concerned. It is of course the function of the court to resolve disputes where the parties are unable to do so. However, I am acutely aware that, as so often occurs in this type of case, the outcome will likely be a financial disaster for one of the parties and, even if not, likely an expensive and ultimately unrewarding result for both.

6. In my view concrete steps to address the challenge of finding a time and cost effective means of fairly resolving domestic property renovation building contract disputes are required. Based on what is now my relatively longstanding experience, both as advocate and as a TCC Circuit Judge, in case managing and trying such cases, I would suggest that one option well worth considering in such cases would be for directions to be given at the first CCMC[1] along the following lines: (a) disclosure limited to documents relied upon and to known adverse documents; (b) a single joint expert building surveyor to be instructed in all cases[2] to address all items in issue, both liability and valuation, with questions to the expert strictly for the purposes of clarification only; (c) a stay for mediation on receipt of the report and questions. If the parties are not willing to mediate and the judge does not consider it appropriate to order mediation, then there should be an order for compulsory early neutral evaluation before another TCC Judge.

7. If no settlement is achieved then there should be further directions as follows: (d) witness statements, limited to matters remaining in dispute, strictly complying with PD57AC and limited in length and/or number ; (e) a trial, which should not normally exceed 1 day in length, at which: (i) each party would have produced in advance detailed written opening submissions; (ii) no oral openings would be permitted; (iii) no more than 1 hour each for cross examination of each party's witnesses on their key evidence would be permitted; (iv) the single joint expert would attend remotely to answer questions from the judge and parties for no more than 1 hour in total; (v) there should be 1 hour each for oral closing submissions, followed by: (f) a judgment, orally or in writing at the judge's discretion, which would be as summary as the trial process. To make the trial workable and fair the judge would probably require a half day pre-reading time and up to a full day judgment time, ideally the day before and the day after the trial respectively, with the latter being used either to produce a

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1 At which the parties could be required to attend in person, especially where the hearing is held remotely, and in advance of which the parties could be notified that the judge was minded to make an order in the stated terms.

2 Even where one or both of the parties have already instructed their own experts pre-proceedings.

written judgment or to give an oral judgment in the afternoon following a morning of judgment preparation.

8. In terms of costs budgeting, the approved costs going forwards should not normally exceed £25,000 per party, broken down as to £2,500 for disclosure; £5,000 for expert evidence (which would include the party's half share of the expert's fee); £5,000 for mediation (including a half share of the mediator's fee); £2,500 for witness statements; and £10,000 for trial preparation, trial and post judgment matters.

9. Whilst this process would not enable a judge to produce anything like the sort of judgment I have produced in this case in terms of length and detail, it would enable the judge to produce a judgment after a fair and open, but summary, trial process in which the key issues were ventilated and which, importantly, was reasonably speedy and reasonably inexpensive. I am not suggesting that an order for directions along the above lines would be appropriate in every case[3] or that it would be a panacea in every case. In particular, it would not address the problem of disproportionate costs being incurred pre-action (although if the judge considered that such costs were disproportionate and was prepared to record as much in the costs management order that might also assist in concentrating minds). However, it would at least allow the parties a better chance to settle with the benefit of independent expert opinion before being plunged into trial. It would also provide a better chance to avoid financial disaster if the case had to go to trial. Most importantly, it would be fair since, based again on my experience of such cases, it is unlikely that a more intensive - and thus more lengthy and expensive - trial process would produce a result significantly different to the result produced through this procedure. In particular, if a party or a witness is thoroughly unreliable or dishonest, that will usually become apparent within a fairly short time, measured in minutes rather than hours, of focussed cross-examination and, more often than not, such findings are unlikely and cases more often turn on the contemporaneous documents, which are usually not seriously in dispute, and the expert evidence which, if given by an independent single joint expert, ought not to be capable of significant challenge.

10. Returning however to the present case, in short, my decision is that there is nothing further due to the claimant under the final account and, in the absence of a counterclaim, nothing due to the defendant either. My reasons follow. I have kept my reasons as brief as is consistent with enabling the parties to understand the findings I have made. To produce a full mini-judgment on each disputed item would have involved unacceptable delay in the production of this judgment, especially given the relatively modest values involved.

B. The evidence

11. This is a reasonably well-documented case. The principal elements of the contract were reduced to writing, although there are disputes about some of the terms. There are voluminous emails as well as some text messages passing between the claimant and the defendant although, as Mr Byrne observed, in some ways they make my task more difficult because those contemporaneous emails show that the parties were not agreed even at the time about what had been said, done or agreed.

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[3] It is likely for example that the number and complexity of the disputed issues and items in this case would have led to the need for a 2 day trial, even adopting a streamlined procedure such as suggested above.

12. There is little if any internal correspondence between the two directors and owners of the claimant (Mr Jeff Britton and Mrs Sharon Britton) or between the claimant and its subcontractors or between the defendant (Dr Mirza) and his two sisters (Jabeen Mirza and Sabina Mirza) even though both sisters had very considerable dealings with the claimant on behalf of their brother. At first blush it is surprising that more correspondence of that nature has not been disclosed, especially subcontractor correspondence in the case of the claimant and internal correspondence between Dr Mirza, Jabeen Mirza and Sabina Mirza in the case of the defendant, since they did not live together and each had busy working lives and, later, caring responsibilities. However, since it was not suggested in cross-examination of any witness that there had been a conscious failure to search for or to disclose relevant communications, and since I am satisfied that the witnesses were all honest people who have not deliberately suppressed relevant documents, I do not place any weight on the absence of such correspondence either way.

13. Jeff Britton and Sharon Britton both gave evidence. In his closing submissions Mr Ho argued that they gave live evidence at trial that seriously undermined their credibility. He gave seven examples. I do not need to deal with each in turn. It suffices to say that I accept that there were some reasonably significant departures between their witness statements and their oral evidence and that I also accept that neither can be said to be wholly reliable witnesses on every issue. That is, I am sure, both because of the passage of time since the key events occurred in 2016-17 and because of the strong personal emotions that the case has excited in them. I thought that overall Jeff Britton was reasonably phlegmatic and less personally involved than Sharon Britton, who was candid in her witness statement in explaining the stress and strain which this litigation had caused her. It is perhaps also not surprising that later on in the project, when it was becoming apparent that it was not running smoothly for various reasons which I shall have to investigate, there was a tendency to minimise any fault on the claimant's side and put the blame on the defendant's side, as well as a wish to maximise cash flow.

14. I consider that Mr Ho's complaints were mostly justified but - for understandable forensic reasons to advance his client's case - also mostly overstated. To take his first example, I do not consider that Jeff Britton was saying in his witness statement (or indeed that Sharon Britton was saying in her contemporaneous email) that Dr Mirza had actually agreed to pay the balance of invoice 4 in full at the meeting referred to, only that the claimant had explained that it would not order further materials until it was paid and the defendant had agreed (in the sense of understood) that this was the claimant's position. I consider that Sabina Mirza's reply email of 20 March 2017 at 08:41 is consistent with this being the contemporaneous understanding, since she did not challenge the email as she would have done had she understood it as Mr Ho now seeks to invite me to read it, simply saying instead "I will respond later today with the decisions / payment we discussed on Saturday".

15. Nor do I accept Mr Ho's submission that Jabeen Mirza, Sabina Mirza and Dr Mirza all gave live evidence at trial that was compelling and credible. They all came across to me as convinced that they were right in every respect. It was apparent that Jabeen Mirza and Sabina Mirza had been very involved with the project and with the litigation. They were all affected by the sad death of their mother during the final stages of the contract and I am satisfied that their grief over the death of their mother has coloured their view of the project and exaggerated their negative view of the claimant's performance of the contract and the works.

16. The initial plan had been that once the large new extension had been completed Dr Mirza, Sabina Mirza and their mother should all move into the house. That changed because, very sadly, their mother had a serious fall in late December 2016 and investigations revealed a terminal cancer diagnosis. Their mother then spent some time in hospital and was later allowed to return home to live with Sabina Mirza, who had the primary caring responsibility for her until her death in early April 2017. Their mother was therefore never able to move into the house which had been acquired and the works planned with that in mind.

17. Because Dr Mirza was very busy throughout with his work as a G.P. and, after his mother's illness had been diagnosed, naturally wanted to spend as much time with her as he could, he had little time to deal with the claimant in relation to the contract and the works. It seemed to me that they had failed to appreciate how much time and effort they would need to expend in self-managing this project, having elected not to obtain professional advice once they had instructed an architect to produce drawings and obtain the necessary permissions. The end result was that Sabina Mirza had primary responsibility for dealing with the claimant until January 2017, after which Jabeen Mirza took over that primary role. It appeared that all three tried to make decisions jointly. It is not surprising that this was difficult and not always successful, especially once their mother fell, became seriously unwell and received a terminal diagnosis. Nor is it surprising that their recollections of events has been adversely overlaid by the combination of the unexpected illness and death and the acrimonious termination of the building contract.

18. For all of these reasons I am satisfied that this is not a case where I can simply prefer the oral evidence of the claimant to the defendant or vice versa. It is a case where the contemporaneous documents are the most reliable guide. Where they conflict or where there are important factual issues which cannot be fully answered by reference to those documents I will have to make findings as to whose evidence I prefer. However, I do so by reference to the assistance I do get from the documents and my assessment of the likely probabilities as much as by a self-standing finding as to whose oral evidence I prefer on that point.

19. I need say far less about the experts. They were all suitably qualified and independent. They had all produced detailed and careful reports and had all co-operated, both in terms of the production of joint statements and in giving evidence on a concurrent basis, which plainly suited them all. I am very grateful to them all. Insofar as I have to make a general assessment, on balance I tended to prefer the evidence of the claimant's experts, as being in my assessment rather more realistic in terms of assessing the nature and extent of any defects and reasonably necessary remedial works and in terms of assessing the reasonable costs.

C. Contract formation and terms

20. The principal areas of dispute are: (a) whether the contract was a fixed price contract based on a fixed price quotation or an estimate; (b) the contractual terms as to interim valuations and payment.

21. Dr Mirza acquired the property in August 2015 and instructed a local architectural practice to draw up plans for the demolition of the existing single storey side extension and the construction of a new double extension in its place. The plans showed a new utility and bathroom to the front ground floor, a new kitchen to the rear ground floor, a new family bathroom and separate ensuite bathroom to the

front first floor and a new 5th bedroom with ensuite to the rear first floor. The plans included fairly standard notes but there was no detailed specification drawn up to provide the detail of what was required.

22. The defendant decided to approach a number of local contractors, including the claimant. Sabina Mirza's email of 20 January 2016 attached the approved plans and asked the claimant to provide an "estimated quote". Sharon Britton's immediate response said that Jeff Britton would work on an "estimate" however her subsequent response, explaining the delay, stated that she was waiting for supplier costings, explaining that "we price all jobs individually and not on a standard meterage. This ensures more accuracy as you will see, we itemise all aspects so you know exactly what is included within that price".

23. The ensuing document described itself as an estimate, although the estimated cost of £144,870[4] showed that it had, as promised by Sharon Britton, been priced on a detailed basis. It set out a breakdown of what was priced for to a reasonable level of detail, running over 3 pages. It was clearly stated that certain items were priced on the basis of assumptions and estimates, for example the sanitary ware and electrics, and concluded by saying that "a site visit will be required to finalise costs, access, additional works and any other requirements e.g. underfloor heating, tiling".

24. The site visit took place, after which an updated estimate in the sum of £156,370 for the extension was provided in March 2016, which said that it had been "calculated based upon the drawings provided and amendments following recent site visit". The additions to the original were shown in blue on the estimate and identified the items which had resulted in a cost increase. It also included a separate price for additional works, comprising a proposed summer house in the rear garden, a dormer to the rear roof elevation, a new composite door to the front porch and provision for a new boiler and pressurised cylinder to service the first floor bathrooms.

25. In April 2016 Sabina Mirza thanked the claimant for its "quote", sought clarification on some matters, including the likely timeframe for the works to start in November 2016, and also said that "if we go ahead with the works, we will require a build and payment schedule, details of insurance covers are in place and project contract". Sharon Britton answered promptly and on 3 May 2016 Sabina Mirza wrote to "confirm the booking" and to schedule a meeting to finalise and sign off paperwork. Sharon Britton replied to say that at the meeting Jeff Britton would produce a draft contract prepared by the Federation of Master Builders (FMB) and work through the gaps which would enable the contract to be completed.

26. The meeting took place on 1 June 2016, attended by Jeff Britton, Dr Mirza and his two sisters. It is common ground that Jeff Britton produced a draft of the FMB standard form Plain English building contract for domestic work, dated 13 May 2016 and signed by Jeff Britton. The copy he left with the defendant contained certain important blanks to be completed, such as the start date and approximate duration and the contract sum. Various sections were crossed out, none of which is material to this case. Various other sections, such as Schedule A, which ought to have been completed to identify the contract documents, were not completed. Relevantly for present purposes the time period for

[4] Inclusive of VAT, as was the second estimate and the subsequent valuations and invoices.

interim bills and the time period for payment of interim bills were not completed. I find that the defendant, not surprisingly, indicated that it was a complex document and that they would all need to look at it.

27. There is a dispute about whether an agreement was reached about interim bills. The defendant's case is that Jeff Britton said that the claimant's standard terms were for 14 day interim bills, payable 7 days, whereas the defendant's position was that they were only willing to agree monthly interim bills, payable 10 days, on the basis that they did not have time to undertake a fortnightly inspection and wanted 10 days to ensure that they would always have a weekend to inspect between the date of the bill and the date of payment, and that he agreed to their terms at the meeting. In cross-examination Jeff Britton did not have much recollection of this but recalled there being some discussion about monthly or fortnightly payments and that it was left with his saying that Sharon Britton would deal with this when she sent a payment plan.

28. I do not accept the defendant's case about this. There is no mention of this agreement in the emails which follow the meeting. It is plain from these emails that no overall agreement was reached either at the meeting or subsequently, because the defendant was still deciding whether or not to proceed with the summer house and asking for a breakdown of the costs for a full electrical rewire of the whole house. In the email of 10 July 2016 Sabina Mirza said that once these matters were all dealt with "we can arrange for the signing of the contract". I do accept that reference was made in Sabina Mirza's email of 13 November 2016 to a monthly payment schedule having been agreed at the meeting, and I am prepared to accept that this may have been the defendant's understanding on the basis that Jeff Britton did not push back very strongly on this point, but I do not accept that it was positively agreed, not least because Sharon Britton did indeed later produce a payment plan showing 14 day valuation and 7 day payment terms.

29. Nothing further of note happened until a pre-start meeting was arranged and took place on 29 October 2016 in anticipation of work starting on 7 November 2016. At the meeting Jeff Britton provided a draft document entitled "building contract for domestic work" which was, effectively, a stripped down version of the FMB contract, together with an attached updated version of the previous estimate. I accept the claimant's evidence that Sharon Britton produced this because she had been led to believe from Jeff Britton following the June meeting that the defendant was concerned about the complexity of the FMB contract. On 9 November 2016 the claimant also produced a "provisional payment plan" which provided for 7 equal stage payments to fall due on specified dates which were, allowing for the festive break, broadly on a fortnightly basis. The stage payments were calculated by reference to the revised provisional price of £170,574, including a new porch, provisional boiler cost and estimated electrics. The claimant also provided a build schedule.

30. On 13 November 2016 Sabina Mirza responded to say that having reviewed the documents the defendant's position was that: (a) the FMB contract discussed at the June meeting was in place, not including the additional works about which no decision had yet been made; (b) the alternative draft building contract was not agreed; (c) equal payments regardless of actual progress were not agreed; (d) monthly interim bills payable within 10 days were suggested.

31. On 14 November 2016 Sharon Britton and Sabina Mirza discussed matters, following which Sharon Britton sent an email with an attached revised payment plan. She said that the claimant was happy to stay with the FMB contract and suggested a meeting to run through and complete the outstanding items. She explained that the attached revised payment plan provided for a monthly invoice to include for the work done at each milestone date. She said that this was only agreed on the basis that the monthly invoices were "paid prompt" and that 10 days could be detrimental to its cashflow. She said that "in order to allow you the time to review the invoice and visit site I will arrange to prepare the invoice and email to you at the beginning of each week when the payment is due" and that "We can arrange to meet at site if you would like to discuss the project development and see the progress being made. We would then hope for payment to be made within a couple of days". The terms of the attached revised payment schedule were consistent with this explanation, with each payment date falling due every fourth Friday, allowing for some modification at the start and over the festive break.

32. On the same day Sabina Mirza emailed to say that she would discuss with her brother and sister and respond. Sharon Britton had proposed a meeting at the weekend, which the defendant could not make. However, in a further email on 16 November 2016 Sabina Mirza said that the defendant was happy to make the first payment on the basis suggested and that he would respond fully on all the other matters once he had been able to review the documents sent. He never did so. There was, however, a telephone call between Sharon Britton, Sabina Mirza and Jabeen Mirza followed by an exchange of emails on 20 November 2016 which confirms that no issue was raised about the contract terms as proposed. Sabina Mirza said "As discussed, we will endeavour to ensure payment is made as promptly as possibly upon receipt of the invoice for works completed to date. Can you please provide an itemised invoice with expenditure and labour as confirmation of works completed". Sharon Britton agreed with this by her return email. The claimant sent the first interim invoice on the Wednesday 23 November 2016 before the due payment date of Friday 25 November. It did not specify a date for payment but it is clear that it was discussed at a meeting on site on Saturday and the payment was made in full by bank transfer, clearing on the Tuesday 29 November.

33. It follows, in my judgment, that the contractual position as regards payment was finally concluded on 29 November 2016 at the latest when, objectively, the defendant must be taken to have accepted by words and/or conduct the terms of the revised payment schedule and the accompanying email as varied and agreed by the emails of 20 November 2016.

34. The reason I have gone through all of this in some detail is because it is necessary to so do to understand the agreed payment terms and, in particular, how they operated in accordance with the standard payment terms in the FMB contract. That is because one of the grounds relied upon to justify the claimant's suspension and then termination of the contract is non-payment of the fourth interim bill, so that it becomes very important to know whether or not the defendant's email setting out the amount which he was prepared to pay and why was a valid payment notice.

35. Before I turn to that more complex issue, I can deal relatively speedily with the issue as to whether the contract as formed was a fixed price contract on the basis that the price was an agreed fixed price, based on a fixed price quotation, or a contract for a reasonable price, based on an estimate.

36. The relevant legal principles, such as they are, are summarised in a judgment which I gave in a case last year, Optimus Build Limited v Southall [2020] EWHC 3389 (TCC), where I said this at paragraphs 5-11:

> "5. The contract is one which was formed during the course of a series of meetings and documentary exchanges. The documents included various iterations of what was described as a budget estimate as well as a number of emails. What each of the parties intended or understood by their written and spoken communications is irrelevant unless that intention or understanding was shared with and agreed or accepted by the other party.
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> 6. I must apply well-established principles of contractual construction to ascertain the meaning of the words used, both in written and in spoken form, which, as summarised by O'Farrell J in *Entertain Video Ltd v Sony DADC Europe Ltd* [2020] EWHC 972 (TCC) at [221] in relation to written contracts, are as follows:
>
> > "When interpreting a written contract, the court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It does so, having regard to the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of: (i) the natural and ordinary meaning of the clause; (ii) any other relevant provisions of the contract; (iii) the overall purpose of the clause and the contract; (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and (v) commercial common sense; but (vi) disregarding subjective evidence of any party's intentions.
> >
> > See: *Arnold v Britton* [2015] UKSC 36 per Lord Neuberger at paras. [15] to [23]; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 per Lord Hodge at paras. [8] to [15]."
>
> 7. Moreover, whilst I should not treat the defendants as having the same detailed knowledge of building contract procurement and the terms commonly used in by those experienced in the construction industry as did Mr Adams as an experienced quantity surveyor, the terms used must be construed by reference to the meaning they would convey to a reasonably well-informed reader. Whilst the defendants were not particularly familiar with building projects, Mr Southall is involved in the professional football business and it is apparent from the way in which he and Ms McManus expressed themselves, both at the time and at trial, that they are intelligent people with good business acumen. There is no pleaded or other basis for any contention that the claimant in any way mispresented the effect of the terms used in the documents or that it was under a duty to explain their effect to the defendants.
>
> 8. The paradigm definition of a building contract, as stated by Lord Diplock in *Modern Engineering v Gilbert-Ash* [1974] A.C. 689 at 717, HL and as cited in the current (10th) edition of *Keating on Construction Contracts* at [1-001], is "an entire contract for the sale of goods and work and labour for a lump sum price payable by instalments as the goods are delivered and the work is done."

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

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

11. It is also necessary to consider whether the use of the word "estimate" - or more specifically in this case - the term "budget estimate" has any particular legal effect when compared with the use of words such as "quotation" or "tender". The latter would usually be understood as a firm offer to undertake works for the specified price stated in the quotation or tender. The status of an estimate however may vary according to the circumstances. It may simply be a preliminary indication of the contractor's opinion of the likely cost of undertaking works which is not on an objective construction intended as being an offer capable of being accepted so as to result in a contract. Alternatively, it may be an offer to undertake works on the basis of a reasonable cost which is estimated to be in the region of the figure specified but subject to measurement and valuation in due course, either on a cost plus or some other basis. Alternatively, it may be regarded as equivalent in all respects to a fixed price quotation, where the use of the word estimate does not on an objective construction differ in any material way from the effect of the use of the word quotation. See generally *Keating* at [2-103] and the decision of the Court of Appeal there referred to in *Sykes & Anr v Packham t/a Bathroom Specialist* [2011] EWCA Civ 608 where Gross LJ observed at [23]:

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

37. Applying those principles, I am satisfied that on a proper construction of the documents and exchanges in this case it was a fixed price contract. I do not regard the use of the word "estimate" in this case as having any real relevance. It was not used consistently. It may well have been apt for the first estimate, because that was produced without the benefit of a site visit so that, whilst the plans gave enough bare bones to provide a price, it was clear that until the specification was known, at least in a little more detail, it was subject to significant uncertainty and qualification. Even then, however, it was plainly sufficiently detailed for a precise price to be given. It would have been perfectly possible for any uncertainty as to the precise scope, as revealed by a lack of detail in the plans and by express qualification in the estimate, to be addressed by the application of well-established principles as to a contractor's entitlement to reasonable additional payment where it became apparent that the scope had become materially different. But regardless of that, once the revised estimate had come in, with the scope issues resolved save as expressly stated following the first site meeting, there could be no basis for regarding it as only an estimate properly so called as opposed to a fixed price quotation. If there was room for any residual doubt that was removed by the production of and subsequent agreement that the contract was entered into on the terms of the FMB standard form, which is plainly intended to be used on the basis of a fixed price contract with detailed provisions as to changes to the work scope.

38. If there had been any real ambiguity on this point, in his excellent written closing outline submissions Mr Ho referred me to section 69(1) of the Consumer Rights Act 2015, which provides that: "If a term in a consumer contract, or a consumer notice, could have different meanings, the meaning that is most favourable to the consumer is to prevail." He submitted that it followed that in such a case, where the term estimate and the term quotation were used without clear differentiation by the parties in the various exchanges, and where the FMB terms refer simply to "the price", the meaning most favourable to the consumer, namely that it is a fixed price quotation, should prevail.

39. I turn then to the more vexed question of payment terms.

40. Clause 2.1, entitled "interim payments", provided as follows: "2.1.1 If the contract period is more than 28 days, we will be entitled to send you interim bills. 2.1.2 We will send you interim bills for the value of any work we have carried out up to that date, together with the cost of all goods and materials delivered to the site and for any payments made to our suppliers for goods not yet delivered to the site but intended just for the work. 2.1.3 You must pay us within [ ] days (insert period, for example, 'seven' or '14' days) of receiving an interim bill. 2.1.4 You will take and keep 3% from all interim bills (the retention).

41. Clause 2.3, entitled "valuations", provided as relevant that "the value due under condition 2.1.2 … will be the value (valuation) we have given the work carried out up to that date in any interim bill or the final bill".

42. Clause 2.4, entitled "payment", provided as relevant that "Within five days of receiving any interim bill …, you must give us written notice showing how much you plan to pay, as long as we have met our obligations under the contract and no set-off or abatement was allowed to be claimed. You must also tell us how you worked out the amount that you are planning to pay. If you do not give us

written notice under this condition 2.4, the amount you will pay us will be the amount set out in the interim bill ...".

43. Clause 6, entitled as relevant "paying less than any interim bill …", stated that: "If you plan to pay less than the amount shown in our interim bill … (or in your notice given under clause 2.4), no later than five days before the final date for payment you must give us written notice to say you plan to pay less than the amount of our bill. You must also tell us the amount you consider to be due at the date you gave the notice and the basis on which you have worked out that amount".

44. It will be observed that these payment provisions mirror very closely the payment provisions to be found in the Scheme for Construction Contracts introduced by the Housing Grants, Construction and Regeneration Act 1996.

45. Page 12 of the form required the time period for interim bills to be inserted. It is reasonably straightforward to conclude that the dates specified in the revised payment schedule are the dates in question. Although the last such date is specified to be 24 February 2017 (on the assumption that the work will be completed a week after that in accordance with the 16 week programme) it would follow from the email and the 28 day gap between the third and fourth payments that if there was any delay the next date would be 28 days from 24 February 2017.

46. However, it is very difficult in my judgment to ascertain when the final date for payment is to be, as inserted in clause 2.1.3, which is intended to run from the date of receiving the interim bill. No specific period is identified either in the revised payment schedule or in the email. The latter simply refers to payment being "prompt" and "within a couple of days" of the site meeting which could take place once the interim bill is submitted. It is clear from the email that the claimant did not accept that payment 10 days from the due date would not be prompt and the defendant did not expressly disagree.

47. In closing submissions, Mr Byrne suggested that it would be sufficient for the obligation to be left no more precisely defined than prompt. However I cannot accept that argument, since clauses 2.1, 2.4 and 2.6 only work if a precise time period is specified. As I have indicated, it is not possible in my judgment to find that it should be 10 days from the due date, since that is inconsistent with the whole premise and point of Sharon Britton's email. In my judgment the contract in this respect can only make sense and be workable whilst being consistent with the intent of the FMB terms and the words used if the 10 days run from the date of receipt of the interim bill, where the claimant would be permitted to issue that interim bill on the Monday before the Friday due payment date or any date from the Monday to the Friday. That would allow the defendant 10 days to inspect and would give 5 days from receipt to issue a payment notice and 5 days before the due date to issue a payless notice. If the bill was issued on the Monday that would mean that the notices would have to be given on Saturday at the latest. That seems to me to fit in with the intent of what was agreed, because it would allow the defendant to inspect on Saturday morning and to give notice by the end of that day. The end result is that the bill would have to be paid at the earliest by the Thursday following the Friday due date if the bill was issued on the Monday.

48. At one stage I wondered whether an alternative interpretation would be the Tuesday, which would be "a couple of days" after the weekend at which the defendant could undertake an inspection.

However, the difficulty with that interpretation is that it does not allow time for a weekend inspection and also sufficient time for the defendant to give a time effective payment notice or payless notice. Since, in my judgment, the email has to be construed in a way which allows these provisions to work together, even if Sharon Britton was unaware of the need to do so at the time she sent the email, I am satisfied that this alternative interpretation must be rejected.

D. Termination

49. I have referred to termination as a shorthand for contractual termination and repudiation, even though Mr Ho took a preliminary point that there was no pleaded case for termination in the Particulars of Claim. Having considered that objection I do not agree with it. In my judgment there is plainly a pleaded case for termination, which is pleaded expressly at paragraph 16 in the context of the prior pleadings at paragraphs 14 and 15 of an alleged non-payment of invoices and refusal of access. Moreover the pleaded case of termination refers expressly to it having taken place "on or about 11th April 2017", which is the date of the solicitors' letter which expressly states that the claimant is terminating the contract for breach. In the circumstances, although there is also a further pleaded case to the effect that the claimant accepted the defendant's repudiatory breach, that does not in my judgment rob the prior pleading of its effect.

50. Although the question as to who is contractually responsible for the contract coming to an end in April 2017 before the works were completed figured large at trial, in the end it is of rather less significance from a financial point of view than it might otherwise have been. That is because although the claimant makes a claim for loss of profit on the remaining work it is a very modest claim as pleaded, only £3,797.88, and because the experts have valued the cost of undertaking the outstanding works on the basis of what it would cost a reasonable contractor to undertake those works and have not produced alternative costings depending on whether it was the claimant or some alternative remedial contractor who undertook them.

51. In short, the two issues are: (a) whether the claimant was entitled to suspend and then terminate the contract due to the defendant's failure to pay interim invoice number 4[5]; and (b) whether the claimant was wrongfully excluded from site by the defendant. If the answer to both those questions is "no" then, since it is common ground that the claimant in fact left site and then terminated the contract on that basis, that conduct would itself have been wrongful and repudiatory.

52. As regards issue (a), there was much investigation at trial as to whether or not interim invoice 4 was overstated and whether or not the amount paid by the defendant was understated. However, as is apparent from the references to the interim payment provisions of clause 2 of the FMB contract as set out above, and as is consistent with the Scheme for Construction Contracts, the crucial question is whether or not the defendant gave a timely and effective payment notice in response to interim invoice 4. If he did, then he was only obliged to pay the amount stated in his notice. If he did not he was obliged to pay the full amount claimed, since no separate issue as to a payless notice arises here.

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[5] A similar issue had arisen as regards interim invoice 3 but since the claimant did not purport to suspend or terminate until after interim invoice 4, which itself rolled up the claimed shortfall on interim invoice 3, it is only interim invoice 4 which is relevant.

53. Interim invoice 4, claiming payment of £64,017.24, was dated Friday 3 March 2017 but was sent under cover of an email sent on Monday 27 February at 21:17 hours, which: (a) explained that it included for all work to be completed by the Friday; (b) asked for payment "for Friday or by Monday 6 March (as this is 7 days' notice from today)". However, as Mr Ho submitted, neither this nor the previous invoices actually stated that it was payable within 7 days. Moreover, by reference to my finding as to the relevant contractual terms, the invoice would not have been payable until Thursday 9 March 2017. It would however have been necessary for any payment notice to have been given by close of Saturday 4 March 2017.

54. Although subsequently challenged by Sabina Mirza in her email of 12 March 2017, it is clear in my judgment that this was a sufficient itemised invoice with expenditure and labour as confirmation of works completed. It identified the work completed to date and provided a breakdown of the cost divided into expenditure on materials, plant and equipment and labour.

55. It is clear that Sabina Mirza was pre-occupied at this time with caring for her mother and her work demands. At the same time there was ongoing discussion about the works. She explained that she was unable to meet the claimant to discuss these matters and - in her email of 1 March 2017 - that she had been unable to read the emails sent since Monday and was finding things very stressful. It was not until Monday 6 March 2017 that she responded by email, saying that the defendant would only be paying £31,990 and providing a breakdown of what had been withheld and why. In short, this included the 3% retention (which had not previously been withheld), £5,000 in respect of a complaint that the windows supplied were unacceptable, £2,500 in respect of incomplete plastering, £20,000 for the boiler system yet to be installed, £216 for the bifold doors, and the extra works claim, as notified in the claimant's email dated 17 February 2017, in full. Sabina Mirza gave reasons for contesting some, but not all, of the extra works claims. The email concluded "I am sorry I have not had an opportunity to discuss these deductions with you today as I had hoped and Jabeen was also unable to meet today, as she was delayed at the hospital. Rest assured that we have no intention of withholding money unnecessarily and will consider your comments in response to this email carefully and we anticipate the final bill will be paid in the next few weeks in any event". The end result was that a very substantial amount of the interim invoice was left unpaid.

56. It follows from what I have already found that this was an ineffective payment notice because it was sent 2 days too late.

57. Mr Byrne also submitted that it did not comply with clause 2.4 because it did not state how the defendant had worked out the amount the defendant was planning to pay. I only agree with this in one respect, which relates to the claim for extra works. It is apparent from a comparison of the extra works claim and the response that a number of items were not addressed. In my judgment it was incumbent on the defendant to provide a response to each of the extra works claims, no matter how summary. It was not acceptable to say, as she did, in respect of a claim submitted over 2 weeks earlier, that "we will need time to look through this document as some additional costs have been priced for but we do not agree there should be a separate price for this", and then giving only an explanation in relation to some of the costs. That non-compliance, although only partial, was more than trivial and it follows, in my judgment, that the payment notice was invalid for this reason as

well. I have not needed to consider whether or not the payment notice could be severed so as to be ineffective only in relation to those items not expressly addressed.

58. In her lengthy email in response the following day Sharon Britton, in addition to challenging the majority of the deductions, stated that she had taken legal advice and that the claimant would be entitled to suspend the works under clause 23 of the FMB terms. She expressed her hope that this would be unnecessary and that matters could be resolved by a meeting. She said that by reference to the deductions accepted by the claimant it would be willing to accept a lesser sum of £26,994.96. In an email sent the next day she clarified that she was giving 7 days' notice of intention to suspend in the event of non-payment of the amount claimed.

59. As relevant, clause 23, entitled "Our right to suspend or end this contract", stated as follows: "Without affecting our legal rights and remedies, we can end all or suspend all or part of our obligations under the contract in one (or more) of the following circumstances: 23.1 If you fail to pay any amount due and still fail to pay for seven days after receiving a written notice we send demanding payment and warning you of our intention to end all or suspend all or part of our obligations under the contract. [See guidance note 12.]; 23.2 If you, or anyone you employ or your agent, interfere with or obstruct the work or fail to make the site available for us (without good reason) for the contract period (or any one or more of these). …; 23.5 If the work is delayed due to your fault for more than 14 days in a row. After we use our right to suspend part of this contract, we can still end our obligations under it if you are still at fault …".

60. It further stated: "We will be entitled to: all relevant payments under condition 2.1; and any reasonable costs and any reasonable losses we suffer (including loss of profit) involved in or resulting from ending all or suspending all or part of our obligations under the contract within 14 days of asking for payment".

61. On 12 March 2017 Sabina Mirza responded in a formal email, challenging the notice to suspend work but making it clear that the defendant had no intention of paying the outstanding balance under interim invoice 4. In her accompanying informal email she said that the defendant would be seeking advice about the issue of the payments and deductions.

62. However, nothing was resolved before the events of 21 March 2017, which resulted in the claimant leaving site. On that day the solicitor then instructed by the claimant had emailed the defendant at 07:42 hrs, setting out the case that in the absence of a valid 5 day payment notice the full amount was payable but that neither this nor the reduced sum which the claimant had said it would accept had been paid, and giving notice that unless such reduced sum was paid by the end of the day he would advise the claimant to suspend works until further payment.

63. There was no response from the defendant and by email dated 11 April 2017 the claimant's solicitor gave formal notice of termination for breach, including for breach of clauses 23.1 (payment) and 23.2 (obstruction) and 23.5 (client caused delay).

64. In my judgment the defendant has no answer to the termination based on non-payment of interim invoice 4. Whilst I am prepared to accept that the invoice was, on an objective analysis, overstated, that is irrelevant under the terms of the FMB contract. The defendant's obligation was to pay what

was claimed, since he had failed to give a timely payment or payless notice, and then to address the true position either in subsequent interim valuations or via the final account and, if necessary, by litigation to recover any overpayment.

65. In his closing submissions, anticipating this difficulty, Mr Ho introduced an argument based on section 62(4) of the Consumer Rights Act 2015 (CRA 2015) which provides that: "A term is unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer." As he submitted, the court is obliged to consider this argument regardless of the fact that it has not been pleaded because of s.71 of the CRA 2015, which states: "The court must consider whether the term is fair even if none of the parties to the proceedings has raised that issue or indicated that it intends to raise it". Mr Byrne did not suggest that he needed an adjournment to consider or address this point.

66. To make good this submission the defendant would have to challenge the provisions of clauses 2 and 23 of the FMB which have the effect, as demonstrated by this case, of making the supplier's interim invoices payable, even if overstated, so long as the consumer has failed to comply with the 5 day payment notice requirement, and permitting the supplier to suspend and then terminate in the event of non-payment.

67. By virtue of s.62(5) CRA 2015, whether a contract is unfair is to be determined by: (a) taking into account the nature of the subject matter of the contract, and (b) by reference to all the circumstances existing when the term was agreed and to all of the other terms of the contract or of any other contract on which it depends.

68. In my judgment these provisions are not unfair, applying the statutory wording, and considering the helpful analysis of the Act and the principal authorities, both in the Supreme Court and the ECJ (as well as the analysis of the Court of Appeal in relation to the construction sector in the West v Ian Finlay & Associates case) as it appears in Chitty on Contracts (34th edition) at paragraph 40-276 ff.

69. The starting point is that in my judgment there is no significant imbalance in the parties' rights and obligations under the contract as regards payment of interim invoices since - as has been seen - so long as the consumer gives the requisite timely notice he need pay only what he has determined payable under his payment or payless notice. In my judgment it is helpful to the consumer, as much as to the supplier, to have provisions such as this, which avoid the need for a dispute whilst the contract is underway as to what is payable under an interim invoice which can only be resolved by dispute resolution as to the merits which in itself may cause more difficulty, delay and expense than does this more simple procedure. Whilst the time to give notice is short (5 days), it only runs from the date of receipt of the invoice, which as agreed had to contain details as to how it was calculated. The time period is not unreasonably short and it is not unreasonable to expect that a consumer should provide a written response to an interim invoice within such a time period. The supplier can only suspend or terminate on 7 days' written notice, allowing the consumer time to obtain legal advice and decide what to do.

70. More generally, it is difficult to discern any lack of good faith on the part of the claimant in putting forward and entering into this contract. The FMB terms are, it is true, produced by a trade association representing builders, but are intended to be (and in my judgment are) fair and balanced.

They are reasonably well known and reasonably widely used in projects such as the present. They are aimed to be and, largely, are written in plain English. They are specifically designed for use in building contracts for domestic properties. The defendant was given the FMB contract at the meeting in June 2016 and asked for time to read it and, some 5 months later in November 2016, decided that he wanted to use the contract in place of the simplified alternative prepared by the claimant. The specific terms of the contract, including the actual payment terms were the subject of express discussion between the parties before they were agreed. The FMB contract enabled the parties to invoke the option of statutory adjudication to resolve disputes about what was payable under interim invoices, had they wished to do so. Thus both parties were given substantially the same suite of rights and obligations as provided for by the Housing Grants, Construction and Regeneration Act 1996 in the case of non-domestic building contracts. Although the claimant is a supplier and the defendant is a consumer, the relative bargaining position of the parties is not unequal, since the claimant is a small husband and wife company whereas the defendant and his sisters are all professional persons, Dr Mirza being a medical doctor, Jabeen Mirza a lawyer (albeit, as she said, not a contract lawyer) and Sabina Mirza working in the HR field.

71. In the circumstances, there is no need for me to embark on the far more factually complex investigation into the alternative argument based on exclusion from site. Indeed, it is unnecessary to do so for another reason, which is that whatever the rights and wrongs of the circumstances which led up to the claimant being unable to gain full access on the morning of 21 March 2017, in her email sent at 12:47 hours that day Sabina Mirza wrote in these terms:

> "To be clear we have not stopped access. The house was only locked by us for security reasons because you had failed to secure it yourself. Otherwise access would have been readily available to you today. We have not prevented access. I simply cannot leave my bedridden mother unattended to get a taxi to come and open the lock for you when you unexpectedly arrived today. I am available now for the next two hours to remove our lock but you will have to guarantee that you will use your own lock to secure the fence when you leave."

72. As Mr Ho submitted in closing, that was a perfectly reasonable response to a problem that had only developed during the course of that morning. It gave the claimant the option of regaining access, so long as it committed to securing the property when it left site for the evening, which was entirely reasonable in the context of the two previous occurrences of break in and theft of stored York stone flags. It follows in my judgment that the claimant could not rely upon clause 23.2 of the contract which, I agree, could only be employed if the interference with access was substantial as well as without good reason, whereas here it was neither.

73. Further, if it is necessary to decide the rights and wrongs, I am reasonably satisfied that Jeff Britton did not tell the defendant that he intended to access site to remove scaffolding and continue work on that day, that it was reasonable for the defendant to provide better site security on the evening before given the previous thefts, that Jeff Britton did tell the defendant that morning that the scaffolders would be removing not only their scaffolding but also their fencing, and that in the circumstances the defendant was not acting unreasonably when Sabina Mirza said that she was unable to leave her mother by herself whilst she came to the property immediately to remove the locks, especially where

the consequence would have been that the security fencing would then have been removed by the scaffolding contractors.

E. Final account valuation

74. It is now necessary to work through the final account valuation. That involves: (a) starting with the agreed contract sum; (b) deciding and adding the claimant's justified variations claim and other adjustments; (c) deducting the reasonable costs to complete outstanding work; (d) deducting the reasonable costs to remedy defective work; (e) deciding and if appropriate deducting various other set-offs advanced by the defendant; (f) deciding and if appropriate adding various other justified claimant claims. This is the order in which the various claims appear in Schedule A to the quantity surveyors' joint statement. It is a convenient means of ensuring - I trust - that nothing is missed.

75. The details of my judgment appear from the attached Appendix to this judgment. As I have already said in paragraph 9 I have kept my reasons reasonably brief, concentrating on the more valuable items.

76. As appears from the attached Appendix, the result is that the final account valuation comes to £120,411.10.

77. It is pleaded by the claimant and accepted by the defendant that he paid £144,213.76 pre-termination and thus, on my findings, has overpaid the claimant, although by nowhere near as much as he has pleaded and claimed.

F. Damages for loss of profit

78. The pleaded case is that as at the date of termination the value of the work outstanding was £25,319.23 and the claimant is entitled to recover its loss of profit on such amount at 15% in the sum of £3,797.88. It is apparent from the Particulars of Claim that the claimant made a conscious decision to limit the claim to that amount and, thus, it makes no difference that I have valued the amount of outstanding work as a much greater amount. On the basis of the expert evidence of the quantity surveyors and, accepting as I do the opinion of Mr Barnes on this point, I am satisfied that 15% is a reasonable allowance for a loss of profit, especially insofar as it will reasonably include a loss of contribution to non site-specifiic overheads, so that the claimant succeeds in recovering this sum.

G. Conclusion

79. It follow that there is nothing due to the claimant under the final account and, in the absence of a counterclaim, nothing due to the defendant either.

H. Windows

80. An issue, much disputed at trial but not, so far as I can see, specifically included in the Scott Schedule, relates to the windows. I am not entirely sure why this is but, for completeness, and since the defendant had deducted £5,000 from the interim valuation to cover the cost of replacing the windows, I address it separately here.

81. The claimant's quotation included for supplying and fitting windows "as per sizes and positions specified on plan". The drawings did not include any statement to the effect that the new windows had to match the existing windows. The elevations plan shows both the existing and the new windows as having two sections, both of which appear to have a ratio of 1:1, which is not consistent with the actual ratio of the existing or the new windows. Indeed, the plan does not appear to show any sections at all to the front elevation ground floor bay window, even though they plainly do have two sections in reality. Thus, not surprisingly, the plans were not sufficient to provide detailed guidance to the claimant as to what was required.

82. The defendant's evidence is that at the first site meeting they explained to Jeff Britton that they wanted to match the extension with the existing house in terms of brickwork, render, cast iron gutters, windows and roof tiles. In cross-examination Jeff Britton agreed that they had briefly mentioned that they wanted a match in relation to certain items, including the windows. It is agreed that it was arranged that they would meet and discuss the details with the claimant's windows subcontractor in due course. They say that on 13 December 2016 Jabeen Mirza and Sabina Mirza met the subcontractor's representative on site to discuss a quotation for replacement windows to the existing house and explained - and he agreed - that these should match the existing windows to the house and also match the new windows to the extension. It is not suggested that there had been any prior meeting at which the design of the extension windows alone had been discussed and agreed.

83. On 22 December 2016 the window subcontractor sent through a quotation which identified and included a handwritten sketch of the extension windows and matching proposed windows for the main house. The defendant relies on these as showing the split between top and base sections. Since they were not to scale and there are no accompanying measurements it is difficult to say anything more than that the ratio of top section to mains section appears to be approximately one third to two thirds. On 4 January 2017 Sabina Mirza emailed asking some questions. Later that day the window subcontractor responded, sending some attachments which included: (a) a photograph of windows sent to show how the ones quoted for would look; and (b) some further sketches of the windows. The former appears to show a split closer to one quarter to three quarters.

84. In the event the defendant chose not to proceed with the quotation for the main windows. However, it is only fair to observe that at the point this quotation was sent it would not have been apparent to the claimant or the window subcontractor that it was obviously necessary to have an exact match between the new windows to the extension and the existing windows to the main house, since the defendant was thinking about replacing the existing windows anyway.

85. On 11 January 2017 Sharon Britton emailed Sabina Mirza to say that "the window order had been placed yesterday and will be commencing production imminently". Having asked a specific question about the choice of frame and bead, she continued "Please find attached order summary for windows cross referenced back to Dave's sketches, the attachments agree with your notes in the email". On the following day Sabina Mirza responded, answering the question about the choice of frame and bead but otherwise making no comment. In a later email sent in March 2017 Sharon Britton stated, wrongly, that "the window order summary was sent to you before we ordered and you had reasonable opportunity to review them" (underlining added).

86. Neither Dr Mirza or his two sisters gave evidence in their witness statements as to whether or not they had reviewed the order summary at the time, although the thrust of their evidence in cross-examination was that they did not, not least because they were pre-occupied because it was at this time that the three children discovered that their mother had cancer. The attached document, headed "delivery note", shows that the ratio of the top section to the main section varies, but is something between 1:2 and 1:3. There is no substantial difference in my view between these more detailed and dimensioned windows and those shown in the sketch sent on 22 December 2016.

87. Jabeen Mirza was the first to see the windows, She agreed that she had said they looked good when she first saw them installed. Her explanation was that they were obscured by scaffolding and she just glanced at them. It appears that Sabina Mirza was unhappy that the top section was less than the one third split she was expecting and was also unhappy that the frosted glass was on the outside (this defect has been acknowledged and the cost provided for) and that the leading was the wrong colour. It appeared to me that it was Dr Mirza who was most cross with the difference between the existing and the new windows, although he had not had the same involvement as his sisters in terms of agreeing the design of the new windows.

88. It is clear that the new windows as installed are similar in appearance to those shown on the sketches sent on 22 December 2016. In other words, what was supplied and installed corresponded substantially with the details provided pre-installation, which itself corresponded substantially with the details in the order summary.

89. I do accept that one can see obvious differences between the existing windows to the main house and the new ones supplied. There is an obvious difference in terms of the proportion between the top and main sections, because the ratio of the existing windows is more like two fifths to three fifths than 1:2 or 1:3. There is also a difference because the existing windows have two leaded transverse bars running across the top sections, whereas the new ones have only one. The difference in colour of the leading is not very obvious from the photographs. The overall difference is also accentuated by the very thick and rather old-fashioned design of the old wooden frames to the ground floor front elevation bay window, compared to the new adjacent UPVC window, which is not so apparent when comparing the existing with the new on the front elevation first floor and to the rear elevation. Overall, in my judgment the differences between the existing and new windows are not so significant, when compared to the similarities between them, that there is a gross and obviously unacceptable disparity between the two.

90. In my judgment the defendant could only succeed on this aspect of the case if he could show that it was an express term of the contract that the new windows to the extension would be an exact or close to existing match in every relevant respect to the existing windows to the main house, which overrode the fact that the contractual information, including the sketches provided by the window subcontractor, did not say that this was the case and when what was supplied conformed with the sketches.

91. I am not satisfied that the defendant has made out this case. I do not accept that the defendant has established an oral agreement that the appearance of the new windows should be the same as or at least very similar to the existing windows. At most he has established that it was part of the

agreement that the appearance of the new windows should be a reasonable match with the existing windows. In my judgment the claimant is not in breach of this obligation. If the defendant had wanted more he should have been quite specific and the defendant should have carefully checked the initial quotation, the subsequent window subcontractor quotation and the order summary to see that this was the case.

92. In closing submissions Mr Ho argued that there had been a specific agreement that the ratio of glass in the upper to main section should be one third to two third. I reject this argument since I am simply not persuaded that anything was discussed or agreed in anything like that level of detail.

J. Appendix

93. In the Appendix I refer to the parties and witnesses by initials, thus: C = Claimant; D = Defendant; JB = Jeff Britton; SB = Sharon Britton; AM = Dr Mirza; JM = Jabeen Mirza, SM = Jabeen Mirza; GN = Geoff Neal, C's mechanical services engineer; LJ = Lee Jackson, D's mechanical services engineer; MW = Matthew Williams, C's electrical services engineer; MD = Mike Davies, D's electrical services engineer; TM = Tony Mancini, C's building surveyor; PR = Paul Roberts, D's building surveyor; RB = Richard Barnes, C's quantity surveyor; PP = Paul Parry, D's quantity surveyor.

94. In their lists of proposed corrections and clarifications both counsel identified certain proposed substantive changes to some of the individual items in the Appendix. I have concluded that I should not accede to these invitations to revisit my judgment, especially since they make no difference, individually or collectively, to the ultimate outcome. The only correction which I have made which has any financial effect is Part 4.1 item 109, where an additional £750 should be deducted, and which I have taken into account in the final calculations.

No.	Item description, value and decision	Add / Omit (£)
1	**Contract sum**	**156,370**
2	**Variations** (section 2 Sched. A QS JS)	
1	Move or cap off gas pipe. Claim £300. I am satisfied the work was not in the original scope, because the location of the gas pipe could not reasonably have been ascertained from the plans or pre-start investigations, that it was done by a qualified person and the cost is reasonable. The claimant's contemporaneous email dated 9/11/16 provides a clear explanation. Addressed further below.	300
2	Increase window sizes and leading. Claim £981, allow £981. I am satisfied the scope was changed and that the cost as set out in the claimant's email dated 15/1/17 is reasonable. I do not accept the defendant's case that the claimant agreed to increase the size from that shown on the plans at no extra charge to the defendant.	981
3	Repoint and bed chimney pots.	-

	Claim £738, allow nil. D contends that C agreed in its email 29/4/16 that repointing of the extension chimney pot was included and that no work to the main chimney pot was ever instructed, as communicated in the email 5/2/17. I prefer D's case and award nil.	
4	Drop ceilings and false wall to ensuite 4. Claim £420, allow £350.85. I am satisfied that this work was done as extra work. RB and PP agree £350.85 as a reasonable cost.	350.85
5.	Remove tiles, plaster and reboard ensuite 4. Claim £1,500, allow £925. I am satisfied this work was done as extra work, because the work was not expressly included in the quotation and it is not obviously work which had to be done to enable the work quoted for to be done. RB and PP agree £925 as a reasonable cost.	925
6	Drain for island including hot and cold feed. Claim £415, allow £500 reduction. RB and PP agree that on a fixed price contract basis drainage savings were generated and lead to a credit of £500.	-500
7	Reposition drain from pantry to new soil stack. Claim £110, allow £110. I am satisfied that this work was done as extra work - see D's email 26/4/16. Quantity surveyors agree claim reasonable.	110
8	Electrics additional points / lighting. Claim £3,366, allow £3,870 (including 15% OHP) No dispute, subject to issues of incomplete and/or defective works.	3,870.90
9	Plumbing / heating. Claim £32,815, allow £1,800. RB accepts that the only items installed were 4 tanks and pipework valued at £1,800, which is agreed as reasonable by PP. By reference to the evidence of GN and LJ under cross-examination I am not satisfied that D has made out his complaints that the tanks: (a) were never needed and should not have been quoted for or supplied; (b) were over specified so as to lead to a real risk of legionella; (c) were not connected in so that a credit is required, thus I allow the claim as valued.	1,800
10	Fitting concrete cills. Claim £180, allow £180. I am satisfied that this work is extra work and the issue as to the cost of completion is addressed in the schedule of incomplete works.	180
11	Lower ceiling to ground floor bathroom / utility. Claim £645, allow £326.48. I am satisfied that this work was done as extra work and that RB's valuation is reasonable. The issue as to cost of completion is addressed in the schedule of incomplete works.	326.48
12	Lintel and extra labour to install pantry window. Claim £160, allow nil.	-

	If this work was undertaken by C it was agreed in its email of 28/2/17 that it would not be an extra costs It is not included in the schedule of incomplete works.	
13	Additional towel radiators. Claim £600, allow nil Common ground that these were not installed.	-
	Variations total	**+ 8,344.23**
3	**Other adjustments** (section 3 of Sched. A QS JS)	
1	Reduction for bathroom suites to be supplied by client. Agreed at £4,000 (£800 per bathroom).	-4,000
2	Additional Bathroom Claim £2,400, allow nil. Apparent from plans that there were 4 new bathrooms upstairs and 1 new bathroom downstairs. Although quotation only refers to 4 new bathrooms, that can only have been an error and D was reasonably entitled to assume that all of the bathrooms had been priced for.	-
3	Cold water mains. Claim £300, allow £175 as agreed valuation and satisfied on the basis of the contemporaneous documents that this work was requested and undertaken on a "future-proofing" basis.	175
4	Variation to window openings. Claim £216, allow nil on basis no evidence to support.	-
5	Difference in cost for bespoke guttering. Claim £3,866, allow nil on basis satisfied compromise reached with no charge either way - see item 153 scott schedule below.	-
6	Extra labour for cast iron guttering. Claim £2,772, allow nil on basis quotation as accepted included for cast iron guttering and insofar as cost relates to bespoke guttering included in compromise as above.	-
7	Aris hip variation. Claim £312, allow nil as not satisfied a variation.	-
8	Purchase of additional tiles as original did not match. Claim £1,108, allow nil as not satisfied a variation or D responsibility.	-
9	Provision of cornice. Claim £1,123.49, allow nil as not satisfied made clear to D at time that this would be a charged variation.	-
10	Tile course feature to match. Claim £288, allow nil as 9.	-
11	Additional wiring in kitchen. Claim £96, allow nil as unclear what is comprised and basis for claim.	-
12	Rewire existing house. Claim £3,690 plus 15% OHP, total £4,243.50, allow £4,243.50 for consistency as cost of completion is addressed in the schedule of incomplete works	4,243.50
	Other adjustments (total)	**+ 418.5**

4.1	**Works to complete** (first part of Sched. C QS JS)	
	Front elevation	
1	Complete decoration gloss coat to timber soffits. Claim £325, satisfied within scope and allow £54 as agreed valuation of work evidenced as done on basis not satisfied scaffolding used and no evidence cost incurred.	-54
2	Provide and install soil vent pipe, including bends to receive pipes at ground floor and first floor levels mechanically fixed. Claim £495, allow £200 as agreed valuation assuming C's materials used, as they could and should have been.	-200
3	Reinstatement of tarmac removed in area of substructure prior to construction. Claim £260, allow £260 as agreed valuation as satisfied within scope.	-260
4	Install manhole chamber level with finished tarmac surfaces and provide chamber lid. Claim £95, allow nil as satisfied all provided by C.	-
	Gable elevation	
5	Complete decoration gloss coat to timber soffits. Claim £430, as item 1 satisfied within scope and allow £110.92 as agreed valuation of work evidenced as done on basis not satisfied scaffolding used and no evidence cost incurred.	-110.92
6	Reinstatement of tarmac removed in area of substructure prior to construction. Claim £283, as item 3 allow £125 as agreed valuation as satisfied within scope and photographs show need for some cleaning.	-125
7	Provide and install remaining section of down pipe, including rainwater shoe mechanically fixed. Claim £495, allow £310 as agreed valuation for incomplete work as shown on photograph.	-310
8	Provide and install soil vent pipe, including bends to receive pipes at ground floor and first floor levels mechanically fixed. Claim £246, allow nil as accept RB's evidence that downpipe not required.	-
9	Installation of underground drainage for UPVC soil pipe. Claim £1,000, allow nil as accept RB's evidence that based on inspection no work required.	-
10	Install UPVC gully with trap at ground level. Claim £65, allow nil as per 9.	-
	Rear elevation	
11	Provide cover trim to head of aluminium bi-folding patio door opening. Claim £35, allow in full as agreed.	-35
12	Complete decoration gloss coat to timber soffits in main roof and outrigger. Claim £790, as 1 satisfied within scope and allow £201 as agreed valuation of work evidenced as done on basis not satisfied scaffolding used and no evidence cost incurred.	-201
13	Provide and install remaining section of down pipe, including rainwater shoe mechanically fixed.	-65

	Claim £65, as 7 allow £65 as agreed valuation for incomplete materials as shown on photograph	
14	Reinstatement of tarmac removed in area of substructure prior to construction. Remove rubble and builders' materials from site. Claim £1370, as item 3 allow £247.50 as agreed valuation as satisfied within scope	-247.50
15	Install manhole chamber level with finished tarmac surfaces and provide chamber lid. Claim £95, as item 4 allow nil as satisfied all provided by C.	-
16	Install ACO linear drain connected to adjoining manhole. Claim £525, allow nil as not satisfied within scope.	-
17	Complete installation of external light fittings. Claim £375, allow nil as addressed at item 119 below.	-
	Ground Floor Kitchen Diner	
18	Complete plastering to bulkhead/opening to small kitchen. Claim £50, allow £30 as agreed valuation as satisfied within scope.	-30
19	Complete central duct supplying services to proposed island unit prior to laying floor screed. Claim £50, allow nil as satisfied work done by C.	-
20	Complete floor screed. Claim £1,320, allow nil as not satisfied within scope. I accept C's case that because D chose to install an overlay panel underfloor heating system there was no need for a screed. I also accept that C left sufficient space for the underfloor heating system and tiling. I do not accept that overlay panel underfloor heating could not properly have been recommended or installed. I do not accept LJ's evidence that an overlay system should only be used where a screeded system could not be provided. There is no evidence as to any costs associated with any alleged complaint that the 40mm allowance was not provided uniformly.	-
21	Complete ceiling decorations. Claim £675, allow nil as not satisfied within scope of quotation (whether expressly or by reference to plans).	-
22	Complete wall decorations. Claim £900, allow nil, reason as item 21.	-
23	Complete internal joinery (including softwood timber door casing, skirting, architrave, panel internal door with ironmongery, and decorations). Claim £1,380, allow £530 as prefer RB's valuation on basis set out in JS.	-530
24	Complete plumbing connections. Claim £80, allow nil as no evidence as to what work within scope was incomplete and no evidence as to what has been done and at what cost.	-
	Ground floor utility	
25	Close cavity on original gable of main house. Claim £75, allow agreed valuation.	-75
26	Complete plasterboard and skim coat to stud walls. Claim £70, allow agreed valuation.	-70

27	Complete plasterboard and skim coat to ceiling. Claim £265, allow agreed valuation.	-120
28	Complete timber bearers for ceiling. Claim £175, allow £75 on basis satisfied some timber work required but not as much as claimed.	-75
29	Provide servicing access for floor duct. Claim £150, allow on basis satisfied within scope and valuation agreed.	-150
30	Complete floor screed. Claim £285, allow nil reason as item 20.	-
31	Complete ceiling decorations. Claim £675, as item 21 allow nil.	-
32	Complete wall decorations. Claim £570, as item 22 allow nil.	-
33	Complete internal joinery (including softwood timber door casing, skirting, architrave, panel internal door with ironmongery, and decorations). Claim £1015, as item 23 allow RB's valuation of £400 as reasonable allowance for joinery as satisfied tiling not within scope.	-400
34	Complete plumbing and service penetrations for UPVC waste drainage for utility sink and washers. Claim £350, allow nil as not satisfied what work within scope is outstanding and required to be or has been done.	-
	Ground floor bathroom	
35	Complete plasterboard and skim coat to stud walls (including plasterboard at high level to stud wall). Claim £730, allow £60 as agreed valuation of plasterboard as satisfied that skim outside scope and on basis of agreed valuation of that option claim overstated in any event.	-60
36	Complete plasterboard and skim coat to ceiling. Claim £330, allow £250 as agreed valuation.	-250
37	Complete timber bearers for ceiling. Claim £175, allow £75 as item 28 above.	-75
38	Complete floor screed. Claim £360, allow £300 agreed valuation as satisfied within scope.	-300
39	Complete ceiling decorations. Claim £180, allow nil as item 21.	-
40	Complete wall decorations. Claim £300, allow nil as item 22 - and not satisfied within scope as to be tiled.	-
41	Complete internal joinery (including softwood timber architrave and decorations). Claim £180, allow as agreed valuation.	-180
42	Complete plumbing and service penetrations for UPVC waste drainage for utility sink and washers. Claim £350, allow nil as item 34.	-
	Ground Floor Pantry / Small Kitchen	

43	Complete plasterboard and skim coat to stud walls. Claim £85, allow nil as no evidence of outstanding work required.	-
44	Complete plasterboard on blockwork and brick walls. Claim £360, allow £360 as agreed valuation.	-360
45	Complete ceiling decorations. Claim £105, allow nil as 21.	-
46	Complete wall decorations. Claim £300, allow nil as 22.	-
47	Complete internal joinery decorations. Claim £135, allow £50 as agreed valuation.	-50
48	Cleaning of builders' dust and debris. Claim £35, allow £35 as agreed valuation as cleaning impliedly within scope.	-35
	Ground floor room adjoining pantry	
49	Remove all builders' items and cart away to tip. Claim £65, allow £65 as item 48.	-65
50	Cleaning of builders' dust and debris. Claim £35, allow £35 as item 48.	-35
51	Cleaning of unprotected carpets. Claim £35, allow £35 as not satisfied D told C carpet would be discarded.	-35
	Entrance Hall and Corridor to Kitchen	
52	Remove all builders' items and cart away to tip. Claim £45, allow £45 as item 48.	-45
53	Cleaning of builders' dust and debris. Claim £55, allow £55 as item 48.	-55
54	Cleaning of unprotected carpets. Claim £35, allow £35 as item 51.	-35
	Downstairs toilet	
55	Cleaning of builders' dust and debris. Claim £85, allow £85 as item 48.	-85
	Main staircase	
56	Cleaning of builders' dust and debris. Claim £85, allow £85 as item 48.	-85
57	Removal of carpet protection and cleaning of unprotected carpets. Claim £110, allow nil as C not liable if protected as required.	-
	First Floor Bedroom 3 and Ensuite	
58	Complete re-plastering to new opening into ensuite. Claim £50, allow £50 as agreed valuation.	-50
59	Cleaning of builders' dust and debris (including floor finishes). Claim £60, allow £60 as item 48	-60
60	Reinstate timber skirting to match existing profile. Claim £85, allow £85 as agreed valuation.	-85

61	Complete mist coat to walls. Claim £30, allow nil as not within scope.	-
62	Complete skim coat to stud/masonry walls in ensuite. Claim £276, allow £100 as prefer RB rate, especially given C lost opportunity to complete given lawful termination.	-100
63	Complete ceiling decorations in ensuite. Claim £70, allow nil as item 21.	-
64	Complete wall decorations in ensuite. Claim £150, allow nil as item 22.	-
65	Complete internal joinery in ensuite (including softwood timber door casing, architrave, panel internal door with ironmongery, and decorations). Claim £445, allow agreed valuation of £327.50.	-327.50
66	Complete plumbing and service penetrations for UPVC drainage in ensuite. Claim £350, allow nil as item 34.	-
	First Floor Bedroom 4 and Ensuite	
67	Complete re-plastering to new opening into ensuite. Claim £50, allow £50 as agreed valuation.	-50
68	Cleaning of builders' dust and debris (including floor finishes). Claim £95, allow £95 as item 48.	-95
69	Reinstate timber skirting to match existing profile. Claim £85, allow £85 agreed valuation.	-85
70	Complete mist coat to walls. Claim £30, allow nil as item 61.	-
71	Complete skim coat to stud/masonry walls in ensuite. Claim £130, allow £125 as agreed valuation.	-125
72	Complete ceiling decorations in ensuite. Claim £105, allow nil as item 21	-
73	Complete wall decorations in ensuite. Claim £150, allow nil as 22	-
74	Complete internal joinery in ensuite (including softwood timber door casing, architrave, panel internal door with ironmongery, and decorations). Claim £445, allow £327.50 as agreed valuation.	-327.50
75	Complete boxing in of pipework. Claim £50, allow £50 agreed valuation.	-50
76	Complete UPVC waste drainage installation. Claim £50, allow £50 as agreed valuation.	-50
	First Floor Corridor to Bedroom 5	
77	Complete re-plastering to existing/new walls. Claim £230, allow nil as satisfied not in scope and would have been extra.	-
78	Reinstate timber skirting to match existing profile. Claim £85, allow £85 as agreed valuation.	-85

79	Complete mist coat to walls. Claim £50, allow nil as item 61.	-
80	Cleaning of builders' dust and debris. Claim £35, allow as item 48	-35
81	Complete ceiling decorations. Claim £150, allow nil as 21.	-
82	Complete wall decorations. Claim £540, allow nil as 22.	-
83	Complete internal joinery (including softwood timber door casing, architrave, panel internal door with ironmongery, cill board to window, and decorations). Claim £495, allow as agreed valuation.	-495
84	Complete skim coat to stud/masonry walls in ensuite. Claim £130, allow as agreed valuation and within scope.	-130
85	Complete ceiling decorations in ensuite. Claim £105, allow nil as 21	-
86	Complete wall decorations in ensuite. Claim £150, allow nil as 22	-
87	Complete internal joinery in ensuite (including softwood timber door casing, architrave, panel internal door with ironmongery, and decorations). Claim £445, allow £327.50 as agreed valuation.	-327.50
88	Complete UPVC waste drainage installation. Claim £50, allow nil as not satisfied what work is outstanding and required to be or has been done.	-
	First Floor Family Bathroom	
89	Complete skim coat to stud/masonry walls. Claim £450, allow £140 as RB valuation based on actual remeasure and not satisfied that any decrease in this room must lead to an increase elsewhere.	-140
90	Complete ceiling decorations. Claim £165, allow nil as item 21	-
91	Complete wall decorations. Claim £300, allow nil as item 22	-
92	Complete internal joinery (including softwood timber door casing, architrave, panel internal door with ironmongery, rebated frame and insulated loft hatch with seal, and decorations). Claim £1220, allow £700 as agreed valuation, excluding paint as outside scope.	-700
93	Complete plumbing and service penetrations for UPVC drainage. Claim £365, allow nil as not satisfied what work within scope is outstanding and required to be or has been done.	-
	Staircase to Attic Rooms	
94	Cleaning of builders' dust and debris. Claim £45, allow as item 48.	-45
95	Removal of carpet protection and cleaning of unprotected carpets.	-

	Claim £65, allow nil as item 57.	
	Attic room	
96	Complete skim coat and insulation of plaster on timber stud to cupboard. Claim £220, allow £220 as agreed valuation.	-220
97	Make good plaster on brickwork damaged as a result of electrical work. Claim £35, allow £35 as agreed valuation.	-35
98	Reinstate timber skirting to match existing profile. Claim £85, allow £85 agreed valuation.	-85
99	Complete mist coat to new plastered walls and painting of new skirtings. Claim £85, allow nil as item 61.	-
100	Cleaning of builders' dust and debris. Claim £35, allow as item 48.	-35
	Attic Room 2 (Tank Room)	
101	Install door to existing opening. Claim £185, allow nil as none within scope of quotation or shown in plans.	-
102	Touch up new plaster. Claim £10, allow £10 as agreed valuation.	-10
103	Cleaning of builders' dust and debris. Claim £35, allow as 48.	-35
	Attic Room 3	
104	Make good plaster on brickwork damaged as a result of electrical work. Claim £35, allow £35 as agreed valuation.	-35
105	Complete mist coat to new plastered walls and painting of new skirtings. Claim £50, allow nil as item 61.	-
106	Cleaning of builders' dust and debris. Claim £35, allow as item 48.	-35
	Roof Space	
107	Complete timber bracing to junction with original roof. Claim £50, allow £50 as agreed valuation on basis satisfied work unfinished.	-50
108	Complete insulation of roof void. Claim £100, allow nil as no evidence work unfinished.	-
109	Install perimeter ventilation to roof soffits, provide baffle plates at wall plate level to contain insulation, and provide ventilation space and ridge line ventilation. Claim £2,250, allow £750. There is no evidence that a continuous baffle plate was required to provide continuous ventilation either by the notation on the plans, by the quotation, by the Building Regulations (especially in circumstances where no remedial action was required by the Building Inspector on his inspection) or by the manufacturer's instructions for the Tyvek insulation provided. Since the Tyvek insulation is designed to be a breathable membrane there is no obvious reason why continuous ventilation is required. I note that only plastic caps have been retrofitted anyway, albeit that I am not	-750

	satisfied that C was in breach of contract in providing these either.	
	Incomplete and/or Defective Electrical Installations	
110	Complete/rectify mains distribution and fused switch. Claim £800, allow nil. There is no evidence that a separate customer fused switch was required either by the notation on the plans, by the quotation or by the then applicable IEE 17th edition Regulations, which MD had inadvertently mis-quoted. I was not persuaded by MD's evidence that C was required to comply with the particular electricity supplier's standard supply requirements as a matter of contract. I preferred MW's evidence that any requirement would have been a matter for a separate M&E specification and that there was no evidence that any further works had been undertaken since C left site, which supported his evidence that such was unnecessary.	-
111	Complete/rectify sub-main distribution. Claim £500, allow nil. There is no evidence that a separate sub-main board or consumer unit was required either by the notation on the plans, by the quotation or by the then applicable IEE 17th edition Regulations. I preferred MW's evidence that there was no evidence that any remedial works had been undertaken, which supported his evidence that such was unnecessary.	-
112	Complete/rectify security installation. Claim £800, allow nil. C had not quoted for and was not required to provide a new security installation. I accepted JB's evidence that he had been asked to power down the alarm system and that his electrical subcontractor would have been able to reconnect the system at minimal cost but for the termination of the contract due to D's breach, even though (as I accept) the subcontractor had also cut some of the wiring as part of the preparatory work for the electrical rewire. Whilst I accept the evidence of both experts that an incoming contractor would probably have considered it necessary to instal a new system out of an abundance of caution, the need for that was not the consequence of any breach by C.	-
113	Complete/rectify TV installation. Claim £400, allow £90. C had not quoted for a TV installation, so that this would have been an extra. However, I accept MW's evidence as explained at trial that the evidence of first fix wiring for a TV in the kitchen, coupled with the schedule of electrical works for the extension, showed that a new TV point from the existing aerial was required and that a reasonable price for such work was £90. Assuming that this has been included in the claim then it is reasonable to include this cost of completion. However, I was not persuaded by MD's evidence that a full installation was required or was C's contractual responsibility to provide.	-90
114	Complete/rectify kitchen electrical installations. Claim £1,000, allow £667. The experts agreed that this work was incomplete. They also agreed to compromise in relation to their respective valuations at an overall valuation reflecting 2/3rd of D's expert's original valuation. Accordingly, where the only issue is as to the extent of the outstanding works and their valuation the awarded amount is 2/3rd of D's	-667

	valuation.	
115	Complete/rectify luminaires. Claim £600, allow £400 as item 114.	-400
116	Complete/rectify lighting installations. Claim £3,000, allow £2,000 as item 114.	-2,000
117	Complete/rectify power installations. Claim £2,800, allow £1,867 as item 114.	-1,867
118	Complete/rectify fire alarm installations. Claim 400, allow £267 as item 114 (notwithstanding cost agreed in full by D's expert the agreed compromise extends to all items)	-267
119	Complete/rectify external lighting installations. Claim £300, allow £200 as item 114.	-200
120	Complete/rectify underfloor heating connections. Claim £500, allow £333 as 114.	-333
121	Supply of mechanical vents. Claim £400, allow £267 as 114.	-267
122	Stripping out. Claim £800, allow £533 as 114.	-533
123	Complete earthing, testing and labelling. Claim 400, allow £267 as item 118.	-267
124	Complete O&M manuals, as-fitted drawings and certification. Claim 400, allow £267 as item 118.	-267
125	Claim £300, allow nil. I prefer MW's evidence that the electrical contractor, and particularly the existing contractor who would have completed the works but for D's wrongful termination, would not have required a temporary supply or would have included it in his overall price.	-
126	Claim £800, allow nil. As 125, no additional contingency would have been required by the existing contractor.	-
127	Claim £800, allow nil. As 125, no unspecified modifications would have been included by the existing contractor nor are such reasonably claimable against C, since they would have been an extra to his contract.	-
	Incomplete and/or Defective Mechanical Installations	
128	Complete/rectify connection of new 25mm MDPE supply to incoming mains cold water supply. Claim £750, allow £100. I prefer GN's evidence that this is a pipe which simply requires capping off rather than connecting, particularly in the absence of evidence that it has been connected.	-100
129	Complete/rectify gas meter and incoming gas supply. Claim £1,000, allow nil. This is a duplication of item 155 which D now claims instead of this item.	-
130	Complete/rectify connection of gas supply from new meter to boiler and kitchen.	-200

	Claim £500, allow £200 as 129.	
131	Disinfect, flush and pressure test first fix hearing and hot and cold water system. Claim £950, allow £650 as 129	-650
132	Supply and install new boiler, pumps, flue and controls. Claim £5,750, allow £2,250 as 129. LJ acknowledged that D had re-used the existing boiler and that he had not seen a remedial works invoice which identified the actual cost for this item. I preferred GN's estimated costings, LJ acknowledging that his costings were based on a new subcontractor quoting to complete the works and thus being more expensive.	-2,250
133	Supply and install radiators, towel rail and kick-space heater. Claim £4,000 agreed.	-4,000
134	Supply and install new unvented, indirect, water heater. Claim £1,500 agreed.	-1,500
135	Complete/rectify first-fix pipework to sanitary fittings. Claim £500 agreed.	-500
136	Complete/rectify ventilation installation in each bathroom and ensuite (including connection of ductwork to exhaust terminals). Claim £1,250, allow £350. I prefer GN's opinion that there is no satisfactory evidence that any extract fans were needed or have been provided and that £350 is a reasonable allowance on the assumption that the existing subcontractor would have been used.	-350
137	Complete/rectify first-fix above-ground drainage installations. Claim £1,500 agreed.	-1,500
138	Complete/rectify installation of all sanitary fittings. Claim £1,250, allow £1,000 as 129.	-1,000
4.2	**Works to remedy defects (second part of Sched. C QS JS)**	
	Front elevation	
139	External brickwork was not completed with reasonable skill and care and/or to a reasonable standard of workmanship, and bed joints and perpends were of irregular depths. Installation of new window cills, cutting back brickwork and reinstatement of windows. Making good of brickwork reveals, cleaning of heavily soiled brickwork, and raking out and repointing poorly weather struck beds and perpends. Claim £1,050, allow £835 The elevation has been completely rebuilt, so that this is a notional assessment of the reasonable cost of undertaking remedial works which have not in fact been carried out. The building surveyors agree that new window cills had to be fitted and that the brickwork required cleaning and the quantity surveyors agree these costs at £835. The disagreement is as to whether the mortar required repointing. I am not satisfied that the workmanship on this elevation was so poor as to require repointing or that the temporary application of brick acid to the brickwork for cleaning would have caused such damage as to necessitate repointing.	-835
140	Chimney brickwork was not completed with reasonable skill and care and/or to a reasonable standard of workmanship. Mortar pointing and minor patch repointing required from ground level.	-48

	Claim £448, allow £48. The issue is whether access by separate scaffolding was required or whereas - as RB believes - access by roof ladder would have been sufficient. In the absence of any evidence that scaffolding was provided and given that C ought to have been allowed the opportunity to undertake these remedial works I prefer RB's evidence and award the agreed valuation of the remedial works without the need for scaffolding access.	
141	Pebble dash at the first floor level was not completed with reasonable skill and care and/or to a reasonable standard of workmanship. Clean off masonry paint / render to the full width of the projecting double rosemary course. Claim £50, I agree that this work is reasonably required and allow £50.	-50
142	UPVC casement windows (frosted glazing) on ground and first floor could not be reached, and the frosted glass was installed incorrectly. The windows were not completed with reasonable skill and care and/or to a reasonable standard. Replace frosted glass, and provide silicone sealant to window perimeters. Claim £625, allow as claimed. The building surveyors agree this item and the quantity surveyors agree the valuation.	-625
143	Lead flashings to chimney were not completed with reasonable skill and care and/or to a reasonable standard, causing a leakage in the first floor bedroom. Remedy lead flashings (soakers and cover flashings) and stop leakage. Remedy damaged plastered finishes and ceiling in first floor bedrooms 3 and 4. Claim £1,180, allow nil. I am not satisfied that PR's evidence is sufficient to demonstrate the existence of a defect in C's works or that the leak was caused by any such defect. There is no documentary evidence that such work was carried out or at what cost.	-
144	Rosemary clay hip tiles were not installed with reasonable skill and care and/or to a reasonable standard, and they were not true to line and level at a critical junction between the old and new roofs. Re-bed tiles midway up the hip. Claim £425, allow £425. The building surveyors agree this item and the quantity surveyors agree the valuation.	-425
145	Underground drainage has not been installed in accordance with Architect's drawings following the perimeter of the building, with reasonable skill and care and/or to a reasonable standard. CCTV drainage inspection. Claim £1,000, allow £500. The building surveyors agree this work was not completed but I accept C's evidence that it was part installed to the kitchen island and accept RB's assessment that only approx. 50% of this work requires to be undertaken and, in the absence of documentary evidence that it has been done or the cost award £500.	-500
	Gable elevation	
146	External brickwork was not completed with reasonable skill and care and/or to a reasonable standard of workmanship – bed joints and perpends were of irregular depths, and there were widespread damaged/spalled bricks. Installation of new window cills, cutting back brickwork and reinstatement of windows. Claim £2,090, allow £720. I agree with TM that as with item 139 repointing was not required and thus allow	-720

	the cost, as valued by RB, of installing the new window cill at £175 and cleaning the brickwork at £545.	
147	UPVC casement windows (frosted glazing) on ground floor could not be reached, and the frosted glass was installed incorrectly. The windows were not completed with reasonable skill and care and/or to a reasonable standard. Replace frosted glass, and provide silicone sealant to window perimeters. Claim nil, included above.	-
	Rear elevation	
148	External brickwork was not completed with reasonable skill and care and/or to a reasonable standard of workmanship. Installation of new window cills, cutting back brickwork and reinstatement of windows. Replace brickwork with suitable facing bricks. Claim £3,125, allow £1,705 I do not accept PR's evidence that it was necessary to rebuild the rear elevation due to the extent of voids in the mortar on the basis that I do not accept that it has been established that there is a proven concern as to the integrity of the keying in of the mortar to the brickwork. I accept TM's opinion that limited repointing in the worst affected area would be sufficient. I allow £300 for the new window cill, £675 for the sliding doors, and as to the brickwork, the total area is 20m2 of which I am satisfied on the evidence of RB that £280 is required to replace approx. 20 spalled bricks, £100 is required for repointing approx. 5m2 and £350 for cleaning 20m2, and thus I allow £1,705 in total.	-1705
149	UPVC casement windows (frosted glazing) could not be reached, and the frosted glass was installed incorrectly. The windows were not completed with reasonable skill and care and/or to a reasonable standard. Replace frosted glass, and provide silicone sealant to window perimeters. Claim £485, allow £241 as agreed valuation on the basis that the building surveyors are agreed that this item was incomplete but not defective.	-241
150	Clay tiles on roof were not completed with reasonable skill and care and/or to a reasonable standard of workmanship, with gaps in the head lap towards the top of the pitch. Adjust tiles to close gap. Claim £350, allow £160 The building surveyors agree the defect and remedial work and the quantity surveyors agree £160 as a valuation.	-160
	First floor bedroom	
151	Gaps to boards on entry to ensuite. Fill and/or plate area. Claim £25, allow £25 on the basis that the building surveyors are agreed that this item was incomplete but not defective.	-25
	Attic room	
152	Bulkhead was poorly formed and not completed with reasonable skill and care and/or to a reasonable standard of workmanship. Take down bulkhead and reinstate cupboard ceiling as originally installed. Claim £450, allow nil. I agree with TM that whilst this work is incomplete and requires skimming it is not so poorly formed in a difficult sloping ceiling area as to justify remedial works. There is no evidence as to the cost of skimming, which I am satisfied would have	-

	been minimal when undertaken with other works had D not wrongfully terminated.	
4.3	**Other additional costs and expenses (third part of Sched. C QS JS)**	
153	Costs of new deep flow cast iron gutters (15 no.) and corner angles (3 no.), which the claimant failed to provide as required by the contract and included in the price. Claim £6,930, allow nil. The chronology in relation to the gutters shows that in its amended quotation C agreed to re-use existing cast iron gutters where possible and to supply new where not. There was no express discussion or agreement as to whether they would be standard or deep flow. By January / February 2017 it had become apparent that the gutters at high level would need to be deep flow to match the existing and that C was contending that to supply new deep flow gutters around the house would involve additional time and cost. In the circumstances, an agreement was reached for matching deep flow gutters to be supplied at the front and standard elsewhere and this is what was supplied. There is no suggestion or evidence that the standard gutters have been replaced or, in my judgment, that there is any proper basis for so doing. I accept RB's evidence that the existing arrangement provides an acceptable match. In the circumstances I am satisfied that what was supplied complied with the final agreement and was acceptable and that there is no basis for claiming the cost of replacement deep flow gutters which, in any event, the quantity surveyors agree would only cost £1,440.	-
154	Cost of replacement of sandstone cills (7 no.) which were damaged by the claimant. Claim £969.43, allow nil. I am satisfied on the evidence that C only agreed to re-use the existing cills if he could remove them without damaging them and I am not satisfied that D has provided that the cills could and should have been able to be removed without damage and thus re-used.	-
155	Costs of Cadent Gas application and installation of new gas service pipe (for the purpose of obtaining a new gas meter and installing the new heating system), as a result of the Claimant's failure to cap off the gas service pipe and disconnect it safely and properly, with reasonable care and skill, and/or in accordance with the relevant legal requirements and good practice. Claim £3,998.95, allow £1,350. This claim arises out of item 1 (variations) above. C submits, and I agree, that in a misguided attempt to expedite progress and save costs C had procured the movement and capping off of the existing gas pipe by a qualified gas engineer but one who was working on his own account and who could not, therefore, provide any quality assurance documentation. However, there is no reason in my judgment to consider that the work done by the gas engineer caused any damage to the remaining gas pipe or created any risk of danger to anyone working on or occupying the site. It is common ground that new pipework was needed from the gas meter into the property. In relation to this work (comprising item 129) LJ had estimated £1,000 and GN had estimated £850. Further, in relation to this item 155 GN had added a further £500 for reconnecting the disconnected pipe. In contrast, LJ relied upon the email from Cadent Gas date 12/6/18 which confirmed the maximum loadings from the gas main to the gas meter and stated that this pipe would not be adequate for the requested loading. However, LJ accepted that there was no basis to criticise the assessment made by C's subcontractor on 16.2.17 as to the need for an increased gas meter based on the	-1,350

	increased capacity. In my judgment what this shows is that since this work was not part of the initial contract works or price and was being designed during the course of the works, as stated in the revised quotation the cost of a new system would always have been an additional costs in any event, so that there is no basis for a contention that C can be held responsible for this additional cost. There is no evidence that the movement or capping off had caused any damage to the existing pipe which would have led to the need to its being replaced in any event. In my judgment it follows that GN's valuations are reasonable and to be preferred and are in my judgment more consistent which the charge which would have been incurred via the existing subcontractor had D not wrongfully terminated.	
156	Costs of replacement of pantry and utility units stored at the Property, which deteriorated due to the claimant's failure to secure, maintain and protect the site properly and/or with reasonable care and skill. Claim £4481, allow nil. There is no evidence that any deterioration of these units was due to any breach by C. D's email 15/11/16 requested C to store the units in the garage and there is no evidence that C did not do so. Moreover, it is apparent from the photograph of the pantry that the existing units were limited, old and basic. In contrast the units quoted for and supplied are completely different in extent and quality. If there was liability I agree with RB that on a like-for-like replacement basis an appropriate valuation would be no more than £500.	-
157	Wasted costs of tiling materials obtained based on the claimant's incorrect representation that the bathrooms were ready to be tiled, which had become unusable when the plumbing works were actually completed. Claim £2,497.60, allow nil There is no evidence that any deterioration of tiling materials was due to any breach by C, particularly since D was responsible for the termination and had control over when the tiling works actually took place. There is no explanation as to which materials listed on the invoice deteriorated or how the sum claimed is arrived at or documentary evidence of any replacement items or their cost.	-
158	Costs of replacement of stolen/damaged York flagstones. Claim £3005, allow nil The claim is not particularised. The evidence of cost comprises one email dated 26/10/18 giving a cost /m2 for supply and a cost/m2 for installation, in response to a request for a quotation for two separate areas of garden with a photograph apparently attached but not disclosed. There is no evidence as to the number of flagstones stolen, by way of insurance claim or otherwise, and no evidence that the security provided by C was insufficient such as to breach its contractual duties, let alone evidence as to whether any burning damage to other flag stones could be or was remedied and if so at what cost. There is no evidence of any flagstones having been supplied or replaced.	-
159	Costs of reactivating electric gates for security. Claim £150, allow nil. I am satisfied that D instructed C to power down the electric gates and that there is no basis for holding C liable for this cost, as to which there is no documentary evidence.	-
160	Costs of replacing alarm system for security.	-

	Claim £2,359.20, allow nil. This appears to be connected with item 112 above. As already found, I have accepted JB's evidence that he had been asked to disconnect the alarm system and that, but for the wrongful termination, his electrical subcontractor would have been able to reconnect the system at minimal cost. Whilst I accept the evidence of both experts that an incoming contractor would probably have considered it necessary to install a new system, the need for that was not the consequence of any breach by C. MW complained about the way in which the wiring had been cut. However, I am satisfied that this could have been overcome by the existing electrical subcontractor. I also accept RB's evidence that the existing system was approx. 20 years old and outdated and would almost certainly have been upgraded by D in any event as part of the updating of the house once the extension was completed. The alarm system was not installed and invoiced until 17/4/19, some 2 years post termination of the contract, which is consistent with this not being causatively connected with any breach.	
	Total sect 4	**- 34,667.93**
	Plus 7.5% for preliminaries	**-2,600.10**
	Sub-total	**-37,268.03**
	Plus VAT on sub-total	**-7,453.60**
	Total sect 4 (inclusive of preliminaries and VAT)	**-44,721.63**
5	**Adjustment to preliminaries** RB notes that C may have given credit for the saved preliminaries at £500 per week over the period it would have taken to complete the works but for the termination. However, I am satisfied that: (a) D has not pleaded or made out a case to the effect that the whole of the delay to the original contract programme was C's fault or contractual responsibility and, to the contrary, I am satisfied that a substantial and equal case of the delay was D's failure to provide clear instructions when requested and/or within a reasonable time in relation to choices, including choices of extra works; (b) it would be unjust to require C to give this credit without also allowing it to recover extended prelims over the period of delay pre-termination, and I am satisfied that on a broad basis the two would cancel each other out.	**Nil**
6	**Adjustment to OHP** Addressed elsewhere where applicable.	**Nil**
7	**Other C costs and losses** RB has included various additional claims advanced by C in its final invoice or elsewhere. As to these: Items 7.1 - 7.3 (materials left on site) are taken into account in the valuation of incomplete work. Items 7.4 to 7.6 (liabilities to the scaffolding and fencing supplier) have not been proven, because there is no evidence of these claims having being made or paid by C. Item 7.7 (administrative time for dealing with various queries) fails for lack of proof. Item 7.8 (overheads) fails because any additional preliminaries claim has been taken into account under item 5 above and in any event has not been proven by sufficient evidence.	**Nil**

	Item 8 (interest) does not apply given there has been no underpayment Item 9 (Harper James) appears to relate to legal costs and, insofar as there is a claim, will be determined after handing down judgment. Item 10 (contracted monthly fee) appears to relate to the fee charged by SB to C for her time services and is not recoverable against D.	
8	**Other D costs and losses** In the schedule supplied by D to include bundle references there was a reference to 4 further items. It is not clear to me whether or not they were included in the Scott Schedule as served, since they are not addressed by the experts or the witnesses. Insofar as they are items included within the claim I award nil on the basis that: (1) D cannot hold C liable for the decision to hire a skip for security. (2) D cannot hold C liable for additional council tax due to the property being empty. (3) D cannot hold C liable for the decision to replace the brickwork. (4) D cannot hold C liable for the hire of a welfare unit.	**Nil**
9	**Total** **£156,370 (contract sum) add £8,344.23 variations add other adjustments £418.5 less incomplete and defective work £44,721.63 final account total £120,411.10**	