

**Neutral Citation Number:** [2018] EWHC 1577 (TCC)

**Case No. HT-2015-000381**

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**TECHNOLOGY AND CONSTRUCTION COURT (QB)**

Royal Courts of Justice  
Strand, London, WC2A 2LL  
Date: 21 June 2018

**Before:**

**The Honourable Mr Justice Fraser**

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Between

**IMPERIAL CHEMICAL INDUSTRIES LIMITED    Claimant**

**and**

**MERIT MERRELL TECHNOLOGY LIMITED    Defendant**

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**Martin Bowdery QC and Lucie Briggs (instructed by Clyde & Co. LLP) for the  
Claimant**

**Justin Mort QC and Robert Scrivener (instructed by Mills & Co.) for the Defendant**

Hearing dates: 17, 18, 19, 23, 24, 25, 26 April 2018, 8 May 2018

Draft distributed to parties: 11 June 2018

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**JUDGMENT (No. 2 QUANTUM)**

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Mr Justice Fraser:

## **I Introduction**

1. This case concerns works performed by Merit Merrell Technology Ltd (“MMT”) for Imperial Chemical Industries Ltd (“ICI”) at a paint manufacturing facility in the North of England between the end of 2012 and into early 2015. MMT was a specialist engineering piping manufacturer, based in Cramlington in Northumberland. It is now in liquidation. On 18 December 2012 MMT and ICI entered into a contract, which was executed as a deed, for works associated with the construction of a new paint manufacturing facility for ICI at the manufacturing facility to which I have referred, which is located at Ashwood Business Park, Ashington, Northumberland (“the Plant”). The value of the works that it was intended, as at that date in 2012, that MMT would perform was quite modest, being only approximately £1.9 million in value. The works the subject of the contract to be performed by MMT were the manufacture, construction, installation, commissioning and handover of steelworks and free issue tank offloading and positioning works. These works were referred to informally during the trial as being those within the Steelworks Contract. No pipework was initially included in those works at all, although in the event 42,000m of such pipework was installed. ICI used to be a major FTSE100 company in its own right, and manufactured many items, including paint, with one of its most well-known brands being Dulux paints. In 2007 it was acquired by AkzoNobel, a Dutch multinational company, whose legal name is Akzo Nobel NV (“AkzoNobel”). ICI was absorbed into the AkzoNobel group as a result of the takeover, but remains a separate legal entity. It was ICI who contracted with MMT for the works. The project was called “Project Fresco”. This judgment is in relation to the quantum disputes between the parties. My judgment on liability is at [2017] EWHC 1763 (TCC), and my judgment on costs in relation to that round of the proceedings is at [2017] EWHC 2269 (TCC). In addition to these judgments, there is one of Jefford J at [2016] EWHC 3082 (TCC) dealing with the adjournment of an earlier trial and the associated costs orders, together with another by the same judge on an adjudication enforcement at [2016] EWHC 3030 (TCC). The first judgment, however, in a long running series is a decision of Edwards-Stuart at [2015] EWHC 2915 (TCC), relating to an attempt by ICI to obtain an order for delivery up of documents. This judgment is therefore the sixth one in this long running series, and is in the following parts:

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2. ICI maintained in the application before Edwards-Stuart J in witness evidence from its solicitors that without those documents the Plant could not be operated, and further that the Health and Safety Executive would not permit ICI to operate the Plant. This latter point is dealt with at [61] and [62] of that judgment. The judge declined to make the order. The Plant did however operate thereafter. It can therefore be seen that this judgment is potentially the final element of some long running, and bitterly fought, litigation arising out of Project Fresco. In addition to the litigation, there have been four adjudications.
3. For convenience I will provide a brief outline of the dispute in this introduction; however, for a detailed analysis of the liability issues and relevant findings the substantive judgment on liability should be read.
4. The Plant was to produce almost 2 million litres of solvent borne, and water borne, paint products per week. Obviously, such works would require piping in very great quantities, and also in a variety of sizes, and these pipes are joined together by welds. This pipework was not however designed when the contract was agreed with MMT. These proceedings, so far as liability was concerned, essentially concerned the quality of the welds performed by MMT, together with a repudiation issue. The value of the works was also very much in issue, although for the purpose of resolving in the liability trial the legal issue about recovery of a potential overpayment I was asked to assume that ICI had overpaid MMT. All matters of quantum were to be dealt with at a later trial.
5. By way of Project Manager's Instruction No.3 ("PMI03") the works to be performed by MMT under the contract had been expanded very considerably. PMI03 was dated 5 February 2013, and predominantly concerned pipework, whereas the original contract was predominantly for steelwork. The PMI03 works were referred to informally as the works under the Pipeworks Contract, although that informal nomenclature does not mean that there were two entirely separate contracts. PMI03 instructed works under the existing contract and the NEC3 terms govern all of the works performed by MMT, whether those works were steelworks or pipework. There is a dispute about the total value of the works performed by MMT, but it is common ground that PMI03 increased their value very considerably, and as at the date of issue of the Claim Form in these proceedings MMT had been paid £20.9 million. Even on ICI's case MMT's works were worth approximately £10 million. Both of these sums are obviously far in excess of the originally contracted works of less than £2 million.
6. Between 2012 and 2014 the works proceeded, with the only point of note for these purposes being that the project as a whole began to run substantially over the internal budget set by AkzoNobel, and to take longer than expected. Although ICI was a separate legal entity, all of the decisions that were made that are relevant to the period from the middle of 2014 onwards, were made by personnel at AkzoNobel, who

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controlled the funding, and who took over and ran the project. A committee within AkzoNobel called the Steering Committee or Steer Co had its own internally approved figure for total expenditure on Project Fresco, which was called CapEx (for Capital Expenditure). In the middle of 2014 the senior management of AkzoNobel decided that Project Fresco had to be finished, and overall expenditure had to be brought down below the approved CapEx figure. Accordingly, some AkzoNobel personnel were dispatched to the site for that sole purpose. By far the most important, and senior, of these for the purposes of this trial (and the earlier trial of liability issues in 2017) was Mr Boerboom. By December 2014 CapEx had been increased by AkzoNobel to £157.7 million, far higher than the figure initially approved by the board earlier in the life of the project. The fact that the cost was increasing so much was one of the main reasons (delay being the other) that the AkzoNobel team were sent to site, and became so involved. The AkzoNobel team were there to get the project back on track. CapEx formed no part of the contractual relations between ICI and MMT. However, given expenditure on the MMT contract (or more accurately, financial exposure by ICI to MMT) was very much higher than initially intended, something of a financial squeeze developed. The amount of CapEx still available to be spent overall, was not necessarily the same as the amount to which MMT was potentially entitled under its contract terms; nor was the amount of CapEx still available to be spent, necessarily sufficient for all the contractual liabilities ICI might have to MMT and the other contractors. These issues were addressed in the first judgment on liability. CapEx was what governed the AkzoNobel approach to MMT and its contract, and not MMT's contractual entitlement, nor the other contract terms.

7. Mr Boerboom is a Director of Engineering Excellence for AkzoNobel Advanced Manufacturing Projects & Engineering based in Arnhem in the Netherlands. Project Fresco had commenced in January 2011 and was supposed to be fully operational by December 2014. Mr Boerboom was sent to the project in July 2014. The contract between ICI and MMT was on the NEC3 form as amended, which is a detailed standard form widely used in the industry and designed to have (as with so many contract forms) an independent third party involved. The Project Manager (the name in the NEC3 form for the entity that performs the independent third party certifier function under the contract) was a company called PROJEN. The relevant person at PROJEN was called Andy Barton. PROJEN was also involved in designing the works. In general terms, such an independent third party certifier in contracts of this nature is intended to have an impartial role in the valuation of works. The NEC3 form entitles the contractor to interim payments; indeed, interim payments are now statutorily required in all construction contracts as a result of the Housing Grants Construction and Regeneration Act 1996. It has been said a great many times before, but cash flow is the lifeblood of the industry. The involvement of an independent third party certifier in considering the correct level of interim payment to be made to a contractor such as MMT is a highly important part of the contract.
8. For the full details of the sorry events of this project from mid-2014 into March 2015, recourse should be had to the judgment on liability. Essentially, Mr Boerboom decided that the best way to bring the project cost down was to push MMT towards insolvency. This is a finding that I made in that judgment, although it is accurate to say that it is a finding to which Mr Boerboom paid little attention in his third witness statement for the quantum trial. When he gave evidence on 17 April 2018, he remained wedded to the theme that ICI had adopted from 2014 to 2017, namely that

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MMT's works were substantially defective. That is one of a number of points in respect of which I had made a number of findings adverse to ICI in the liability judgment; but again, those findings did not seem to trouble Mr Boerboom. There are other instances in which ICI's case at this quantum trial wholly ignored earlier findings of the High Court that did not suit it, not least the approach of its accountancy expert Mr Thompson, which I deal with further below. It goes without saying – or rather, it should – that quantum trials that follow detailed liability findings by the court ought to treat those findings as what they are, namely the final resolution of that particular component of the litigation between the parties.

9. I had also found in the liability judgment that ICI had repudiated the contract with MMT, by purporting to accept non-existent repudiatory breaches on MMT's part and dismissing MMT from site. Mr Boerboom and the other members of Steer Co knew these were not valid grounds when the decision was taken on ICI's behalf to "accept" these alleged breaches. However, this final act only came after some months of stringing MMT along, including promising MMT a payment of £2.5 million in late 2014 if certain conditions were met. That payment was part of an agreement (at least so far as MMT was concerned) in something I called the 10-Point Letter, which was dated 19 November 2014. Internally at AkzoNobel, authority for making such a payment to MMT was withdrawn shortly after this letter was agreed with MMT, and AkzoNobel thereafter did not intend to make such a payment, nor did those within AkzoNobel any longer have authority to do so once this had been withdrawn. Nobody, however, told MMT that, who were encouraged towards fulfilling the conditions specified in the letter regardless. This was not the only example of double-dealing on the part of AkzoNobel in this case. By double-dealing I mean deciding one thing behind the scenes or internally, but either saying something different or allowing MMT to believe something different at the same time. During the quantum trial it became clear that an agreement was reached in early September 2014 between Mr Conrad of ICI and Mr Wells of MMT that £1.4 million would be paid to MMT for preliminaries and secondary steelwork support in the interim payments for August and September 2014. Mr Boerboom decided this would not be paid. Again, nobody told MMT that either.
10. An enormous number of allegations of defective work were made against MMT, a precision manufacturer and installer of high quality welding, by AkzoNobel/ICI. Such defects did not exist in such quantities, if barely at all, and were also raised based upon a more stringent testing regime than the one contractually agreed. Radiographic testing was something that ICI had expressly decided in 2012 (when more reasonable personnel were involved in the contract) would not be required on MMT's part, and should not be part of the contractual testing regime. However, during 2014 and 2015 ICI insisted that such testing *was* contractually required. I found in the liability judgment that this was part of a disreputable strategy adopted by AkzoNobel against MMT. As an example of the degree to which allegedly defective work was exaggerated by ICI at the time, from late 2014 and throughout the liability trial it was said that the defects would cost ICI approximately £5 million to remedy. Following the liability trial and my findings on defects, this head of claim against MMT was agreed in the more modest sum of only £187,000, or about 3.7% of the sum originally claimed.

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11. MMT started experiencing payment difficulties from about July/August 2014 onwards. This coincided with the arrival at the project of Mr Boerboom. MMT found that from October 2014 onwards, payments dried up altogether and nothing at all was paid. On 16 October 2014, an instruction was given by ICI for MMT to stop all welding. Defects were alleged against MMT by the AkzoNobel team, and the senior management of MMT were involved with some senior personnel from AkzoNobel in attempting to agree a resolution; it was this that led to the “agreement” that a further £2.5 million would be paid, although as I have said, unbeknownst to MMT, AkzoNobel had already decided this sum would not be paid. An earlier, and more substantial, agreement was reached in October 2014 after a two day meeting on 7 and 8 October 2014, the purpose of which was to try and agree all outstanding valuation issues for MMT’s works, including the correct value of a great many Project Manager’s Instructions or PMIs. At this meeting, which was attended by many senior personnel, agreement was reached both on rates and many elements of the works, including measurement and value of a large number of these PMIs. These agreements were reached, on ICI’s side, by different personnel actually involved in the works and with detailed knowledge of them, and also by Mr Barton the Project Manager.
12. This agreement, or these agreements, was or were not honoured either after the meeting in October 2014 by ICI, AkzoNobel, or Mr Boerboom nor at any time up to or during the trial on quantum before me. This is a topic to which I will return. Mr Boerboom, in his evidence before me on 17 April 2018, initially said he had no recollection of this meeting, although when he was taken to documents emanating from that meeting his recollection improved rather markedly. Mr Boerboom and his reliability as a witness is dealt with as a separate subject below.
13. The independent Project Manager appointed under the contract, PROJEN, resigned on 9 October 2014, shortly after Mr Barton was given an instruction that all valuations had to be approved and signed off by a member of the AkzoNobel site staff. I made findings about this in my liability judgment too. Mr Boerboom, when he gave evidence in May 2017, had said that he did not know why Mr Barton the Project Manager had resigned. I did not accept this evidence, and expressly rejected it. By the time of his third witness statement on 5 January 2018 for the quantum trial, he had at least partially recovered his extraordinarily selective memory and now said that Mr Barton had left for personal reasons. I do not accept that evidence either. Mr Barton, in my judgment, resigned as the Project Manager due to the very considerable level of interference with the exercise by Mr Barton of his professional duties as Project Manager under the NEC contract form. This interference was by AkzoNobel personnel generally, and Mr Boerboom in particular. I made an express finding to that effect in the liability judgment, in the following terms at [37]:  
“The unavoidable inference is that PROJEN decided, for professional reasons, that they could not continue to act as Project Manager in these circumstances and Mr Barton resigned, even though he remained involved behind the scenes assisting Mr Boerboom and his team with the administration side in terms of paper work and so on. For the avoidance of doubt, I find as a fact that this is why PROJEN resigned. Mr Boerboom’s evidence makes clear that this interference by him must have started very shortly after he arrived, and he must have purported to act as Project Manager behind the scenes even before PROJEN resigned.”

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It was at least consistent with Mr Boerboom's approach to the liability judgment generally – namely to ignore the findings within it with which he did not agree– to read in his 3<sup>rd</sup> witness statement the following passage “I did not interfere in the work of Andy Barton and/or Jeff Conrad in dealing with the MMT situation.” I had made express findings of fact and these were not appealed. Indeed, permission to appeal was not even sought by ICI. I consider that none of the findings that I made in the liability trial are open to reconsideration in the quantum trial.

14. Although welding was restarted by MMT upon instruction from ICI in January 2015 for isolated parts of the works, AkzoNobel remained unhappy. I dismissed all of the allegations of repudiatory breach made against MMT in the litigation trial. However, another ground, neither pleaded in the Particulars of Claim by ICI, not included by Mr Boerboom in his evidence for the liability trial, emerged during the quantum trial. He said that the fact that MMT had initiated adjudication proceedings against ICI in January 2015 was a reason for dismissing MMT from site. He said that as a result he did not wish to work with MMT anymore. The terms in which he did this are set out in the section below dealing with his evidence specifically at [96]. I accept that this was a reason why Mr Boerboom wanted MMT dismissed from site; and also that it was a reason operating on the collective mind of both ICI and AkzoNobel at the time. I do not accept that it is an acceptable way for parties to a construction contract to behave, for reasons I explain at [48].
15. By a letter dated 17 February 2015, ICI (on AkzoNobel branded notepaper) wrote a letter to MMT accepting what was said in that letter to be the repudiation of the contract by MMT, and thereby terminated MMT's employment under the contract. MMT's solicitors, Mills & Co, in a letter of the same date, replied on MMT's behalf and disputed the factual and legal basis upon which that action had been based, and raised the issue of repudiation by ICI. It was also said in that letter of reply to be “ridiculous” to assert a repudiatory breach by MMT when the majority of welding work had been formally suspended months earlier. This was therefore a classic “who repudiated the contract?” scenario, which was resolved in MMT's favour. ICI's explanation for what occurred in the autumn of 2014, running into early 2015, was that the work MMT had performed was of dreadful quality – one witness at the liability trial spoke of “the worst welding I had ever seen” – and MMT were said to be unable and/or unwilling to resolve such issues. The allegations by ICI of such widespread defects were challenged strenuously by MMT, and MMT's position ultimately vindicated, but not until July 2017 after the liability judgment, and after MMT had gone into liquidation. It may therefore have similarities with a Pyrrhic victory. This vindication does not seem to have reached Mr Boerboom, nor does one of the other important findings that I made in the liability judgment, namely that Mr Boerboom's appointment as Project Manager under the NEC3 contract form to replace Mr Barton was invalid. That finding has important implications for the quantum exercise being carried out by the experts, and again, this is a topic to which I will return.
16. There were a number of adjudications between MMT and ICI. In the first one, which was commenced in January 2015 and led to a decision in March 2015, a payment of approximately £8 million plus VAT was ordered to be paid by the adjudicator to MMT, which was the amount of the interim payment applied for by MMT in November 2014. However, the delay in receipt of such a substantial sum between

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November 2014 and March 2015 (when, following the adjudicator's decision and issue of court proceedings by MMT to enforce the decision, it was paid by ICI) meant that MMT's bank had lost confidence in it, and without notice removed all of its lending facilities the very day that the sum was received by MMT. This was the Bank of Scotland. This bank applied the adjudication sum against MMT's outstanding indebtedness, and expressly told MMT to go and bank somewhere else. Mr Wells gave evidence of this in the liability trial. After MMT left site in February 2015, and following receipt of this adjudication sum, it had been paid approximately £20.9 million. ICI's case was that this constituted an *overpayment* of approximately £10 million. That figure was based on what was said by ICI, at the time in 2015 and subsequently, to be a Project Manager's Final Assessment which was performed by Mr Brownlee of Blake Newport, a practice of quantity surveyors. Mr Brownlee was instructed by Mr Boerboom.

17. Due to the findings in the liability judgment, it was necessary to have a valuation of MMT's account as at the date of the repudiation, together with analysis of the quantum of MMT's counterclaim, which sought damages for the wrongful repudiation. Mr Boerboom's witness evidence for the liability trial had stated that he had become Project Manager "shortly after" July 2014. No notification was given to MMT of this at that stage, and indeed until Mr Barton of PROJEN resigned three months later, Mr Barton was still, on the face of it, the Project Manager, and MMT thought he was the Project Manager. PROJEN had been specifically instructed that they could only certify payments to MMT if the AkzoNobel personnel expressly agreed to this in writing. Such an instruction is plainly at odds with how a third-party certifier, or decision maker should conduct themselves professionally (to use the phrase of Jackson J as he then was in *Scheldebouw BV v St James Homes* [2006] EWHC 89 (TCC)). The purported appointment of Mr Boerboom was invalid for the same reasons; the fact that he was employed by AkzoNobel and not ICI made no difference. He was eminently unsuitable to act as the Project Manager, and from all the evidence I have seen did not remotely at any stage attempt to do anything other than fulfil the AkzoNobel purpose, which was to reduce expenditure on, or exposure to, MMT by forcing that company into insolvency. Indeed, he was eminently unsuitable in every single respect, and was the very opposite of independent. I found in the liability judgment that PROJEN decided, for professional reasons, that they could not continue to act as Project Manager in the circumstances, and that PROJEN resigned due to improper interference by Mr Boerboom.
18. Each party in the quantum trial called a quantum expert who was a quantity surveyor, and also called an expert accountant. Valuations of MMT's work had been done throughout the whole of 2013, and for the first nine months of 2014, by PROJEN, until Mr Boerboom's interference and attempts to influence those became too much for Mr Barton. In this quantum phase, ICI called two witnesses of fact, Mr Boerboom, and Mr Brownlee, the latter being a qualified quantity surveyor who was appointed in 2015, and had nothing to do with MMT whilst they were on site. ICI did not therefore have the benefit of any witnesses prior to July 2014, and the only witness who had anything whatsoever to do with the project contemporaneously was Mr Boerboom. ICI did however seek to have the entirety of what PROJEN had agreed with MMT contemporaneously revisited. This includes rates, measures, quantities and value of PMIs, and also interim payments, entirely re-valued on a wholly different basis to that adopted at the time.

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19. I have been careful to approach the hearing of this quantum trial with no preconceptions whatsoever, notwithstanding the terms of my judgment on liability and the fact that I ordered 95% of MMT's costs of that trial to be borne on an indemnity basis by ICI. It is important that the court has a completely open mind at all stages of litigation, and ICI were given an entirely fresh start in these quantum proceedings, apart from the obvious point that findings made in the liability judgment applied, and governed the quantum exercise. However, the approach ICI adopted towards MMT from 2014 to 2017 seems to have continued throughout 2017 and throughout this trial in 2018 too. A good illustration of this is the ICI approach to PROJEN. There is nothing to suggest that PROJEN did not carry out their professional duties from 2012 to late 2014 with anything other than professionalism and skill. The role of Project Manager under the NEC3 contract form, on a contract for this project, would have included a large amount of detailed valuation work amongst qualified people. Whether ICI were legally bound or not by the valuations performed by PROJEN— and that is an issue which is considered below – simply in terms of common sense and logic it would be expected that the PROJEN valuations, or at least agreements regarding quantities (or measures) and applicable rates made at the time by those most closely involved with the works themselves, would be used as a starting point. There was evidence before me of detailed measures having been reached after lengthy meetings by (for example) Mr Riley of MMT (who gave evidence before me) and Mr Hall, an ICI-employed site-based quantity surveyor (who did not). It was agreed between ICI and MMT in 2014 that agreeing the measures and valuations of PMIs would be Mr Hall's principal priority. He was taken off one of the other contract packages specifically to do this. Most of the detailed measures and valuations were agreed with Mr Hall in the summer and autumn of 2014. It was a painstaking and detailed exercise, and I have direct evidence from Mr Riley that it took a very long time and many meetings.
20. However, in the so-called "Final Assessment" exercise that Blake Newport was instructed to do by Mr Boerboom in February 2015, and in this litigation, these agreements were entirely ignored by ICI. MMT submits that the reason that this was done here, is because ICI knew or realised that to honour such agreements would lead to a valuation of MMT's works far closer to the amount MMT had in fact been paid, rather than the £10 million overpayment that ICI sought to substantiate. In order to suppress the "valuation" of MMT's works to a figure as low as possible, it was necessary for ICI to revisit each and every element of valuation including previously agreed rates, being rates agreed by those far more closely involved in, and knowledgeable about, the MMT works themselves, and at the time, and previously agreed measures. No good reason was advanced by ICI for why these agreements should be entirely put to one side. Mr Hall was not called as a witness. No other ICI person with any knowledge of the works was called either. No direct evidence of fact was called by ICI going to the works the subject of these numerous agreements. This is a topic dealt with further below.

**II Disclosure**

21. There is an important point concerning disclosure and availability of documents that arises due to the events of 17 February 2015. This directly impacted upon the trials both of liability but particularly quantum. When MMT was dismissed from site, it was given 24 hours' notice and was not permitted to take any documentation away from

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the site offices. On such a substantial project, it is entirely usual for contractors such as MMT to maintain such offices, and keep working documents there. The evidence before me was that a great deal of the project-specific documentation relating to valuation that MMT had generated itself, or received, or used in meetings, was kept there. This is to be distinguished from the weld packs, which was also called project documentation, with which I dealt at [231] to [259] in the liability judgment, which had been supplied to ICI in disclosure for the liability trial. As a result of the documentation being left at site when MMT left site, MMT did not have very many documents of the type that would ordinarily have been in its possession to substantiate its quantum claim. These documents were, however, available to it prior to November 2014 when the detailed agreements were being reached between MMT and the Project Manager. This lack of documentation is not therefore the fault of MMT. That there would have been a considerable quantity of such documentation is not in doubt; there were a total of 545 Project Manager's Instructions and Site Instructions ("PMIs and SIs") issued on this project.

22. The fact that these documents were not available was entirely due to the repudiation of the contract by ICI, and also the way in which this repudiation was carried out by ICI. Dismissing MMT from site was one thing. The extremely short notice and the way that MMT's site documents were retained seems almost designed to impose upon MMT the maximum adverse impact of this act. It is hard to imagine a greater blow to MMT's commercial reputation than such events. However, a main theme of ICI's approach to the quantum exercise was that MMT "could not prove" certain elements of its claim. Such assertions were very easy for ICI to make in this round of the litigation, particularly given ICI itself had deprived MMT of the ability to demonstrate the full extent of its works by retaining all of MMT's documents that had been kept at site. A clearer example of a party attempting to take advantage of its own breach is difficult to imagine.
23. The difficulties that this presented MMT were then compounded by the fact that the ICI version of the documents that would have been marked up by Mr Hall in his meetings to agree the measure with MMT personnel such as Mr Riley, were for whatever reason also said to be missing. The MMT version of these documents would have been kept at site, as Mr Brownlee accepted, and therefore left behind when MMT was dismissed. Nobody knows what has happened to the large number of ICI hard copy documents that would have also been created at the time. Mr Hall's working documents of this nature certainly were not made available to MMT in disclosure, nor was there any satisfactory explanation of why this was the case, or what had happened to them. The matter of such missing material was explored with Mr Boerboom in cross examination. He accepted that litigation was anticipated by ICI and AkzoNobel from early 2015 and that documents should have been kept. He had no explanation for why such documents were not available, and the best he could do regarding why documents referred to in the Blake Newport Final Assessment were not available – he having instructed Blake Newport himself – was "you have to ask Blake Newport".
24. This unsatisfactory situation regarding documents had echoes of the difficulties that ICI had in the liability trial concerning not only retention and preservation of documentation, but also losing physical evidence that appears to have been destroyed, namely the so-called "meeting room welds" which I dealt with at [66] to [69] in the

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liability judgment. These welds were said by ICI to be examples of MMT's defective work, but were not available for inspection by any of the experts, notwithstanding their obvious importance. ICI had simply lost them. Mr Boerboom had not left instructions for their preservation when he left site at the beginning of 2016, but expressed himself to be "quite astonished" when the subject was put to him in cross examination in that earlier trial. This destruction or loss of physical evidence for the liability trial greatly troubled me then; the loss, non-preservation and non-availability of MMT documents left at site when MMT was dismissed when the repudiatory breach by ICI occurred, and of Mr Hall's working documents, greatly troubles me now. Whoever is to blame for this situation, it cannot be anyone at MMT, as these documents were left in the custody of ICI. ICI has itself solely to blame for any inadequacies in the documentation available.

25. The degree to which the lack of any documentation impacts upon the issues that I have to decide will have to be addressed on an issue by issue basis, if and/or when they arise. It is not possible, nor would it be desirable, in my judgment, to set out a blanket approach to this matter that will apply regardless of the issue and/or the relevance of the different types of information.
26. The parties produced an agreed list of issues that were to be dealt with in this quantum trial, together with some further issues that may potentially arise depending upon the court's conclusion as to whether certain issues have been adequately pleaded. During the trial, when further detailed issues of valuation were crystallised, further issues were said to arise on the separate items in the Scott Schedule. I refer to these as Scott Schedule sub-issues.

### **III The issues**

#### *The Final Account*

1. What is the value of the work carried out by MMT as at 17 February 2015?
  - a. What is the value of the Contract Sum?
  - b. What is the value of PMIs 003 and 003a?
  - c. What is the value of the Steelwork PMIs?
  - d. What is the value of the Pipework PMIs?
  - e. What is the value of the Design PMIs?
  - f. What is the value of the Mechanical PMIs?
  - g. What is the value of the SIs?
  - h. What is the value of the Claims?

### **IV The Counterclaim**

2. What damages is MMT entitled to recover as a result of ICI's repudiatory breach of the Contract?
  - a. It being accepted that in principle MMT is entitled to recover its loss of profit on work that had already been instructed under the Contract but which MMT was prevented from carrying out due to ICI's repudiation, what is the value of such work and what rate should be applied to it?
  - b. Is MMT entitled to damages representing the cost of professional advice incurred in relation to each of the consultants listed in the table at paragraph 20 of MMT's Particulars of Quantum of Counterclaim advising on the matters set out therein, and if so in what sum? In particular:

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- (i) Begbies for advice and assistance relating to the initiation and management of the CVA proposals.
  - (ii) KPMG for advice and options if the CVA proposal was rejected by MMT's creditors.
  - (iii) Ward Hadaway for independent advice on the CVA proposals and directors' duties.
  - (iv) Deloitte for advice on, assisting with and managing the raising of additional finance following the repudiation and the impact on MMT.
  - (v) 3V Partnership for due diligence for a preferred funder.
  - (vi) Deloitte for renewing banking facilities and subsequently finding an alternative bank.
  - (vii) Neil Matthews for liquidators' fees.
  - (viii) Bond Dickinson for independent advice to MMT's liquidator and expenses.
- c. Is MMT entitled to damages in relation to "the cost of management time" as pleaded in paragraph 21 of MMT's Particulars of Quantum of Counterclaim and if so in what sum?
- d. Is MMT entitled to damages representing the alleged "reduced payment negotiated" on the SCL Project and if so, in what sum?
- e. Is MMT entitled to damages representing the alleged "reduced payment negotiated" (which for the avoidance of doubt includes a claim for legal fees) on the Murphy Project and if so, in what sum?
- f. Is MMT entitled to damages in the sum of £61,131.77, which represents the sum claimed in an invoice addressed to Bouygues dated 16 March 2016 relating to the "Canningtown Project", that Bouygues has failed to pay MMT?
- g. Is MMT entitled to recover the damages set out in the table at paragraph 36 of of MMT's Particulars of Quantum of Counterclaim and if so in what sum in relation to each item? In particular:
- (i) Increased interest cost in relation to the higher bank rate of interest.
  - (ii) Insurance premium advice relating to the giving of personal guarantees and Personal Guarantee Insurance.
  - (iii) Legal fees and increased bank costs from the Bank of Scotland.
  - (iv) Santander's legal fees.
  - (v) FW Capital and Lloyds Bond costs to 1 June 2016.
  - (vi) Santander Bond fees from 1 June 2016.
  - (vii) VAT Loan.
  - (viii) Lost rebates for 2016, 2017 and 2018.

*Interest*

3. Should any interest that is to be awarded be calculated on the Final Account (i.e. the claim) and counterclaim separately from one another, or alternatively should it instead be calculated by reference only to the net amount payable after setting off the claim and counterclaim?
4. Subject to (3) above, for what period and at what rate should interest be applied to (i) the claim and (ii) the counterclaim?

*The further potential issues*

5. Has MMT pleaded a claim for lost profits on work which had not already been instructed under the Contract?

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6. If it has, is MMT entitled to damages reflecting the loss of profit on such work and if so what is the value of the work which would have been awarded to MMT but for the repudiation and what rate (of profit) should be applied to that value?
7. Has MMT has pleaded a claim for re-branding costs?
8. If it has, is MMT entitled to damages reflecting the cost of the re-branding exercise and if so what is the recoverable cost of this exercise?

*Scott Schedule Sub-Issues*

9. These were submitted, in agreed form, the day *after* oral closing submissions. This is not the most helpful stage of a trial to submit agreed issues to the court. They all arise under Issue 1, the Final Account, and there are 29 sub-issues (under Issues 1(a) to (g)), and 12 separate PMIs under what is called the Claims Worksheet which are under Issue 1(h)). I deal with these separately in the section of the judgment entitled Scott Schedule Sub-Issues.
27. The way that the matter of the final valuation of the MMT works was presented and fought by both sides presented considerable challenges in terms of judicial resolution. The parties' approach to their dispute in this case, including but not solely because of the introduction of the Scott Schedule, is heavily reminiscent of another long-running TCC case from a decade ago, concerning the construction of the National Stadium at Wembley in London. The name of that case is ***Multiplex Construction (UK) Ltd v Cleveland Bridge UK Ltd***. Jackson J (as he then was) had the unenviable task of dealing with a number of trials and interlocutory hearings, conducted by parties bitterly contesting each other on everything. He described that litigation as a Herculean task, namely slaying of the Hydra. Resolution of a myriad of preliminary issues did not resolve the litigation. In one of his judgments, [2008] EWHC 2280 (TCC), this one dealing with costs, the judge described at [13] the introduction by one of the parties of a Scott Schedule as being:
- “the source of immense difficulties in this litigation. The schedule and its appendices run to considerable length. The schedule is not well constructed and I suspect that it has not been drafted by either solicitors or counsel. The more closely one studies schedule 4, the more difficult it becomes to deal with the claims.”
- He also referred at [20] to the use of the schedule “blowing the litigation off course”. In an earlier judgment in the same litigation, dealing with an application to amend, he stated the following at [2008] EWHC 231 (TCC):
- “5. .... This litigation has gone on far too long. The parties are incurring excessive costs. The longer this litigation drags on, the greater will be those costs and the more disproportionate they will become to the sums in issue.
6. Two years ago, when giving judgment on certain preliminary issues, I ventured the suggestion that once the questions of principle were resolved (such as which party had repudiated) the parties may wish to seek a commercial resolution of the quantum issues. With a bit of goodwill on both sides and with the assistance of their advisors or a skilled mediator independent of the court, the parties should be able to sort out for themselves all matters of valuation. If that suggestion had been heeded, this litigation could have been brought to a fair and reasonable conclusion during 2006 at a cost which was proportionate to the sums in issue.
7. In the event, however, that suggestion was not heeded. This litigation has dragged on for a further two years at what I surmise must have become disproportionate cost. There has been a myriad of amendments, re-amendments, re-re-amendments, applications, cross-applications and appeals. When one stands back from the detail

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and looks at the overall picture, the parties may care to reflect whether much has been achieved on either side as a result of all these expensive endeavours. But that is a matter for the parties, not for me.

8. It is the wish of the parties that this court should, in effect, value every piece of steel work in Wembley Stadium and every item of damages from the Scott Schedule.

I cheerfully undertake this task, because that is the parties' wish and because the parties are entitled to the decision of this court upon the matters in issue.

Nevertheless, in discharging this duty I must manage the litigation in accordance with the over-riding objective.”

(emphasis added)

28. I optimistically stated in the judgment resolving liability in this case at [225] the following sentiments, following my finding that as a matter of law ICI was entitled, under the terms of the contract, to a valuation of MMT's works as at the date of the repudiation, notwithstanding a decision in MMT's favour by an adjudicator in Adjudication No.1 on Interim Payment No.22:

“225. I appreciate that any exercise which requires an analysis of the correct value of MMT's contract works is something that could, potentially, involve both parties in further wasteful and expensive litigation, if that amount cannot be agreed between them. Mr Brownlee's exercise was done as though the contract had been validly terminated pursuant to its terms, that did not occur and so his exercise (which is challenged in any event) will be redundant. Further wasteful and expensive litigation ought to be avoided if possible. Valuation of an account, if it cannot be agreed, should at least be capable of being distilled into a small number of discrete issues. The amount of court time available for the quantum element of this trial will be no more than four days. Judicial resources are not infinite. However, with the necessary degree of realism on both sides such differences should be capable of resolution.”

(emphasis added)

29. Some parties, and this appears on the face of it to include ICI and MMT (pending any revision to that conclusion after all matters of liability and quantum are resolved), seem to believe that the justice system will devote to them unlimited judicial resources to resolve each and every tiny point of disagreement. Jackson J, as he then was, found himself being asked to value every piece of steel work in Wembley Stadium. He expressed himself as ready cheerfully to undertake that task. I am being asked to value over 42,000m of pipework installed in a paint manufacturing facility, a great deal of it work that had to be redone as the design changed, which was not shown on the original design models, and with a great deal of work directly instructed on site. I do not share the good cheer of Jackson J at such a task. Nor do I consider that, in this case, on the material available to the court and with proper consideration of the overriding objective, the parties are entitled to this from the court in this case. CPR Part 1.1(2)(e) requires the court to allot this case “an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.”

30. The trial duration for the quantum hearing had to be increased from four to eight days as a result of the addition of accountancy experts, who were necessary for resolution of some of the larger items in the counterclaim. ICI and MMT have, with respect to them, consumed far more than their fair share of judicial resources already. Further, to resolve each and every non-agreed item on the Scott Schedule would take an enormous amount of time, added to which there is simply not the material available

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before the court to do so in any event. Some of the items are of very small value, yet they are still not agreed. Many are worth just hundreds of pounds. Yet because of the number of these and the bitter dispute over the total valuation of the account, the aggregate value becomes important.

31. The following points will suffice to identify the difficulties with the approach taken by the parties, and one that was raised by the court with ICI during closing arguments. The Scott Schedule appears to have had its genesis as one of the appendices to Mr Kitt's report. With ICI's written Closing Submissions an appendix, Claim Appendix I, was provided to the court entitled "Agreed Scott Schedule". This stated, in some introductory text, the following:
1. The purpose of this Scott Schedule is to assist the Judge identify the parties' respective valuations and how they differ.
  2. In order to do this, the valuations given by the parties to different items of the account are set out side by side. It is hoped that this will enable the Judge identify where the major points of difference are.
  3. The parties have also identified certain issues which will need to be determined as part of the Judge's assessment of the value of the PMIs. Although the wording of those issues has been agreed between the parties:
    - (i) This agreement is without prejudice to their pleaded positions.
    - (ii) The issues identified are not necessarily exhaustive of the dispute between the parties. Instead, there may be other subsidiary issues which need to be determined. The identification of an issue is intended only to assist the Judge identify the main reason why the parties' valuations are different."
32. These passages are, in my judgment, a clear example of the parties ducking the matter of resolving their issues, and attempting to preserve a "sit on the fence" approach to the quantum trial, whether to assist in the prospects of a future appeal or otherwise. To provide what are said to be agreed issues, but recite that this is "without prejudice to their pleaded positions" is wholly unhelpful, and in any case contradictory. Firstly, the parties' pleaded positions in this case only go to the total, and not to the underlying elements of the account. There are precious few, if any, specific valuations issues pleaded. Secondly, there is no attempt to identify what the "other subsidiary issues" that are said to arise in fact are. Thirdly, these "other subsidiary issues" are not even addressed anywhere else in any event. The valuation of MMT's account is made up of approximately 270 PMIs, and a very considerable (and greater number) of Site Instructions or SIs. Many of these SIs are not dealt with in the quantum expert reports. They are usually of modest value. Over 700 were issued during the project. There is a total of 271 SIs in total of which 88 are agreed. There are 165 SIs listed in the Scott Schedule. Only 73 of these are dealt with by the quantum experts (and hence coloured yellow in the Schedule handed up on the last day of trial). The total claimed by MMT for the SIs is £611,085.41, against an earlier total of £642,924. ICI, on the face of the schedule, advances three figures for the value of the SIs. Mr Brownlee's assessment for these is £227,000; Mr Kitt's High Valuation is £312,000; and Mr Kitt's Low Valuation is £232,000.
33. When the specific problem in relation just to the first SI, SI 6, was explored in closing submissions it was clear that there was no practical solution being advanced by the parties as to how this should be addressed. The issue of whether prior agreements on values of SIs should be kept is an issue that runs like a thread through a great many of

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the different times. However, if the answer to that were to be “No”, of the three competing ICI valuations for SI6 (or two, if Mr Brownlee’s is ignored) ICI appeared simply to be inviting the court to think of a number, as long as it is lower than the one sought by MMT.

34. It also appeared that resolution of all of the issues, both in the Agreed Issues list before the trial, and the Scott Schedule issues, could potentially leave some numbers yet to be agreed. In other words, figures might still need to be attached to the court’s findings on the issues concerning quantum. The apparently serious suggestion from Mr Bowdery when this point was raised during closing submissions, was that the court should write to the quantum experts directly for assistance, were this to be the case. I am not prepared to entertain this for two reasons. Firstly, I do not consider it to be proper for the court to enter into separate correspondence with experts in any event. Secondly, even if it were, there is no guarantee that would lead to any agreed figures in any event – indeed, rather to the contrary, all the indications are that the parties and the experts would simply disagree about something else. The quantum experts’ agreement to date is anything but an agreement.
35. The “Agreed Expended List of Issues” which was submitted the day after oral closing submissions was accompanied by what was called an Explanatory Note. This included text such as the following, in relation to a Scott Schedule which had to be used electronically due to its size and complexity:  
 “For those parts of the account where there are a large number of elements, the “Analysis of Difference” column has filters applied to it. This will enable the reader to select only those PMIs which are affected by a particular issue by filtering out the “blanks” ..... The claims PMIs do not have “issues” columns in view of the fact that the parties have discussed these considerably during the hearing and submissions, and they have been subject to individual consideration by the parties’ experts.”
36. I find this approach extraordinarily unhelpful. It is a more sophisticated way of saying – the court has the trial bundle; here are the figures; please just get on with it. It fails to consider whether there is evidence in relation to a PMI, or not. This approach was reflective of what had been done in Opening Submissions. For example, MMT’s submissions in the appendix dealing with the valuation of Steelwork PMIs (Issue 1(c)) stated “The court would probably be assisted by having [a particular spreadsheet] open when reviewing this appendix. The court will find most (but not all) of the documents it needs in relation to the steelwork PMIs in the quantum e-bundle in the folder named ‘1-Disputed Steelwork PMIs and associated documentation’.....Other relevant documents will be in the chronological bundle.....”  
 This is an extremely unhelpful approach. There were a total of four counsel instructed for this trial, and I consider that the court is entitled to greater assistance on such detailed matters, and on the use and scope of the Scott Schedule – a document neither ordered by the court, nor approved – than it received in this case.
37. Nor did the Explanatory Note present an agreed position in relation to SIs, if these were found not to be due in the amount claimed by MMT. In summary, due to Mr Kitt’s approach in his report, ICI favoured a pro rata percentage approach, whereas MMT wanted the parties to have the opportunity to agree figures, but failing that to have another day of submissions. It will only be necessary to resolve these different approaches when or if there remain any further issues outstanding after resolution of

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the issues above, and the 29 sub-issues and 12 PMIs under “Claims” in Issue 1(h). It may help if I indicate that I am not prepared to allow any further evidence at all in this quantum trial.

38. The crux of this is that, so far as the valuation of MMT’s works are concerned, it may be necessary to invite the parties to agree further figures, depending upon the scope and effect of individual findings on the separate issues that have been identified as arising out of the Scott Schedule. This is particularly likely to arise in respect of preliminaries, which are claimed by MMT on a percentage basis, and which therefore depends upon the final total of the items in the account.

*Whether the potential further issues numbered 5 to 8 are pleaded*

39. ICI challenges that issues 5 to 8 arise in this trial as it is submitted these matters are not pleaded. It is necessary to resolve that first. After handing down the liability judgment on 12 July 2017, the usual hearing for consequential matters took place. On that occasion, this included an application by MMT to amend its counterclaim, that application being dated 21 July 2017 and supported by evidence from Mr Mills of MMT’s solicitors, which on this occasion was included in Box 10 on the application notice itself, form N244. This evidence, which was brief, stated that:  
 “The Particulars of Claim do not presently include for the business losses and disruption arising from ICI’s repudiation but which are substantial and do come within the scope of conventional principles.”
40. An order had been made in relation to the split trials of liability and quantum by Coulson J (as he then was) on 12 February 2016. He ordered that the liability trial would deal with “all issues of liability arising out of the allegations of termination and repudiation, including issues of breach, welding defects, contractual payment issues in principle, the consequences of finding that either party was in repudiatory breach and the principle of ICI’s claim for unjust enrichment”. The quantum trial was ordered to deal with “the detailed accounting, damages for breach of contract, and other outstanding issues”. Although I granted MMT permission to amend its counterclaim in some respects in July 2017, I concluded that a small number of amendments ought not to be allowed. This was because they required new issues of liability to be resolved in MMT’s favour, those issues not having been dealt with in accordance with the order of Coulson J, and no evidence having been served by MMT to support them in that respect. The amendments that were not allowed were (in summary) that by attending to issues caused by ICI’s repudiation, the management of MMT had been prevented from winning new work for MMT; that MMT’s position and reputation in the market, both for existing and prospective customers, had been damaged; and that this had caused “loss of income, including (a) loss of contribution to overhead, and (b) loss of profit”. MMT sought to appeal my ruling on that application but were refused permission to do so by Jackson LJ.
41. Notwithstanding that ruling, MMT seeks to advance two heads of claim in its evidence for the quantum trial which ICI maintains are not pleaded. These are (1) loss of profits on works not instructed to MMT, but which were part of Project Fresco works generally, and which were awarded or instructed to other contractors; and (2) the cost of what is called a “rebranding exercise”.

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42. The loss of profits claim is in relation to work which had not been instructed to MMT at all – it formed no part of MMT’s scope of works – but which MMT argues would or should have been awarded to it, had the repudiatory breach not occurred. Mr Wells sensibly accepted that there was no contractual obligation upon ICI to instruct this work to MMT, rather than the other contractors to whom it was instructed.
43. The rebranding exercise arose in the following way. Before the issue of the adjudicator’s decision in the first adjudication between MMT and ICI, that decision having been issued in March 2016, MMT had been starved of any cashflow on this project due to ICI’s commercial strategy as I have found in the liability judgment. In fact, no money at all was paid to MMT by ICI in respect of its interim applications from October 2014 onwards. Not only that, but due to the fact that MMT was (at least up to and into the New Year 2015) working towards satisfaction of the conditions in the 10 Point Letter, MMT had believed for a large part of this period that it was on the verge of receiving £2.5 million from ICI. Eventually in January 2015, the penny finally dropped with MMT, and Mr Wells and his co-directors realised that they would have to change their strategy in order to receive some payment from ICI. This led to the commencement of the first adjudication. The evidence however from Mr Wells and Mr McGrady was that the industry had already realised MMT was in trouble and at least one other contractor, Murphy, stopped paying it too as a result.
44. Accordingly, the directors of MMT took specialist professional advice about the company’s future and instituted the preparatory steps for MMT to seek a creditors’ voluntary arrangement, or CVA. The day this was going to be initiated, was coincidentally the day after ICI finally paid MMT the money the subject of the first adjudicator’s decision in MMT’s favour, namely £7.9 million. Together with interest and VAT the actual gross total was £9.1 million. MMT received this decision and had issued proceedings to enforce it in the Technology and Construction Court. Those proceedings were issued on 11 March 2015 and were given action number HT-2015-000161. Expedited directions were made on paper by the then-Judge in Charge of the Technology and Construction Court, Edwards-Stuart J, on 12 March 2015, and a hearing was ordered to take place on 16 April 2015. ICI did however pay the money and that hearing was not required. All seemed dramatically rescued, and the need for the CVA no longer arose. However, later on the day of payment the Bank of Scotland, having credited MMT’s account with the funds, immediately withdrew all MMT’s credit facilities. The CVA did not occur, but MMT remained in deep financial trouble as a result of this behaviour by its own bank. An alternative approach was therefore adopted by the directors. Instead of a CVA, the business of MMT was transferred to its holding company, Merit Holdings Ltd (“MHL”), which began to trade in its stead. The creditors of MMT had their debts transferred on a pound for pound basis, and MHL was paid a dividend of £2 million by MMT to strengthen its balance sheet and allow MHL to bid for new contracts. This group reorganisation was referred to, colloquially, by the witnesses and during the trial as “the hive up”. The dividend was paid to MHL on 31 March 2015. The transfer of assets and liabilities took place the day after that, on 1 April 2015.
45. The rebranding costs in the evidence for this trial relate to costs said to have been incurred by the trading of the group (which had been MMT) being undertaken or performed by MHL, whereas prior to 1 April 2015, these works had been done by

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MMT. Some invoices were produced which were for items used in contracting work (for example hi-visibility clothing) with the new name of MHL shown on it.

46. In my judgment neither of these heads of counterclaim are currently pleaded. This is, I consider, rather obvious when one reads the counterclaim (as amended). The general approach of the courts under the Civil Procedure Rules, and specifically the specialist courts, is to take a pragmatic approach to pleadings and not to shut a party out from having its case heard on overly literal analysis of such a document. Technical pleading objections are certainly not encouraged, although very occasionally they are justified. I consider that here, however, the objections are justified. I therefore consider whether, were MMT to make an application to amend, such an application should be permitted, even though no application to amend has been made. CPR Part 17 governs amendments to statements of case, and the notes at CPR Part 17.3.5 state this, and also recite the dicta of Peter Gibson LJ in *Cobbold v Greenwich LBC* 9 August 1999 (unrep.) CA which stated: “The overriding objective (of the CPR) is that the court should deal with cases justly. That includes, so far as is practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed.”
47. However, here, the following points arise, which I consider would militate against the success of such an application (were one to be made), and which are fatal to these heads of counterclaim. Firstly, I refused MMT permission to amend its counterclaim to seek and recover lost profits on future work. The lost profits sought here are on work instructed by ICI *before* the repudiation. They cannot therefore arise as a result of the repudiation, which had not occurred when they were instructed. Also, it is accepted that this is work which ICI was under no contractual obligation to instruct MMT to perform. Accordingly, no possible breach of contract can arise on the part of ICI in instructing this work to be performed by one of the many other contractors on the project. Mr Mort relies upon the dicta of Patten LJ in *Durham Tees Valley Airport Ltd v BMIBABY Ltd* [2010] EWCA Civ 485, [2011] 1 Lloyds LR 68, 85 where at [79] he referred to the factual enquiry necessary “as to how the contract would have been performed had it not been repudiated. Its performance is the only counter-factual assumption in the exercise”. However, the exercise to which he was referring was in that case the one necessary to determine how the contract would have been operated post-repudiation. This is clear from the judgment.
48. As is made clear from the terms of the contract, the airline in that case had a discretion as to how many flights, and to where, it would operate. The court had to decide how, counter-factually, that would have unfolded had the repudiation not occurred. As stated in [59] “token flights or a complete absence of any flights (which is this case) clearly would not amount to operating the aircraft. Subject to this, the question of how many times and to where are matters for the airline’s discretion”. The court in that case therefore had to decide the scope of a contractual obligation. That is different to the case here.
49. I consider that MMT are misconceived in attempting to rely upon this authority in the respect it does in its dispute with ICI. In the instant case, the question of what works

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MMT was obliged to perform contractually (and entitled to perform, absence the repudiatory breach) is not in issue; ICI accept that MMT would be entitled to profit lost on that work. Here, the work in question is non-contractual and the counterfactual scenario relates, not to what would have occurred had the repudiatory breach not occurred, but rather an imaginary world where Mr Boerboom had never appeared, or where ICI had always behaved as MMT wished ICI had behaved, but in respect of which ICI had no contractual obligations, namely by instructing it to perform a great deal more work. *Durham Tees Valley Airport Ltd v BMIBABY Ltd* concerns a contractual obligation upon the airline to operate aircraft from the airport; ICI had no contractual obligation to instruct MMT to perform the works that form the underlying subject matter of this element of the counterclaim.

50. Although MMT might argue that it was part of Mr Boerboom's strategy not to issue further work to it, and that might be right, there are a host of reasons why a company in ICI's position could choose to instruct work to another contractor. That other contractor might be cheaper. Where two companies are in dispute, as MMT and ICI were here – regardless of the merits of the dispute – it could be seen as counter-intuitive to issue new work to the contractor.
51. Mr Mort also submitted that the court should approach the contract between MMT and ICI as though it were a Framework Contract. That term refers to a contract – often used, for example, by Local Authorities - where an employer instructs work to be performed over the duration of the Framework Contract, for which the contractor charges pre-agreed prices. However, this is not such a contract. A Framework Contract would usually (but not inevitably) be exclusive, whereas the contract between ICI and MMT imposed no obligation upon ICI to instruct MMT to perform any extra works. I do not consider that this approach would be legitimate. Framework Contracts often impose an obligation upon an employer only to instruct work to its framework contractors, whether there is one or more of them. There was no such limitation upon ICI here. The lack of any contractual obligation in this respect is fatal to MMT's arguments.
52. In my judgment, the whole basis of this part of the counterclaim by MMT is flawed in principle, and a proposed amendment must have some prospect of success to be allowed; CPR Part 17.3.6 and *Groveholt Ltd v Hughes* [2010] EWCA Civ 538. Therefore even if an application to amend were to be made, I would refuse it.
53. So far as rebranding costs are concerned, these also have no prospect of success but for a different reason. The only limited documentation to support this claim consists of a few invoices that total £2,679.72 (against a pleaded claim of £20,000). Firstly, there is no excuse available for MMT not having full supporting documents for the whole head of claim, as the rebranding arose after MMT had left site. More importantly, the invoices are all addressed to MHL who incurred these costs. This is not a loss, in my judgment, borne by MMT at all. This too is fatal to this claim, whether because it is not pleaded (which is my finding) but on evidentiary grounds too. Again, if a proposed amendment has no prospects of success, it should not be allowed. This has no such prospects. I would refuse an application to amend were one to be made.

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54. For those reasons therefore, issues 5 to 8 above do not arise, or to be more accurate, issues 5 and 7 are resolved in ICI's favour.

**IV The ability to revisit assessments under the NEC3 contract terms**

55. There is a legal issue that impacts upon each component of issue 1 above, and these relates to the legal status of the assessments made by the Project Manager during the course of the works. There is also an associated issue concerning the agreement or agreements reached during the works between MMT and the Project Manager and ICI concerning the valuation of compensation events. A great many of these agreements were reached during the course of the works, and MMT argue that as a result of this, there is no legal ability to revisit these agreements. Whether that is estoppel, proper interpretation of the contract terms, or some other legal mechanism (and the point is put by MMT in different ways) the point requires resolution, and is of widespread practical effect so far as the quantum valuation exercise is concerned.
56. Because it has an effect upon so many aspects of the valuation exercise, I will deal with this legal contractual issue first concerning assessments, before turning to the similar issue about measures and rates, and then turning to the witnesses.
57. In outline, MMT argue that because the Project Manager reached assessments of the value of work for the purposes of interim applications during the works, ICI has no contractual ability to challenge these; or to put the matter another way, the court has no ability under the contract terms to revisit these. The way that this is expressed in MMT's Opening is as follows:  
 "Firstly, there is a contractual issue: ie is it in fact open to ICI as a matter of contract to seek to re-open not just the items that have always been disputed, but items that were once agreed. (In the alternative, MMT contends that in an appropriate case ICI is estopped from reneging upon the parties' agreement as to how to proceed.)"
58. This submission wraps two issues into one. The first is indeed a contractual one, on the terms of the NEC3 contract itself (as amended in this case) as to the status of a Project Manager's assessment. The second is particular to this case, namely the status of the particular agreements reached on a host of individual items (but particularly rates and measures) reached between MMT and Mr Barton the Project Manager (and also Mr Hall, an ICI employee) on many PMIs.
59. So far as what could be called "the contractual issue" is concerned, Mr Mort's argument rests on the wording of the contract itself, and in particular section 6 of the NEC3 terms, which deals with compensation events. What follows is a general summary of the operation of section 6 (which has within it many clauses starting at 60.1 and running to 65.4). The issuing of an instruction by the Project Manager is a compensation event. Under clause 61.1, the Project Manager will notify the Contractor of the compensation event when he issues the instruction, and will instruct the Contractor to submit quotations. He does not instruct the submitting of quotations "if quotations have already been submitted" (clause 61.1). Under 62.1, the Contractor may even submit alternative quotations for alternative ways of doing the works. Clause 63 includes the provision for "assessing compensation events" and 63.4 states "The rights of the Employer and the Contractor to changes to the Prices, the Completion Date and the Key Dates are their only rights in respect of a compensation event". It is therefore the case that, even if a quotation has not been submitted and/or

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not been accepted (as in practical terms is often the case) a contractor is entitled to changes to the Prices, which effectively means the contractor is entitled to payment for the works the subject matter of the instruction, which constitutes the compensation event.

60. Clause 64.1 states (amongst other things) that if the Contractor has not submitted a quotation, then the Project Manager assesses the compensation event. There are other reasons for him doing so, but here the relevant points are either or both of the first and/or second of the four bullet points in that clause. Clause 63.3 provides: “The Project Manager notifies the Contractor of his assessment of a compensation event and gives him details of it within the period allowed for the Contractor’s submission of his quotation for the same event. This period starts when the need for the Project Manager’s assessment becomes apparent”.
61. MMT argued – essentially based on the wording of clause 65.2, although there were other subtleties too – that an assessment of a compensation event could not be opened up in legal proceedings. Clause 65.2 states: “The assessment of a compensation event is not revised if a forecast upon which it is based is shown by later recorded information to have been wrong”.
62. I do not accept that the court is constrained in the way contended for by Mr Mort, such that the court must as a matter of law be bound by any assessment by the Project Manager. This is for two reasons. Firstly, the argument mounted by MMT ignores the scope of the dispute resolution clause. Option W2 is bound into the contract documents. There is another adjudication provision called Appendix 2. There is some controversy between the parties about whether, as a matter of construction, Option W2 applies at all. I find that it does. This is for the same reasons as explained by Edwards-Stuart J in [12] to [38] of his judgment concerning enforcement of the decision in Adjudication No. 2 at [2015] EWHC 2915 (TCC), who also found that Option W2 was the appropriate clause as a matter of construction of the contract documents.
63. Option W2 states, at W2.3(4) that:  
 “The Adjudicator may
- review and revise any action or inaction of the Project Manager or Supervisor related to the dispute and alter a quotation which has been treated as having been accepted,
  - take the initiative in ascertaining the facts and the law related to dispute
  - instruct a Party to provide further information related to the dispute within a stated time and
  - instruct a Party to take any other action which he considers necessary to reach his decision and to do so within a stated time.”
64. The scope and extent of an adjudicator’s powers are not determinative of the court’s jurisdiction, but the court can certainly not have *less* power in this respect than an adjudicator. It is at this early point in the analysis that MMT’s legal argument on the contract founders. In my judgment, an adjudicator clearly has jurisdiction, as set out in the first bullet point of clause W2.3(4) “to review and revise any action of the Project Manager...”. This must include, as a matter of language, the assessment of a compensation event.

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65. I am fortified in this conclusion by the analysis in a recent case of Coulson J (as he then was) in *Grove Developments Ltd v S&T (UK) Ltd* [2018] EWHC 123 (TCC). In that case, one of the issues was whether the conclusion that I had reached in the liability judgment about whether an adjudicator's decision on an interim application could be opened up at the next interim valuation stage (as I had found at [195] to [212] of the liability judgment) was correct, or whether the contrary approach in *ISG Construction Ltd v Seevic College* [2014] EWHC 4007 (TCC), a decision of Edwards-Stuart J, should be followed. My finding had been challenged by MMT in this case, who sought permission to appeal both from me, and from the Court of Appeal when I refused permission. Jackson LJ refused MMT permission too. The judge in *Grove* at [129] and [130] agreed that my approach was correct, and found at [144] and [145] that *ISG v Seevic* case was wrongly decided. In order to reach that conclusion, the judge adopted three entirely different routes. One was the application of first principles. The second was the Court of Appeal adjudication authorities. The final one was the approach taken in the TCC cases. The same conclusion was reached by him by each different route.
66. In the course of his consideration of the first route, namely first principles, which is at [67] to [90], he analysed the powers of an adjudicator and stated the following, which I consider to be of wide application.
- “68. An instructive starting-point (not least because of the strength of the constitution in the Court of Appeal) is *Henry Boot Construction Limited v Alstom Combined Cycles Limited* [2005] 1 WLR 3850. At paragraph 23 of his judgment, Dyson LJ (as he then was) said:
- "It does not, however, follow from the fact that a certificate is a condition precedent that the absence of a certificate is a bar to the right to payment. This is because the decision of the engineer in relation to certification is not conclusive of the rights of the parties, unless they have clearly so provided. If the engineer's decision is not binding, it can be reviewed by an arbitrator (if there is an arbitration clause which permits such a review) or by the court. If the arbitrator or the court decides that the engineer ought to have issued the certificate which he refused to issue, or to have included a larger sum and a certificate which he did issue, they can, and ordinarily will, hold that the contractor is entitled to payment as if such certificate had been issued and award or give judgment for the appropriate sum."
69. Later in his judgment, when discussing *Beaufort Developments (NI) Limited v Gilbert-Nash (NI) Limited* [1999] 1 AC 266, Dyson LJ noted that the fact that the power to open up, review and revise certificates was expressly conferred on an arbitrator was not to be construed as removing the court's unlimited power to do the same. He confirmed that the court had always had the inherent power to determine the rights and obligations of the parties.
70. *Henry Boot* is therefore authority for the proposition that the court can decide the 'true' value of any certificate, notice or application and that, as part of that process, it has an inherent power to open up, review and revise any existing certificates, notices or applications. Mr Speaight properly conceded that, if the court had the power to do something, then so too did an adjudicator. I agree: in any case where the parties have conferred upon an adjudicator the power to decide all disputes between them, the adjudicator has the same wide powers as the court. In this case, therefore, I consider that, in line with *Henry Boot*, the court (and/or an adjudicator) has the power to decide the 'true' valuation of interim application 22.

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71. The second reason why, as a matter of first principles, I have concluded that the employer can start a second adjudication dealing with the 'true' valuation is linked to the first, but it arises from the statutory power of the adjudicator.

72. Consider first s.108(1) of the 1996 Act. That provides:

"A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section."

73. There is therefore no limitation on the nature, scope and extent of the dispute which either side can refer to an adjudicator. There is no qualification to the types of dispute encompassed by s.108: see *Banner Holdings Limited v Colchester Borough Council* [2010] EWHC 139.

74. The same is also true of paragraph 20 of the Scheme. That provides:

"The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication which the matters under the contract which he considers are necessary connected with the dispute. In particular, he may –

(a) Open up, revise and review any decision taken or any certificate written by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive;

(b) Decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or some other currency) and, subject to section 11(9) of the Act, when that payment is due and the final date for payment;

(c) Having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid."

It seems to me that the first sentence of paragraph 20 of the Scheme could not be broader.

75. It is convenient to note here that there has been some discussion in the cases (analysed in **Section 6.4** below) about sub-paragraph 20(a) and whether or not this gives an adjudicator the power to decide the 'true' valuation, after the employer has paid the sum stated as due (because of an absent or deficient payment notice or pay less notice). To the extent that it is suggested that the adjudicator does not have that power, I disagree, for the reasons already outlined. Moreover, paragraphs 88-91 of the judgment of Chadwick LJ in *Carillion v Devonport Royal Dockyard Limited* explained that the three instances (a) - (c) which follow the words "in particular" in paragraph 20 are not to be taken as in any way limiting the unqualified and broad words in the first sentence, which allows the adjudicator to decide "the matters in dispute". The three sub-paragraphs are merely examples of the adjudicator's powers: they are not limits upon it.

76. Accordingly, that is a second reason for concluding that, not only can a court decide any subsequent dispute as to the 'true' valuation of the interim application, but there is also no limit on the power or jurisdiction of an adjudicator which would prevent him or her from doing the same."

(emphasis added)

67. There is nothing in the NEC3 form (here, as amended) that states that a Project Manager's assessment is conclusive as to the rights of the parties. If there is "no limitation on the nature, scope and extent of the dispute which either side can refer to an adjudicator" then an employer could, if it wished, refer a dispute about an assessment to an adjudicator. If the adjudicator has jurisdiction to determine that dispute, then the court must be entitled to determine it too. If the court were not so

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entitled, then the decision of the adjudicator would, contrary to all authority, be a final and binding determination of that dispute. In my judgment, estoppel does not arise either. There is no such legal obstacle that prevents ICI from challenging, in law, the assessments reached by the Project Manager.

68. However, in this case, there is a further aspect of MMT's arguments that are relevant to this question. This was Mr Mort's third (though alternative) submission in opening, and is an evidential one. As he and Mr Scrivener put it in their written Opening Submissions:

"ICI and/or the professional team acting on ICI's behalf, agreed to the different items during the project for good reason: because the rates and/or measures and/or sums being agreed were correct, or appeared to be so. What ICI now seeks to do is to challenge such items, but (a) on the basis of the evidence of individuals who had nothing to do with the project until after the event; (b) without any evidence that Mr Barton was incompetent, or unaware of the nature of the task."

69. In my judgment, that is a compelling evidential argument, and one to which I do not consider there is any good answer. This is, in terms of logic, an unanswerable point. Here, during the actual works, a great many personnel within ICI, and the Project Manager himself, concluded on a vast number of different issues that MMT's items of work were worth (in contractual terms) particular precise amounts. They decided, with their detailed and in depth knowledge of the project, that works the subject of any particular PMI had taken a particular period of time, had used a particular quantity of materials and labour, and should be fairly valued in a particular way resulting in a particular amount. In this litigation, MMT advance the same points. The only evidence available to the court from ICI to the contrary is that of Mr Boerboom, who was not involved at all until July 2014 and did not have any detailed knowledge of the works, and who approached valuation and payment in a way wholly contrary to the contract terms. He does not give any direct or detailed (or any) evidence concerning the particular work scope of a particular PMI, explaining that the agreement at the time used the wrong quantities, for example, or suffered from other difficulties. Such evidence of fact as there is from ICI on this – if it qualifies as evidence at all, rather than simple high level assertion – does not begin to meet the weight of contemporaneous material in MMT's favour to the contrary. There has to be some evidential basis for the court deciding to depart from the assessments reached at the time by Mr Barton (who was fairly balancing the interests of both MMT and ICI). MMT has an unanswerable evidential case in this respect. Accordingly, although the assessments reached at the time do not conclusively determine ICI's rights in this respect, they are of powerful evidential weight.

## **V The ability to revisit agreements reached with ICI personnel and the Project Manager**

70. This project did not run smoothly, at least from about July 2014, and certainly not as was intended by the parties when they agreed the contract terms at the end of 2012/beginning of 2013. In July 2014, Mr Boerboom arrived at site in the circumstances described in the liability judgment and as further addressed below. He interfered in the administration of the contract by the Project Manager, and this ultimately led to Mr Barton resigning on 9 October 2014. For the period July 2014 until October 2014, therefore, Mr Barton was still involved, and all the evidence demonstrates, was doing his best to perform his role correctly.

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71. During this period, a great deal of time was spent attempting to reach agreement between ICI and MMT as to the final valuation of MMT's works. Many agreements were reached during this period, on many minutely detailed elements of MMT's works. These were reached after a number of meetings, some held with Mr Barton, and others held with other ICI personnel such as Mr Hall (and also Mr Conrad). The specific purpose of these meetings was to agree the *final* valuation of MMT's works, not to agree interim valuations per se. Obviously, where final agreement was reached (for example on particular PMIs), these items were included in the next interim valuation, because there would have been no reason or justification for doing otherwise. However, they were intended by all the parties at the time – ICI, MMT and Mr Barton – to be final agreements so far as the particular work, PMI, item, rate, or quantity was concerned. Any final valuation is made up of a number of smaller elements, and some of these are particularly work specific – such as the valuation of a particular instruction, including the relevant measure – and others are of wider application, for example rates and percentages.
72. There is both a legal issue, and an evidential issue, that arises in respect of these agreements. These are similar to the ones that arise in respect of the assessments by the Project Manager, but the legal issue requires analysis by virtue of first principles and not the NEC3 contract terms.
73. The evidence from MMT, and the contemporaneous documents, shows that final agreements were intended by the parties in respect of these items. The intention of the parties was that they would conclusively determine the rights of both ICI and MMT. All of Mr Wells, Mr McGrady and Mr Riley were clear that this was so. Indeed, the only evidence to the contrary is what the court was told by Mr Boerboom, which was that Mr Conrad had told him not to worry and “let's agree to this”. I reject that evidence below for the reasons given, but in any event even Mr Boerboom did not say that he told MMT this at the time. He in fact said he had relied upon Mr Conrad and Mr Barton in respect of the MMT contract. Objectively analysed therefore, with the common background knowledge known to both parties, I find that each of these agreements satisfies the requirements for the formation of binding legal relations between ICI and MMT in respect of each particular item of work.
74. Even if I am wrong about that, MMT has the same compelling evidentiary point in this respect as it does in respect of the Project Manager's assessments, namely that the court is now being asked by ICI to ignore and entirely revisit these agreements, for reasons that are based on the ex post facto evidence (if that is the right word) of Mr Boerboom, the exercise of Mr Brownlee (insofar as any of that remains) and to some extent the expert evidence of Mr Kitt. I have dealt with that evidentiary point at [69] above. It remains unanswerable. There is simply no good reason, and practically no evidence of fact submitted by ICI in this trial, that could lead to a conclusion that those at ICI tasked at the time with reaching such agreements, and who did agree so many detailed items with MMT, came to a figure that ought to be re-valued at all, re-valued differently, or re-valued in a lower figure.

**VI The burden of proof**

75. There is one other difference in principle, and it arises as a result of ICI's approach to the question of valuation (and inherent within that, MMT “proving” its entitlement to

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payment for works said to have been performed). This is which party has the burden of proof in respect of the final valuation of MMT's works.

76. The issue – if it is an issue – arises in this way. MMT has the benefit of two adjudications decisions in its favour. The first was referred to as Adjudication No.1, was made in relation to Interim Application No.22 in November 2014, and was in the sum of £7.9 million approximately. This decision was made in March 2015 and paid shortly after MMT issued enforcement proceedings in the TCC. Three other adjudications followed, Adjudication No.2 initiated by ICI in relation to delivery up of documents, and Adjudication No.3 initiated by MMT in relation to which party repudiated the contract. Adjudication No.4 was then initiated by MMT, and this decision related to the amount said to be due under Interim Application No.23, which was made in December 2014. The amount recovered by MMT under the decision in this adjudication was £816,000, and this decision was dated 11 September 2016.
77. However, both of the decisions under Adjudications No.1 and No.4 were made on the basis of the lack of any payless notices being served by or on behalf of ICI. ICI submits that it is for MMT to establish the final value of its works, and any inability to do so counts against MMT as it will have failed to satisfy the burden of proof.
78. MMT on the contrary submits that it is for ICI to show that it has overpaid MMT. The relevant authorities upon which the parties relied on this point are as follows:
- (1) Jacob LJ in *Rupert Morgan Building Services (LLC) Ltd v Jervis* [2004] 1 WLR 1867, 1872 where, in the context of considering interim certificates and whether they can be corrected, he stated at [14](2)
- “(d) It does not preclude the client who has paid from subsequently showing he has overpaid. If he has overpaid on an interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or if necessary arbitration or legal proceedings”.
- (2) Lord Mance JSC in *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] UKSC 38. That case concerned the correct categorisation of any cause of action for repayment of monies paid as a result of an adjudicator's decision. The point was relevant due to issues of limitation, and the central question was the nature of the cause of action, as that resolved the date when time would start to run for limitation purposes. At [23] and [24] Lord Mance stated:
- “[23]....I agree with the Court of Appeal that the obvious basis for recognition of this right is by way of implication arising from the Scheme provisions which are themselves implied into the construction contract. I prefer to express the implication in the way I have, because it focuses on the core element of Aspect's claim which is to recover an alleged overpayment....
- [24] I emphasise that, on whatever basis the right arises, the same restitutionary considerations underlie it. If and to the extent that the basis on which the payment was made falls away as a result of the court's determination, an overpayment is, retrospectively, established.”

Mr Mort accepts that each of these cases are not directly on the point, but he says that the language and analysis is consistent with ICI having to demonstrate that it has overpaid MMT, rather than MMT having to demonstrate the contrary.

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(3) The third authority is a Scottish case called *SGL Carbon Fibres Ltd v RBG Ltd* [2012] CSOH 19, an opinion of Lord Glennie. This was an appeal under the Arbitration (Scotland) Act 2010 for legal error, and at [26] he stated:

“[26] When it comes to arbitration (and, in terms of Option W2, adjudication is no different), the arbitrator has power to review and revise any actions or inactions by the Project Manager. He can therefore correct mistakes in any assessment and payment certificate. It follows that he can open up the whole question of PWDD, Defined Cost and Disallowed Cost and reach conclusions different (perhaps very different) from those reached by the Project Manager. To do so he will require to see the accounts and records kept by the Contractor under clause 52.2. But unless and until he has corrected the Project Manager's payment certificate, that certificate stands. In those circumstances, it seems to me, in agreement with the findings of the arbitrator and the submissions of Mr Lake, that the onus must be on the party seeking to persuade the arbitrator to depart from the assessment of PWDD made by the Project Manager. In so far as the Contractor (RBG) seeks further payment, the burden is on him. In so far as the Employer (SGL) seeks to argue that the Project Manager's assessment is too high, it must shoulder the burden.”

79. The courts are naturally reluctant to determine cases on the burden of proof. It is an unsatisfactory resolution of any dispute, but particularly a complex one such as this, to determine it on the basis of the burden of proof. The extent to which my decision on this point will have an effect upon the overall position on the MMT final valuation remains to be seen. However, from the authorities to which I have referred and upon first principles, I conclude that ICI has the burden of proof of demonstrating that MMT has overpaid. The first principles to which I refer are those governing adjudication. Adjudication is a means whereby a party can recover money said to be due to it as a matter of interim finality. The “finality” in that phrase is achieved by a decision in litigation or arbitration that the contractor has been overpaid. If an employer seeks to demonstrate that the contractor has been overpaid, the employer has the burden of demonstrating that. In my judgment, it does not matter whether a party such as MMT holds the money as a result of a decision by an adjudicator on the substantive value of an interim application, or because of the absence of a payless notice (what used to be called a withholding notice). It is neither necessary nor desirable that adjudicator's decisions are analysed to see what the reasons for the payment in fact were. Apart from anything else, a decision might be on its face wrong (for example because an adjudicator has added up figures incorrectly). The same principles must apply for all adjudicators' decisions, regardless of how they have been reached.
80. There can be little doubt that if a party (such as ICI) is seeking to demonstrate an entitlement to be repaid money (which is the case here) it must make good that case. Jacob LJ in *Rupert Morgan* expressly stated “It does not preclude the client who has paid from subsequently showing he has overpaid.” Here, the party who is “the client” who wishes to show “he has overpaid” is ICI.
81. If Mr Bowdery's position on this were to be correct, it would lead to a rather strange procedural situation. MMT would effectively have to obtain a decision from the court justifying that it could keep the sums which the adjudicator has decided it should have been paid. A party such as ICI could (as here) commence proceedings seeking to recover sums held by a contractor as a result of a properly obtained adjudicator's

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decision, yet simply by issuing the claim form, transfer to the defendant the burden of demonstrating that it, the defendant, is entitled to those sums under the substantive dispute. The lack of a payless or payment notice would not be of any particular advantage to such a contractor. Immediate service of a claim form by the employer would instantly put the burden on the receiving party. I do not consider that this is how the legislation can be interpreted in any respect, whether literally, or by a purposive construction.

82. Mr Mort put the matter as follows in his oral submissions on the point.  
 “It is the determination of ICI's assertion that they have paid too much money against the value of the work that we did. So that requires them to identify where that overpayment arises rather than for us to show, no, we're entitled to keep this money.”
83. Nor does it make any difference, in my judgment, that this is a claim by ICI for valuation of the MMT works on the final assessment, rather than one seeking finality (say) on the value of Interim Valuation No.22 and/or No.23. On any analysis, the amount already paid to MMT comes into the equation as part of ICI's case that it has overpaid MMT. This is made crystal clear in the prayer to the Particulars of Claim which claims “(1) Payment of £10,906,213.14 in respect of the balance due from MMT to ICI.....(2) Alternatively, £10,906,213.14 by way of restitution for unjust enrichment by reason of the proper value of the works carried out by MMT.” On neither analysis can it be correct to say that MMT's bears the burden of proof. ICI seeks to demonstrate that the valuation of MMT's works leads to a repayment to ICI of £10.9 million.
84. On this point therefore, I prefer the submissions of MMT to those of ICI. ICI bears the burden of proof to demonstrate that it is entitled to be repaid £10.9 million from MMT.

**VII The witnesses of fact**

85. I will now turn to the witnesses of fact. ICI called two witnesses of fact, namely Mr Henk Boerboom and Mr Greg Brownlee. Mr Boerboom was the only one of these two gentlemen who had been involved in the works on site at all, and Mr Brownlee only became involved in January 2015.

*Mr Boerboom*

86. Mr Henk Boerboom's 3<sup>rd</sup> witness statement was said to be a “reply witness statement” to the statements of Mr Wells, Mr McGrady and Mr Riley. Before he was sworn, I raised with Mr Bowdery my concern that Mr Boerboom's written evidence contained matters of evidence that were directly contrary to findings that had been made in the liability judgment. Mr Bowdery assured me that, as he put it, “no disrespect was intended”. Whilst, of course, this was reassuring, that was not the point. Evidence must be relevant to be admissible, and if a binding finding has been made on a particular point in the liability judgment, then further evidence on the same point in the quantum proceedings (particularly evidence directly contrary to that finding) cannot be relevant. If it is not relevant, it cannot be admissible in strict terms. Rather than take time, in a time-limited trial, dealing with an application to strike through passages, the more cost-effective approach was to allow the whole statement in without ruling on the specific admissibility of particular sentences, with Mr Mort

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having the opportunity to make submissions in due course. That was the course which I adopted. However, it is of note that Mr Boerboom had not changed his views of the rights and wrongs of what had happened in 2014 and 2015 as a result of the liability judgment in 2017.

87. He maintained in his oral evidence that MMT's works were defective and that this was why MMT had been removed from site. A finding directly contrary to this had been made in the liability trial. This was not, however, the only point of note when considering Mr Boerboom as a witness, and indeed the general quality of his evidence.
88. He accepted that Mr Jeff Conrad of ICI had the ability to bind ICI contractually – Mr Conrad was a director of ICI who had been involved throughout the project, and certainly for far longer than Mr Boerboom – but although Mr Boerboom knew that in early September 2014 Mr Conrad of ICI and Mr Wells of MMT expressly agreed that £1.4 million would be paid to MMT for preliminaries and secondary steelwork support in August and September 2014, Mr Boerboom decided this would *not* be paid to MMT. Although Mr Conrad had an AkzoNobel e mail address and may be an AkzoNobel employee, I find that makes no difference as he was plainly acting for ICI on this contract. When Mr Boerboom decided the amount of £1.4 million would not be paid to MMT, he neither told MMT this, nor instructed anyone else in the organisation to do so. He just decided to ignore the agreement between Mr Conrad and Mr Wells. This was not only to ignore the agreement on this point itself, it was to ignore that Mr Conrad had the express authority (confirmed in Mr Boerboom's own cross-examination) to make the agreement in the first place. He had no adequate explanation for this.
89. Another substantial agreement (or series of agreements) was reached in October 2014 between MMT and ICI after a two day meeting on 7 and 8 October 2014, the purpose of which was to try and agree all outstanding valuation issues for MMT's works, including the correct value of a great many PMIs. At this meeting, which was attended by many senior personnel from both ICI and MMT, and also by Mr Barton himself, agreement was reached both on rates and many elements of the works, including measurements, and also the value of a large number of these PMIs. These agreements were reached, on ICI's side, by different personnel actually involved in the works and with detailed knowledge of them, and also by Mr Barton the Project Manager. This meeting, which was called by those involved a commercial meeting, was specifically organised to try and resolve the issue of the valuation of MMT's works. That was its very purpose. It must be remembered that the scope of the works which MMT had performed was far wider, as a result of the way that the design of Project Fresco had evolved, than those for which MMT had originally contracted. The evidence that ICI adduced in the liability trial made it clear that CapEx had been increased within AkzoNobel very substantially during the life of the project as a result of the scope of the works increasing. The original MMT contract works had no pipework at all. In the event, 42,000m of this was installed. PMIs were used extensively to instruct further or different works. The valuation of MMT's account was a very important matter in the second half of 2014, and it was also a very extensive exercise.

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90. This agreement (or these agreements, if each of the elements such as rates and measurements and/or the PMIs are considered as separate agreements) reached at the commercial meeting was (or were) not honoured after that meeting in October 2014 by any of ICI, AkzoNobel or Mr Boerboom. Nor have they been honoured at any time up to or during the trial on quantum before me. It is also notable that it was the day after this meeting was held, that Mr Barton resigned. Mr Boerboom, in his evidence before me on 17 April 2018, initially said he had no recollection of this important two-day commercial meeting, although when he was taken to documents emanating from that meeting, he recovered his recollection. I find that he did remember at all times that this important meeting had taken place, and was simply pretending not to have any knowledge of it initially. Although a number of years has elapsed, he is a highly intelligent person, has a detailed knowledge of the project and of the litigation, and the documents relating to it were in the trial bundle. I find that his reason for pretending to have forgotten about it was to make it easier (so far as he could tell) for ICI to continue to avoid honouring the agreements on rates, measures and valuation of PMIs reached with MMT at this meeting. It may also have been a device to try and use up some of the time available for his cross-examination during a time limited hearing, a tactic that I consider he deployed more than once.
91. In paragraph 20 of his witness statement Mr Boerboom had said the following. This was in response to written evidence given by Mr Wells in his statement that MMT “were very unhappy with this situation – especially as the PM was confirming to us that his certifications were being expressly constrained by ICI. I believe that this was part of the reason why Andrew Barton resigned as the PM as he was not being allowed by ICI to undertake the NEC PM certifying role independently”. This evidence was challenged by Mr Boerboom in the following terms:  
“I was not aware of Andy Barton being unhappy as project manager. His resignation came to me as a surprise. He then explained to me that he had personal problems at home which meant that he could not dedicate as much time as he wanted to his work at Ashington”.
- In my judgment, this evidence from Mr Boerboom is not remotely accurate, is wholly disingenuous, is positively misleading, and is directly contrary to the text of a vast number of contemporary emails. I reject it in its entirety. Firstly, in the liability trial, Mr Boerboom had said that he had no idea why Mr Barton had resigned. That evidence then, is impossible to reconcile with this evidence from him in this trial now, one year later. Secondly, it is directly contrary to the email that Mr Barton himself sent dated 9 October 2014 explaining that he was resigning. Thirdly, I made an express finding on this very subject in the liability judgment. This was in the following terms, reproduced here for convenience:  
“37. Mr Boerboom was brought to the project in July 2014. He was appointed Project Manager in October 2014 after PROJEN resigned, although the validity of that appointment is challenged by MMT. In his first witness statement he stated in paragraph 3 that he became Project Manager “shortly after” July 2014. If that is correct, then no notification was given to MMT of this at that stage, and indeed until Mr Barton of PROJEN resigned three months later he was still, on the face of it, the Project Manager. Indeed, part of MMT’s theme concerning the second half of 2014 is that PROJEN resigned *because* they were unable to deal with the level of interference or pressure being brought to bear by Mr Boerboom who was acting solely in ICI’s interests. PROJEN were specifically instructed that they could only certify payments to MMT if the AkzoNobel personnel expressly agreed to this in writing. Such an

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instruction is plainly at odds with how a third-party certifier, or decision maker (to use the phrase of Jackson J as he then was in *Scheldebouw BV v St James Homes* [2006] EWHC 89 (TCC)) is supposed to behave. The unavoidable inference is that PROJEN decided, for professional reasons, that they could not continue to act as Project Manager in these circumstances and Mr Barton resigned, even though he remained involved behind the scenes assisting Mr Boerboom and his team with the administration side in terms of paper work and so on. For the avoidance of doubt, I find as a fact that this is why PROJEN resigned. Mr Boerboom's evidence makes clear that this interference by him must have started very shortly after he arrived, and he must have purported to act as Project Manager behind the scenes even before PROJEN resigned.

38. In paragraph 15 of the same statement Mr Boerboom explained that he "took over as Project Manager for the purposes of the Contract in October 2014" but states that he is "not aware of why Andy Barton and/or PROJEN decided to no longer act...however it seemed sensible for me to take over that role given my project involvement and my position as the internal project manager for ICI". I deal with the legal issue of an employer-appointed employee seeking to be appointed or act in this role further in the section of this judgment headed "The Project Manager". Further, given the identity of interest between ICI and AkzoNobel, its parent, I find that there is no difference between an employer-appointed employee here, and an employer-appointed employee of AkzoNobel on the facts of this case.

39. Further, in my judgment, it is simply not credible that Mr Boerboom did not at the time, and does not know now, why PROJEN resigned as Project Manager. He is a highly experienced person – Director of Engineering Excellence – and was brought on to this project specifically to be the project manager for ICI. The entire project was late and seriously over budget. The notion that the Project Manager under the Contract with MMT could resign, yet the reasons for that neither be discussed nor brought to the attention of Mr Boerboom by others within ICI and/or by PROJEN personnel at the time, is verging on the absurd. It cannot seriously be thought that the reason or reasons would not be discussed directly then, and at a high level. This is even more compelling when one considers that Mr Barton remained working on the project; his resignation was plainly not due to his availability. I conclude that Mr Boerboom dealt with this in his evidence in the way that he did because the real reason would be detrimental to ICI's case in this litigation. He chose to keep his knowledge of this to himself."

92. I reject Mr Boerboom's evidence in this trial, that Mr Barton resigned because he had "personal problems at home". There is nothing whatsoever to support it, and I consider that statement to be plainly factually wrong. No explanation was proffered by Mr Boerboom for why he did not give this evidence last year, when he expressly said that he did not know why Mr Barton resigned. Nor is it corroborated in any document whatsoever, and by now I have reached the point where I would not accept anything Mr Boerboom says about this project without some sort of independent corroboration. His statement about why Mr Barton left could also be interpreted as exposing Mr Barton to some criticism of his professionalism. This was a high profile project that was considerably over budget and in considerable delay, and Mr Barton was the Project Manager, tasked with a very important, if not the central, role in

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administering the contract with MMT. One imagines that a professional person in this situation would wish to see the project through to its conclusion, not abandon it a few months from the end when it is essentially at crisis point with its most centrally involved contractor MMT (save in the severest personal circumstances of an extreme kind). Yet this is what Mr Boerboom is now saying that Mr Barton did, by springing upon him his resignation which was “a surprise”. Mr Barton himself in an email of 9 October 2014 explained his decision, and I deal with this at [137] of the liability judgment. Mr Boerboom’s evidence is to the effect that what Mr Barton said in his e mail was *not* the real reason. I find this attitude by Mr Boerboom to the facts to be reprehensible. I consider that this evidence has been advanced now because I rejected Mr Boerboom’s evidence in the liability trial that he had no idea whatsoever why Mr Barton resigned. When he realised that this was simply inconceivable, this new reason is one designed to avoid any blame attaching to ICI’s behaviour at the time. The fact that this new explanation puts Mr Barton in an unfavourable light in terms of his professionalism does not concern Mr Boerboom. His explanation is also entirely at odds with the documents, and with the evidence from the MMT witnesses.

93. Further, Mr Boerboom expressly stated in paragraph 12 of his witness statement for the quantum trial that:  
“I did not interfere in the work of Andy Barton and/or Jeff Conrad in dealing with the MMT situation”.
- This again is contrary to the express finding I had made at [37] of the liability judgment so far as Mr Barton was concerned, but also directly contrary to the contemporaneous documents so far as both Mr Conrad and Mr Barton are concerned. Not only that, but in this trial further evidence has emerged of what had occurred regarding MMT’s valuations after Mr Barton resigned. On 4 December 2014 Mr Hall, who is a qualified quantity surveyor, sent Mr Boerboom an e mail in relation to MMT’s application for November 2014. Mr Hall sent Mr Boerboom what he called two “options” for the payment certificate. Option 1 did not allow for any progress by MMT during the month of October, resulting in a figure for the certificate of minus £12,000, which would mean that MMT would owe ICI money that month, rather than receiving an interim payment. Option 2 was not quite so draconian, allowing MMT some progress, but included a set-off for the allegedly defective welds of £1.3 million. To put that into context, that figure is ten times greater than the figure agreed by the parties to be the correct figure for defects. This option would have resulted in a figure for the certificate in MMT’s favour of £113,000, which at least would have resulted in some payment.
94. Mr Hall, quite wrongly, gave Mr Boerboom the option of paying MMT whatever figure Mr Boerboom chose. This is made clear in the final sentence of his email, where he stated “Please note these are only draft and we can adjust the contra charge value to suit our level we are happy with”. For anyone familiar with the intended operation of the NEC3 contract form – or indeed, any standard form construction contract – this behaviour is extraordinary, and wholly incapable of being justified on the contract terms. It shows ICI were plainly adjusting the figures in a wholly improper way.
95. The reply dated 5 December 2014 was copied to Mr Hall, but Mr Boerboom effectively asked the next person up the management chain above him, namely Mr John Schelhaas, a senior AkzoNobel director, what he (Mr Schelhaas) wanted to do

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about the certificate in the following clear terms (after explaining) “Please advise what to do with the certification for November 2014”. Mr Schelhaas had absolutely nothing to do with the works. Not only that, but Mr Boerboom made it clear in that same email how much interference had been going on by reminding Mr Schelhaas: “since September we followed the line not to pay until an agreement with MMT was made regarding the welding quality issues.”

September was a whole month before Mr Barton resigned. It was plain that ICI/AkzoNobel had decided not to pay MMT sometime earlier, a clear case of interference with the Project Manager. Yet this is something that Mr Boerboom maintained in his witness statement for the quantum trial that he had *not* done.

96. Mr Boerboom also made it clear that the fact that MMT had initiated adjudication proceedings against ICI was a reason for dismissing MMT from site, and that this was something that had resulted in his no longer wishing to work with MMT. This evidence was given in the following terms:
- “Q: When you asked [MMT] to leave the project, it must have been fairly obvious that that was going to have a fairly dramatic effect on the staff, on the employees, on the business to eject them from such a significant project. Is that something you thought about?
- A: They were not responding, they were delaying resolution, they were to me exaggerating the claims, exaggerating the work to be paid, and they were seeking adjudication. So I would certainly not be prepared to work with them any more.”
97. Adjudication is designed to be a swift and interim resolution of disputes on construction projects. Any party to a construction contract in the United Kingdom has a right to initiate adjudication proceedings on any dispute at any time. It is enshrined in the legal framework within which all employers and contractors operate in this jurisdiction, and it is now widely used across the world in other jurisdictions too. If adjudication is not included expressly in the contract terms agreed by the parties, it is imposed by statute, and has been since the coming into force of The Housing Grants Construction and Regeneration Act 1996. Adjudication has a considerable number of advantages: the decision on the dispute is made by someone who is impartial; the decision is reached very quickly; it is therefore far cheaper than complex litigation; and it is only binding in an interim way. That a party such as ICI can hold the commencement of adjudication proceedings by a contractor, against that contractor in the manner which occurred in this case, is highly regrettable. It is to penalise a company for taking advantage of its legal rights, those legal rights having been made specifically available to that company by Parliament, and made available in order to avoid the very kind of scenario that occurred in this case. It was also in this case a considerable penalty; MMT were ejected, without justification, from a significant and high profile project. Although the repudiation issue was finally determined by the liability judgment, this new evidence from Mr Boerboom in the quantum trial puts ICI and AkzoNobel in an even worse light, in my judgment, than it was before in terms of its behaviour in the period November 2014 to February 2015. It is also notable that Mr Boerboom gave no evidence to this effect in the liability trial, when the reasons for dismissing MMT from site were extensively explored.
98. Mr Boerboom also paid no attention to the fact that his purported appointment as Project Manager had been found by me to have been invalid. ICI’s pleaded case that it

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had overpaid MMT by approximately £10 million was based upon a figure calculated by Mr Brownlee in what was said to have been a Project Manager's Final Assessment. Given Mr Brownlee was instructed by Mr Boerboom, and I had found that he could not validly be appointed as the Project Manager, it can therefore be seen that whatever Mr Brownlee was doing for Mr Boerboom, he cannot have been doing a Project Manager's Final Assessment. There was no Project Manager to instruct him to do so. I found in the liability judgment that ICI was in repudiatory breach of its contract with MMT by failing to appoint a replacement for Mr Barton, but that breach was never accepted by MMT. As can be seen from the exchange of emails to which I have referred above emanating from Mr Hall about the November 2014 certificate, after Mr Barton left there was not even a semblance of attention paid by ICI to the contractual terms concerning interim valuations, or to the way that the NEC3 contract is supposed to operate. ICI simply massaged the interim valuation figures to suit whatever it wanted to achieve with MMT and to restrict its cashflow. To use Mr Hall's own words, passed on by Mr Boerboom to Mr Schelhaas, ICI would "adjust the contra charge value to suit the level" ICI were "happy with".

99. Another point which, in my judgment, counted against the reliability and credibility of Mr Boerboom was his explanation concerning the commercial meeting on 7 and 8 October 2014. I have identified the factual circumstances of that meeting above. The agreements that were reached were referred to in emails passing between the parties that emanated from Mr McGrady of MMT in the days immediately following the meeting. Mr Boerboom had said earlier in his evidence that he approached the contract in the following way:  
"I relied on Mr Jeff Conrad and Andy Barton to deal with the contract contractually. As you've already mentioned just now, there were many contracts in the project and I looked over in general, but I let the people who were dealing with the contracts act on the contracts, so for Merrell, this was Andy Barton, Mr Andrew Barton, and Mr Jeff Conrad"
100. The reality at the time was however very different to how Mr Boerboom wished to portray it to the court. I have already dealt with the way in which the agreement between Mr Conrad and Mr Wells for the payment of £1.4 million for August and September 2014 was simply ignored by Mr Boerboom. That is inconsistent with Mr Boerboom's evidence that he "let the people dealing with the contracts act on the contracts", as he claimed. Also, the vast bulk of rates were agreed on a schedule – which was a sizeable spreadsheet called "MMT Schedule of Rates Master" – by Mr Barton, and this had been confirmed in an email from Mr McGrady in September 2014. However, Mr Boerboom told the court that he had been told that these agreements were "subject to final account judgment" and that he had been told this by Mr Conrad. Apparently, this had been done in the following terms:  
"Henk, let's agree to this, don't worry about this, we will -- this will all be subject to assessment on the final account."
101. I reject this evidence. It does not match the contemporaneous correspondence. It does not match the way that the NEC3 form is supposed to operate. It is evidence that comes from Mr Boerboom, whose evidence as a whole I have concluded bears remarkably little, if any, resemblance to the truth. There is no substantiation of any of it from anyone else, and it is directly contrary to the evidence of the MMT witnesses.

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But further, it flies in the face of commercial reality. Senior personnel such as Mr Conrad, and the Project Manager Mr Barton, would not waste their time going through and reaching detailed agreements on an enormous number of very detailed components of a complicated account, simply as an exercise of going through the motions, with the expectation that they will do it all over again a few months later. There would be no point in doing so, and I find that they did not intend to do so on this project. Even if they were prepared to do so, their expectation would be that they would do it again using substantially the same material in any event, and they would surely expect to reach broadly the same results. Such a second exercise would be wholly redundant, and I do not accept that Mr Conrad ever told Mr Boerboom this would happen. Mr Barton and Mr Conrad were plainly engaged in reaching final agreements on all these matters, and on Mr Boerboom's own evidence before me, had authority to do so. Yet further, the agreements that were reached after the meeting of 7 and 8 October were reached after a meeting with MMT that was specifically held to narrow down points of disagreement, in order to agree as many of the PMIs as possible, and in order to resolve the valuation of MMT's work. The suggestion that this would be done, just a couple of months before the end of the works, only to be redone all over again, on the same material, with the intention being that the agreements of early October would be of no effect (or of effect only for a few interim applications) is nonsensical. I reject that interpretation which ICI seek to put upon these agreements.

102. ICI did, however, in early 2015 seek to have the entirety of what PROJEN had agreed contemporaneously with MMT so far as rates, quantities, measurements and value of PMIs included in interim payments, entirely re-valued on a wholly different basis to that adopted at the time in 2014. I find that this was done at the behest of Mr Boerboom, who wished to suppress the value of MMT's works downwards as much as was humanly possible and by all and any possible means, whether legitimate or illegitimate. It was necessary for ICI to ignore all of the agreements that had been reached with MMT in order to do this, because those agreements were ones which led to a valuation of MMT's works far higher than Mr Boerboom wanted to pay. It was for this reason that Blake Newport became involved. I deal with this when considering Mr Brownlee's evidence.
103. My conclusion, should there be any room for doubt following my detailed findings above, is that Mr Boerboom is a wholly unreliable witness. He was obviously deferring to Mr Schelhaas, his superior, at the time on implementation of the strategy adopted by AkzoNobel, as shown in the email from him to Mr Schelhaas dated 5 December 2014 about MMT's certificate for November 2014. Mr Boerboom appeared to me, on all the evidence before me and the contemporaneous documents that are available, more likely to be an instrument of a Steer Co decision to save AkzoNobel money on Project Fresco, rather than being on a frolic of his own, or bearing MMT any particular animus. If I am right and he was merely an instrument, he proved himself to be a remarkably effective one. It is regrettable that this effectiveness, which led ultimately to MMT's financial problems (which eventually resulted in great problems with its bankers, and later on in liquidation, a sequence considered in greater detail below) was then compounded by the extremely low accuracy of his factual evidence to the High Court.

*Mr Brownlee*

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104. The second and only other witness of fact called by ICI was Mr Greg Brownlee. Mr Brownlee is a quantity surveyor. Mr Brownlee's status as a witness of fact was somewhat fluid, and he was not, even on the analysis of the legal advisers of ICI itself, entirely conventional as a witness of fact, as will become clear.
105. He served a lengthy witness statement dealing with quantum for the liability trial, and some passages of it were relied upon in that trial as they dealt with liability. The summary of that evidence is given at [30] and [31] of the liability judgment. He had become involved in January 2014, and there were emails from that month showing Blake Newport were involved. His first witness statement explained that Blake Newport was "instructed to support the Project Manager", by which he meant Mr Boerboom. He stated that Blake Newport "was appointed by AkzoNobel on the 5 February 2015 to consider the events surrounding a potential dispute with MMT." He said that the "remit was adapted such that the primary focus was the independent assessment of the works undertaken by MMT. This remit followed MMT's referral of a dispute to adjudication regarding the non-certification/non-notification of a payment against the November 2014 application".  
(emphasis added)  
He denied that he had acted as an expert for ICI in the adjudications.
106. Mr Brownlee in his first statement said that following the repudiation (which he characterised as a termination, as at that stage repudiation was in issue) Blake Newport "was then requested to undertake the final assessment of the works within the period prescribed by the Contract; accordingly the date for completion of the final assessment was determined as the 18 May 2015, being within 13 weeks from the date of termination".
107. For the liability trial, ICI only relied on small parts of Mr Brownlee's evidence. Given he had performed a valuation exercise, and quantum was not in issue, this was understandable. In the quantum trial, he was also tendered as a witness of fact. His witness statement for this trial contained a large amount of opinion evidence. ICI had a separate expert quantity surveyor, Mr Kitt, for which it had permission, and Mr Brownlee's different opinion evidence, for which it did not. Permission is required under CPR Part 35 to adduce expert evidence. ICI had, for the liability trial, served expert reports from two experts dealing with the same ground, and were ordered to amend these reports so that more than one expert did not give opinion evidence on the same issues. For the quantum trial, the same approach was adopted – serving expert evidence covering the same ground by two people - but one of the two individuals was said to be a witness of fact. MMT sought to strike out parts of Mr Brownlee's statement in advance of the trial, and ICI accepted that it would not rely upon any of his evidence that amounted to opinion. I ordered re-service of his evidence with his opinion evidence deleted. His evidence had consisted of three witness statements; after the order, parts of the 1<sup>st</sup> and 2<sup>nd</sup> statements were deleted as they contained his opinions, and ICI did not seek to rely upon his 3<sup>rd</sup> statement at all. Some isolated statements of opinion remained, but these were inadmissible and can be ignored.
108. However, even though he was called as a witness of fact, and claimed to have been doing a detailed valuation under the contract (which he called an "independent assessment" as set out above) there were very few emails from and to Blake Newport initially disclosed by ICI, even though standard disclosure had been agreed by the

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parties. This was challenged by MMT, who in a witness statement dated 5 February 2018 from Mr Mills explained that only 13 emails in the period 17 February 2015 to 9 November 2015 were disclosed from and to Blake Newport, and only another four emails that referred to Blake Newport. Initially the solicitors acting for ICI, Clyde & Co, explained in a letter dated 22 November 2017 that this was because “the primary form of communication with Blake Newport was face-to-face at site for which no emails are available”. In other words, there were no other emails.

109. This explanation, as with other explanations given by those acting for ICI in this case about disclosure (for example, see [21] to [25] of the liability judgment regarding the number of different, and mostly incorrect, explanations about disclosure of Steer Co documents for the liability trial), also proved to be incorrect. In the 4<sup>th</sup> witness statement of Mr Morris, it was explained that an error had been made by ICI’s “third party management provider, Lineal” and that there *were* many other documents concerning Blake Newport that had not been disclosed. This was, as at the date of that statement 20 February 2018, said to have been remedied, although of the 4,585 documents that emerged as a result, a great number were said to be “either irrelevant, privileged or both”. Four different grounds of privilege were asserted in a general way, without any differentiation between them. One of these was communications which came into existence for the sole or dominant purpose of collecting evidence for use in litigation. Another was documents from or relating to the litigation itself. Another was legal advice privilege.
110. At a contested disclosure application on 28 February 2018, MMT sought various orders in relation to disclosure against ICI. One of the categories sought was PROJEN documents. Disclosure was resisted by ICI expressly on the basis that these were not within ICI’s custody power or possession, and that even though PROJEN had been asked, PROJEN would not provide them. (I deal with this further below – this too turned out to be wholly incorrect as well, and ICI in fact had over 4,000 such documents in its possession, but had not disclosed them). I ordered disclosure of these; I found it unarguable that PROJEN would not produce its project documents if ICI correctly approached the simple task of asking for them. It turned out that ICI had them in any event, although that fact did not emerge until during the trial. In respect of the particular category of Blake Newport documents, I ordered disclosure of the Blake Newport documents identified by Mr Morris as existing, subject to privilege. I ordered that counsel acting for ICI were to review each such document, and insofar as privilege was maintained, that a schedule be served identifying what type of privilege was claimed in respect of each document.
111. This resulted in further substantial disclosure being given by ICI, and privilege continuing to be asserted over 1,914 documents, identified in a schedule (containing references both to emails and other documents) in respect of which ICI’s counsel had separately reviewed, and therefore approved, the assertion of privilege. Although the covering email from the solicitor at Clyde & Co, Mr Leadbetter, rather glibly stated that ICI’s solicitors “expect the vast majority of these documents” that were newly disclosed to be irrelevant, this exculpatory statement somewhat overlooked the fact that an express Order had been made for disclosure after the contested application on 28 February 2018.

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112. Based on this schedule and the continuing assertion of privilege over documents emanating from Blake Newport, Mr Brownlee was asked about his actual role at the very end of his cross-examination.

Q: The final topic very briefly, Mr Brownlee. I've got slightly confused as to what your role was on this litigation. Is it fair to say you have performed a number of different roles since January 2015?

A. No.

Q. But you have been heavily involved in the large number of adjudications as an expert?

A. No.

Q. You haven't been involved in the adjudications?

A. Largely not, no.

Q. We've got a long schedule of emails from Blake Newport.

A. Okay.

Q. Which are said to be privileged because they arise out of adjudications or litigation. If the witness could be provided with the schedule....”

Mr Brownlee was then shown the schedule of emails and asked the following questions.

“Q. Do you see those are the emails, that's the same -- those are the emails we were looking at from 2 November, updated pipework PMIs?

A. Yes.

Q. They're said to be privileged, category 2, which I believe is contemplated litigation.

A. Okay. So I've been involved in the litigation.

Q. You have been involved?

A. Well, I've prepared three witness statements and assisted Clyde & Co in --

Q. Of course.

A. Yes.

Q. The emails we were looking at are between you and internal to your team, between you and Mr Boerboom?

A. Yes.

Q. We've got a long old schedule of emails here involving Blake Newport.

A. I can see that, yes.

Q. They're all said to be privileged. For some reason, this little clutch from 2 November have leaked out.

A. Right.

Q. We can see what they are. They're correspondence between you and Mr Boerboom about your --

A. Sorry, which, the clutch of emails --

Q. 2 November.

A. Right, okay.

Q. Did you see the email about the meeting in October 2015?

A. Right, okay, yes.

Q. Those emails just relate to your function of preparing the final assessment, don't they?

A. Well, in 2015 the final assessment, November 2015, the final assessment being issued, and legal proceedings at that time were sort of either contemplated or had commenced. So ...

Q. I see.

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113. The exchanges continued a little later, after a question from the court.

“I provided my emails, sir, to Clyde & Co. If there's been a determination that they are privileged, then -- you know, my role since May 2015 has been assisting ICI with the quantum element of this claim.

MR MORT: Since when, sorry?

A. Well, since May 2015 when the final assessment was concluded, my role's continued assisting them with the quantum element of this matter.

Q. All right, well, look at 571, earlier on in the story. This is page after page. So they start on 5 February 2015, privilege category 2 which we think is contemplating litigation, and I think category 1 is contemplating adjudication?

A. Okay.

Q. Do you see what I'm getting at, Mr Brownlee? On the first page alone it just covers a few days of February, all of these emails are said to be privileged. So were you working as the expert for --

A. No.

Q. What was your function at that stage?

A. In February 2015?

Q. Yes.

A. My function was to prepare the final assessment as instructed by ICI.

Q. So what are all these references to these privileged documents, category 2 is adjudication? Were your colleagues involved in adjudications?

A. There were some specific questions that Clyde & Co would have asked me about the adjudications, but generally adjudication number 1 was on a technicality around a payment notice. There were other issues, there may well have been some interaction with Clyde & Co around the adjudications, but generally I wasn't involved in the adjudications, and generally my role was to prepare the final assessment as instructed by ICI. I couldn't run through all of these emails and tell you what the contents are.”

114. Mr Brownlee, both in the passages above, and generally (including in his written statements) was anxious to emphasise that his valuation exercise, which concluded that MMT had been overpaid to the tune of £10 million (or almost 50% of the sums in the interim valuations) was the Final Assessment for the Project Manager (even though Mr Boerboom was not the Project Manager, as I have found). Such a Final Assessment – not least because it is something done under the auspices of the independent third-party certifier – is supposed to be done impartially and fairly. In other words, and based upon what was said to be an independent assessment, ICI asserted that as a result of the Blake Newport exercise, MMT's works should be valued under the contract in the sum of £10.9 million (the figure in the Particulars of Claim served on 9 November 2015) or £11.217 million (the figure in the Particulars of Quantum served on 8 September 2017). It was also asserted that these figures were the product of a proper contractual analysis carried out entirely under the contract and in accordance with its terms. The primary purpose of it would be to assess the value of MMT's works.

115. However, Mr Brownlee's explanation of what he had been doing, and this representation of the final assessment exercise, did not sit alongside ICI's legal advisers' explanation to the court of the task upon which he had been engaged, and

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the assertion of privilege of so many of his communications with Mr Boerboom. Mr Brownlee had said that “the primary focus was the independent assessment of the works undertaken by MMT”. If that were right, it was hard to see how privilege could be asserted by ICI, after specific review by ICI’s counsel team, over nearly 2,000 emails and other documents in relation to this exercise.

116. At the beginning of an application made by ICI during the trial to adduce a supplementary expert report from its quantity surveying expert Mr Kitt, it was necessary to explore the nature of the exercise performed by Mr Brownlee. This was relevant to the stage at which, and how, Mr Kitt had obtained certain documents from disclosure upon which his new report (called Daily Task Registers), served upon MMT without prior notice on the first day of the trial, was based. This is dealt with further in the section of this judgment that relates to Mr Kitt. In fairness to ICI (and also to Mr Brownlee) I will set out the text of the exchange between the court and leading counsel for ICI, Mr Bowdery about Mr Brownlee’s exercise. This exchange occurred on Day 4, Mr Brownlee having given his evidence on Day 1.

“Can you firstly, please, just in a sentence or two, explain to me the nature of the exercise that Mr Brownlee was undertaking in March 2015 because I thought I had understood it.

MR BOWDERY: He was carrying out, amongst other matters, a final assessment for the purpose of future litigation, which you will be aware, we've never disclosed draft final assessments or his workings.

MR JUSTICE FRASER: He was carrying out a final assessment for the purposes of future litigation?

MR BOWDERY: Yes.

MR JUSTICE FRASER: Not a final assessment within the terms of the NEC3 contract, is that correct?

MR BOWDERY: It was going to be used for that purpose. From 19 February [2015] our instructions are everyone contemplated litigation.”

117. The following points arise as a result of the exchange above:
1. Mr Brownlee had been preparing a final assessment for the purposes of litigation. That must have been its main or dominant purpose. This is consistent with the assertion of privilege made after careful review by counsel of the material generated by him. It was not consistent with what he said in evidence that he was doing. It is certainly not consistent with the main or primary purpose of the exercise being a Final Assessment of MMT’s entitlement under the contract terms.
  2. Mr Brownlee had also been involved in the adjudications. This was consistent with the assertion of privilege made by ICI’s counsel, with the selection of the appropriate category of privilege maintained, but was not information that was exactly forthcoming from Mr Brownlee when he was asked about it. Indeed, he sought to avoid admitting he was involved in the adjudications at all, and initially claimed he was not.
118. The instructions given to Mr Brownlee by Mr Boerboom were given face to face and not in a specific document or documents. There is therefore no record of them. However, apart from one instance which I will deal with presently, he had not even been told by Mr Boerboom that any agreements had been reached between MMT and Mr Barton or others at ICI such as Mr Hall, or Mr Conrad. Mr Boerboom gave Mr

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Brownlee no instructions as to how he should deal with such agreements either, at least this is what Mr Boerboom told the court in his oral evidence. The one exception to this was on 30 October 2015 when Mr Boerboom sent Mr Brownlee, after he had done his assessment, an email from over one year earlier. This was the email dated 10 October 2014 from Mr McGrady to both Mr Barton and Mr Hall, in which updated valuations for 13 different PMIs had been calculated by MMT in accordance with the agreements reached. This was following the commercial meeting on 7 and 8 October 2014. Attached to the email were 13 different, and highly detailed, PMI valuation spreadsheets performed by MMT based on the agreements reached at the commercial meeting, and in the email Mr McGrady stated:

“Hi all, please find attached the updated PMIs based on the following:

- Agreed quantities
- Agreed rates for valves....
- Agreed bracket centres for PMI 29 and 31 at 1.2m
- We will remove wastage which will be discussed separately
- We have used a pump rate for skis and filters for now
- We have removed the bond element for prelims which will be replaced by a separate PMI
- Bracket price for all PMIs at £29.79 and secondary supports to be agreed separately.”

119. The PMIs affected were those numbered 15, 29, 31, 47, 57, 115, 118, 120, 147, 190, 204, 239, 240, and the valuations for these were sent with that email in the spreadsheet attachments to which I have referred. No response went back to Mr McGrady from either of these two recipients suggesting these matters had not been agreed, which I find would have been expected had Mr McGrady not been accurate in describing these as being specifically agreed. I find these items were agreed as set out in the email and spreadsheets.
120. Mr Boerboom asked Mr Brownlee in October 2015 “I found this email. Was this email considered?”. The summary of the answer back to him from Blake Newport was “No”. In a lengthy email response, Mr Brownlee explained why such agreements made no difference to the Blake Newport analysis. He declined to accept the email at face value and stated in his reply to Mr Boerboom that “the agreement was not confirmed” by Mr Barton or Mr Hall. However, in his oral evidence he told the court that he had very little input from Mr Barton in any event. He relied upon some alleged non-confirmation from Mr Barton about this agreement in order to ignore it, but where that came from it is impossible to say; it cannot have come from Mr Barton, and was very difficult to reconcile with his evidence about his contact with Mr Barton:
- “.....Mr Barton was no longer on the site when we were engaged.
- Q. So Mr Barton didn't provide you any input at all?
- A. Very little. We had a meeting with Mr Barton in his offices in Warrington, but the information that was forthcoming was very sparse.
- Q. But neither Mr Hall nor Mr Boerboom thought fit to mention that there had been this two-day discussion about rates, about measures, and so on?
- A. No.
- Q. Do you feel that undermines the exercise [the Final Assessment] at all?
- A. Well, I think there were several agreements that were made that I wasn't aware of, which is quite obvious when you read the final assessment.

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Q. Okay. So to that extent the exercise is, again, redundant, agreed?

A. Elements, perhaps.”

121. Given he had so little input from Mr Barton into the exercise, and given neither of Mr Hall, Mr Barton nor Mr Boerboom had told him about the meeting even taking place, let alone of agreements having been reached at the commercial meeting, it is difficult to see how in October 2015 he could rely upon “non-confirmation” from Mr Barton about the existence of an agreement in order to explain why it could be ignored. The text of his reply suggests he had consulted Mr Barton, and been told there was no agreement. That had just not happened. Also, it is obvious that a contemporaneous email from MMT to the Project Manager about such agreements, dealing with so many agreed items and so many PMIs, and also identifying that measures and certain rates were agreed, should have led to a detailed reconsideration of the Blake Newport exercise, using those agreements. The fact that it did not should come as no surprise, however, to anyone who troubled to read all the way to the end of the email response from Mr Brownlee to Mr Boerboom which stated the following conclusion: “Overall, had the Final Assessment used these MMT PMI valuations as the starting point, there would have simply been much higher deductions necessary to arrive at the final assessment figure.”
122. This sentence makes clear exactly the sort of exercise upon which Mr Brownlee and Blake Newport were engaged. This was to choose (or be given by Mr Boerboom) a number for the MMT valuation that was far, far below what MMT had been paid, and work downwards *towards* that number, rather than properly valuing the works. As Mr Brownlee said in this e mail, had the MMT PMI valuations been used, “much higher deductions” would have been “necessary to arrive at” that figure. This is not what a Final Assessment under the NEC3 form (or indeed any industry standard or sensible contract) should consist of. In fact, it is diametrically opposite to what a valuation exercise should be. In order to achieve this end, Mr Brownlee valued at zero a whole host of items which had been given valuations by the Project Manager, Mr Barton.
123. That this was what Mr Brownlee had intended, was implicit in one of his answers to Mr Mort early in his cross-examination, when he was asked about an email to him from Mr Boerboom of 10 March 2015 when he had been told by Mr Boerboom the following: “I would like to inform you that we are proceeding as discussed and planned with you regarding Blake Newport’s involvement with the final assessment in a.o. the MMT case. Decision making in this is fully with me (time, money and resource). I am OK with the plan we made and the resource allocation.....”

It is unclear from the email itself what “the plan” that Mr Brownlee and Mr Boerboom had made was, but I find that it was as I have identified in the preceding paragraph of this judgment, namely to work downwards to a very low figure. In answer to a question from Mr Mort about this email, Mr Brownlee stated that: “by that point, AkzoNobel had already paid an immense amount of money to [MMT], by virtue of the adjudicator’s decision.”

As a point of fact this is incorrect, because AkzoNobel did not pay the sum under the adjudicator’s decision until 17 March 2015, and the proceedings issued by MMT in

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this court to enforce the decision were not issued until 11 March 2015. However, even putting that to one side, the issue was not whether the amount paid to MMT was, in absolute terms, a large one; the issue was (and is) what was the proper valuation of MMT's works under the contract. Mr Brownlee's approach is to me obvious, and it certainly was not to adopt a fair, impartial and independent approach to valuation. His approach was to work downwards to a very low figure to permit ICI to claim it had vastly overpaid MMT. His approach was also implicit, if not explicit, in his answer to Mr Boerboom in his email response at the time when he confirmed Blake Newport's appointment by stating:

"Rest assured this is an important project for Blake Newport.

We will give it our full attention in order to resolve these matters positively for AkzoNobel."

124. By "resolve these matters positively" I find that he meant arriving at the figure for MMT's works that ICI wanted to achieve. Further, it would have been contrary to Mr Boerboom's approach from July 2014 onwards for him suddenly to have decided in February 2015 that actually, he now did want some independent valuation input into MMT's account. That was exactly what PROJEN and Mr Barton had been doing before Mr Boerboom arrived, and he had stopped this, interfering with their function and causing the resignation of the Project Manager. He and Mr Schelhaas had done their best to ensure that no payments were made to MMT, and that contra charge figures were massaged to accomplish this. There is nothing to suggest this strategy changed in February 2015 after MMT were dismissed from site on grounds that had no basis in fact.
125. There may be nothing wrong in providing quantity surveying services to a client who wishes to achieve a certain end. There is, however, in my judgment, certainly a great deal wrong in doing so, yet attempting to disguise either what the exercise consisted of, and/or what that end in reality in fact was, and/or in blatantly mis-describing the exercise performed. I find that the Blake Newport exercise, termed the Project Manager's Final Assessment, was nothing of the kind, and Mr Brownlee must have known throughout that it was nothing of the kind whilst he was doing it. It was in fact an attempt to justify a sum for MMT's works, supposedly under the contract, which paid no attention to the proper scope of those works; paid no attention to the contract terms; paid no attention to the agreements reached by the Project Manager, Mr Barton, and other individuals at ICI such as Mr Hall, on rates, measures, and numerous PMIs; and paid no attention to the extent and reality of the works on site. This was done to achieve, on the face of it, a figure for a repayment *back* to ICI from MMT of £10 million or so. In that, it achieved its end. That is the figure that has been on the pleadings for a period, as a minimum, of three years. The Blake Newport exercise was simply a more sophisticated instrument to be used by ICI in its overall strategy against MMT, in respect of which I have already made findings. The fact that within its text the Final Assessment purported to be a proper and fair contractual valuation does not affect its true purpose, which was quite different. The description within that document of what it was is wholly misleading, and Mr Brownlee's explanation to the court in evidence of what it consisted of was misleading too.
126. This is yet further confirmed by the fact that even Mr Kitt, ICI's quantum expert (of whom more later) valued the MMT works (at their lowest) some £2.6 million higher than Mr Brownlee. I find that Mr Brownlee's assessment is of no assistance

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whatsoever in resolving the valuation of MMT's works, and I find that his evidence is of no assistance in resolving the issues in this case.

127. There are two other matters of direct relevance concerning Mr Brownlee and his exercise. The first is that I had expressly made certain relevant findings in respect of this in the liability judgment. At [225] in the liability judgment I stated the following, having dismissed Mr Mort's argument based on the case of *ISG v Seevic* that ICI had no legal right to a valuation of the works:
- "I appreciate that any exercise which requires an analysis of the correct value of MMT's contract works is something that could, potentially, involve both parties in further wasteful and expensive litigation, if that amount cannot be agreed between them. Mr Brownlee's exercise was done as though the contract had been validly terminated pursuant to its terms, that did not occur and so his exercise (which is challenged in any event) will be redundant. Further wasteful and expensive litigation ought to be avoided if possible. Valuation of an account, if it cannot be agreed, should at least be capable of being distilled into a small number of discrete issues. The amount of court time available for the quantum element of this trial will be no more than four days. Judicial resources are not infinite. However, with the necessary degree of realism on both sides such differences should be capable of resolution."
128. That finding seemed to have escaped the attention of both parties; it had certainly escaped the attention of those acting for ICI, who called Mr Brownlee in any event and sought to rely upon his exercise until almost the bitter end.
129. The reason that I have used the phrase "almost the bitter end" is that even ICI itself by its leading counsel abandoned any reliance on Mr Brownlee half way through the last afternoon on the last day of the quantum trial, for the reason that Mr Kitt the ICI independent expert did not support his analysis. The last day of the quantum trial was 8 May 2018. Mr Kitt's expert report was served two months before that, on 8 March 2018, although his broad conclusions must have been known, at least in outline, to ICI and its advisers at least some weeks before then. This realistic appreciation of the worth, or lack of it, of Mr Brownlee's exercise on the final day of trial came far later than it ought to have done. It had echoes of the abandonment, again during the closing stages of the trial, of the ICI case on radiographic testing of the welds which played such a crucial part during the liability trial phase. Although that point was ultimately abandoned by ICI, that abandonment then was on the basis of what appeared to be forensic developments during the liability trial. No such excuse or explanation can be ventured on ICI's behalf so far as the Brownlee exercise is concerned.
130. MMT did not have a chance to make many, or indeed any, submissions about this development, because it came so late in the day. Whether this was a cynical ploy to keep the quantum trial as long as possible as part of the attritional approach to the litigation, or for some other reason (for example a belated recognition that the exercise was so flawed as to be doomed) does not for present purposes matter. The abandonment of the Brownlee figures on the MMT valuation should have come far earlier than it in fact did, and would have saved much time, cost and court time had it done so.

*Mr McGrady*

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131. MMT called three witnesses of fact. The first was Mr Matthew McGrady. Mr McGrady is a chartered accountant and the Finance Director of MMT. He gave evidence and was cross-examined in the liability trial, and my summary of his evidence is at [51] to [56] of that judgment. Altogether there were four witness statements served from him. The 1<sup>st</sup> statement being for the liability trial; the 2<sup>nd</sup> being his main statement for the quantum trial; the 3<sup>rd</sup> was for an interlocutory application for disclosure; and the 4<sup>th</sup> was dated 12 April 2017 (which was served on 13 April 2018, the Friday before the week the trial started).
132. The final statement responded to some criticisms made by Mr Kitt about certain elements of the MMT claim, which had been put together by Mr McGrady. Mr Kitt's report was dated 2 March 2018, and was very detailed. Mr McGrady worked through that whole report and made some amendments to the claim, removing some duplication and so forth, reducing the overall figure claimed by MMT. Sensibly, there was no opposition by Mr Bowdery to MMT having permission to rely upon this 4<sup>th</sup> witness statement, as long as ICI had sufficient time to deal with it. Accordingly, I granted permission for the statement, but Mr McGrady was recalled on Day 6 to be cross-examined on its contents, after the quantum experts gave their evidence. This was so that Mr Bowdery had sufficient time to assimilate its contents and the supporting documents that were provided with it.
133. Mr McGrady had been very closely involved in the works at the time, and in particular (so far as the quantum trial was concerned) he had been extensively involved in agreeing elements of the MMT account with Mr Barton and Mr Hall, and had also attended the commercial meeting on 7 and 8 October 2014. He sent further amended valuations of PMIs following agreements reached on rates and measures, attached to the email he sent to Mr Barton on 10 October 2014 to which I have referred above. He had also prepared certain parts of the MMT counterclaim, namely those for retention, payment for work done after last assessment date, loss of profit on unfinished work and work not awarded to MMT, cost of professional advice, management time, reduced payments negotiated on other projects, additional cost of financing and other sundry costs.
134. Due to the way that Mr McGrady's and Mr Wells' substantive quantum witness statements were drafted, I shall now deal with Mr Wells.

*Mr Wells*

135. The second witness of fact for MMT was Mr Tony Wells, the Managing Director of MMT. He had given evidence at the liability trial, and my summary of his evidence then is at [45] to [50] of that judgment. I repeat some of those paragraphs here for convenience, as these events were still the subject of cross-examination in the quantum trial:
- “47. Mr Wells also gave evidence about the adjudications and the financial impact upon the company. Adjudication No.1 was commenced in late January 2015, and such was the cash flow position of MMT at that time that a Company Voluntary Arrangement or CVA came to be contemplated by MMT's Board of Directors in late February/early March 2015. However, when the decision in Adjudication No.1 was issued in MMT's favour, there was the prospect of a very sizeable cash injection if ICI complied with that decision. Timing became crucial. In what Mr Wells described as “surreal” events, the money was received by MMT, leading (as he said) to

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enormous relief, followed almost immediately by further tension and difficulty because MMT's bankers chose precisely that moment to terminate all of its lending facilities and overdraft arrangements without notice. Small and medium companies sometimes complain about the treatment they receive at the hands of their banks. This behaviour must have been a hammer blow to MMT and its directors and employees. It led to certain steps being taken, which I find are not relevant to the liability phase of these proceedings. In the event the CVA was avoided.

48. MMT as a company had acted on a variety of different projects before, including prestigious ones such as the Diamond Light Synchrotron facility at Didcot, and the Harrods department store. Mr Wells relied upon this to show that MMT is capable of high quality work, and although a Small or Medium Enterprise or SME (an expression for companies such as MMT in terms of their economic size), MMT had a sizeable cash surplus earlier in 2014 and appears to have been soundly run. Mr Wells was effectively the decision maker and no doubt found himself increasingly involved in the middle to latter part of 2014 as the commercial problems on the project with the AkzoNobel project management team increased.

49. My view of the quality of evidence provided by Mr Wells is also assisted by the fact that what he wrote at the time, both in letters and e mails, both internally and to the different personnel at AkzoNobel with whom he found himself dealing, was entirely consistent with his evidence. This is usually useful corroboration for the court when considering a witness' reliability, and was here.

50. Mr Wells gave his evidence openly and frankly, and I am satisfied that he was accurate and reliable in what he told the court. Following ICI's concession on Issue 1, Mr Wells' credibility was, if anything, increased; however, regardless of that concession I was satisfied that his evidence was to be preferred. If, in any area, Mr Wells' evidence differed to that of Mr Brugman and Mr Boerboom, I prefer that of Mr Wells."

(emphasis added)

136. However, both the witness statements of Mr McGrady and Mr Wells served for the quantum trial by MMT had some peculiarities. Both of these witnesses served very lengthy witness statements. Upon analysis, it was realised that they were, for considerable passages, simply the same text, with the first person having been changed to the third person where necessary grammatically, and vice versa. These were the only differences for over one hundred paragraphs. This was unusual, but was particularly notable as being almost the converse to the unusual situation that had occurred concerning Mr Wells' and Mr McGrady's witness statements for the liability trial. For that trial, MMT had three witnesses, Messrs Wells, McGrady and Conn. Each of the witness statements of Mr McGrady and Mr Conn were curiously worded and extraordinarily brief. Mr McGrady had simply stated in his paragraph 5 that he had read Mr Wells' statement and agreed with everything Mr Wells had said. Mr Conn stated that he too agreed with what Mr Wells had said, but identified certain passages in respect of which he had no knowledge of his own, and therefore which he could not corroborate. This led to an application by ICI, at the 2<sup>nd</sup> Pre-Trial Review seven days before the liability trial was to start, to strike out both these witness statements as failing to comply with the rules and not being in the witnesses' own

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words. I refused that application, not least due to its lateness, but also because ICI had had the statements for eight months, including participating in the 1<sup>st</sup> Pre-Trial Review, before raising any objections at all. I did however give a warning at [52] of the liability judgment that the result in other cases would not necessarily be the same.

137. The peculiar approach to witness statements for the quantum trial may therefore have been adopted as a rather misguided attempt at avoiding what had occurred for the liability trial, but still failed to grasp the essential point that written witness evidence is supposed to be in a witness' own words. ICI therefore issued an application to strike out large parts of the witness evidence served by MMT for the quantum trial on the basis of this wholesale duplication. This was heard by me on 15 March 2018 at the Pre-Trial Review. One submission made by Mr Bowdery for ICI on that application was that MMT's approach to their witness statements for the quantum trial was verging on contemptuous (whether in a grammatical, or technical, sense) given the history of the MMT witness statements for the first trial. Presenting the evidence in this way also raised practical trial-management difficulties for ICI, as Mr Bowdery would not know which witness was the correct person to ask about particular points during cross-examination. I ordered MMT to re-serve the witness statements of Mr Wells and Mr McGrady striking out the duplication, so that ICI would know which witness was giving evidence about which events. This was done on 27 March 2018, shortly after the order was made.
138. I do not know why this approach to witness evidence was taken by those at MMT, or by those advising MMT, but the reasons behind it do not matter. The rules concerning witness statements are clear; they are included at CPR Part 32 and are available to be consulted by all litigants and their advisers. At Part 32.4.5 guidance is given on "preparation and content of witness statements". Modern litigation depends upon witnesses setting out (with the necessary degree of assistance) their factual evidence in writing, served on the other parties in the litigation in advance. Much time and costs should be saved by doing this. It avoids what is now seen as the old-fashioned approach in civil cases, where a witness would give their evidence in chief orally, which takes some time. Indeed, I am firmly of the view that the specialist courts could not conduct the number of trials they currently do without the use of witness statements; I doubt judicial resources could be stretched to accommodate the extra court time that would be required for oral evidence in chief. Somewhat presciently so far as this case is concerned, the notes to CPR Part 32.4.5 state "Unfortunately, rules, practice directions and guidance as to the content of witness statements appear to be habitually ignored by practitioners". I would draw the attention of practitioners in the specialist courts in particular to the requirements in the rules for such documents. Statements are not supposed to be drafted by those who equate length with substance, and regardless of expertise with the copy and paste functions of word processing programmes, witness statements must be drafted in accordance with the Civil Procedure Rules. Nor should such documents include lengthy quotations from contemporary documents. Inevitably, judges are, notwithstanding these clear rules, regularly confronted with lengthy statements that do exactly that. It may be that this is done in an attempt to impress the other side in adversarial proceedings with the weight of evidence in party's favour. Not only is this usually counter-productive, it is also wholly wasteful in terms of legal costs, but importantly also judicial resources. These documents are invariably read by the court prior to the witness being called. There is absolutely no good reason, in any case, for the regular and continuing failure

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to pay attention to the rules concerning witness statements. Attention is also drawn to the likely consequences if such rules are ignored, and to the *Review of Civil Litigation Costs: Final Report* (December 2009) by Jackson LJ (as he then was) Chapter 38.

139. Although both Mr McGrady and Mr Wells were starting from the position of having had their evidence accepted in the liability trial, that of itself does not mean that their evidence would or should be accepted uncritically in the quantum phase. Both witnesses were cross-examined by Mr Bowdery for a reasonable period of time, and Mr Bowdery put all of ICI's points to them in a sensible way, doubtless on instruction. That is not, however, to say that the points themselves were sensible. Given that both Mr Wells and Mr McGrady had been very closely involved in the works, and neither of the ICI witnesses of fact had been to the same extent (and so far as Mr Brownlee was concerned, had not been involved at all) the majority, if not all, of these points were wholly artificial.
140. An example of such an artificial point will suffice. It was put to Mr McGrady that the hours claimed by MMT for PMI 208, pipework modifications, "were absurd". The title of this PMI is "works to revised models" and it relates to work performed by MMT when the design models were revised, as they were constantly. Such revisions required modifications to the existing work that had been installed to the pre-revision model, prior to the design change, and new work to have the work conform with the revised model. The hours for this PMI were said, by ICI in the quantum trial, to be very excessive for modifications. The stark difficulty with this point for ICI was that the Project Manager himself had approved these hours at the time for this PMI. PROJEN had designed the works, had instructed the modifications required as a result of the design changes in the revised models (which changed a great deal), and had a detailed knowledge both of the work originally done, and the work required to modify it. These costs had been approved by the Project Manager in April 2014, and reviewed in July 2014 and paid in full from that point. ICI did not call any witness of fact at all from April 2014. Mr Boerboom did not even arrive on site until three months after that. There was no ICI evidence of fact about what these works involved.
141. Mr McGrady gave a lengthy and patient explanation on this PMI and these hours, which I accept, which demonstrated that simply because one of the lengths of pipe that was being modified was only 1 metre long, did not mean that ICI could now assume (as it did in the quantum trial) there was not much work involved, still less conclude hours approved by the Project Manager were absurd. The fundamental issue, and it is one that came up during the quantum trial innumerable times, is that at the time, those tasked by ICI with administering the contract fairly, namely the Project Manager, and with extensive and detailed knowledge of the works, did not remotely share ICI's concern now in the litigation (whether genuine concern, or contrived to suit its strategy) that there was anything wrong or excessive either with the hours, or the costs, attributed to this PMI by MMT, nor with the sums claimed in respect thereof. Quite to the contrary, in fact, these costs were both approved by the Project Manager, and paid by ICI. In my judgment, challenges of the nature raised by Mr Bowdery could only be credible if they were made or explained by someone – indeed, anyone – at ICI who had been actually involved in the works, who knew something about the subject matter, and who had some direct evidence to give on the point. For whatever reason, this was not the case. There was no direct evidence from ICI in this respect at all, and any evidence about it (which for the most case simply did not exist)

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did not have any credibility. The challenges seemed to have their origin in either Mr Brownlee, and/or ICI's experts, and/or ICI's advisers, trawling through the documents and seeking to raise points of criticism that might be superficially justified, but without any evidential basis. The fact that a measurement on a document showed lengths of pipe of 1m did not remotely assist in the circumstances of this case, and this project.

142. I found both Mr McGrady and Mr Wells impressive and truthful witnesses, and I accept their evidence. I do not unhesitatingly accept their evidence about causation and the liquidation of MMT as I explain below in that section of the judgment dealing with that head of the counterclaim, but that is a different matter. Subjectively, they believe that to be the case, so the fact that I do not accept their evidence on that point does not diminish its value on all the other points in dispute in these proceedings. So far as MMT's actual works on site, the effect upon MMT of what occurred in 2014 and 2015, and all the valuation issues are concerned, they are wholly reliable. Both of them were involved during the project at the time, had a detailed knowledge of the works, and were credible and honest. Indeed, as their cross-examination unfolded, not only was their evidence not damaged in any appreciable respect, but the patent unreality of the case being run by ICI became more and more apparent. The greater that Mr Bowdery went into detail, the more stark the lack of direct evidence from ICI became.

*Mr Riley*

143. Mr Jonathan Riley was the third witness of fact called by MMT. He had not given evidence in the liability trial. He was, earlier in his career, a marine engineer in the Royal Navy working on the mechanical/propulsion systems of warships, and then after leaving the Royal Navy in 1998 he worked for Siemens. His career has progressed since then as a project manager/quantity surveyor and he now either works in that combined role on smaller projects, or as a quantity surveyor on larger projects. He joined MMT in 2013 and worked on Project Fresco between August 2013 and late October 2014. He was based on site. From March/April 2014 he prepared the measurements and valuations of compensation events together with Mr Drane of MMT, a very experienced quantity surveyor in his late 50s who has been in construction his entire career. They both worked closely with Mr Barton and Mr Hall.
144. Mr Riley was told by Mr Barton in February 2014 that the backlog of measures that had, by then, built up was caused by detailed measures and valuations (that had been submitted by Mr Riley to Mr Barton) being sent onwards by Mr Barton to AkzoNobel's engineering department in Holland for checking, but that process was being delayed. Accordingly, to deal with this backlog, Mr Hall of ICI was allocated to the MMT contract, from a different contract on Project Fresco, and given the principal task of reaching agreement with MMT on these measurements and valuations, as a priority. Mr Riley was then involved in doing this exercise with Mr Hall, and regular site meetings and discussions were held over a period of months to do this. Some of the issues could not be agreed. However, a great number were agreed, and after the commercial meeting of 7 and 8 October 2014 which Mr Riley attended he explained that "the Schedule of Rates items had virtually all been agreed and it had been agreed that many of the pipework measures had been agreed."

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145. It is clear from the totality of Mr Riley's evidence that this was a long and painstaking task for those involved. It was a task performed, from ICI's side, by somebody specifically tasked with doing so (Mr Hall), and under the direct instruction of the Project Manager. It is also clear that the common purpose of the parties, and of the task, was to reach valuations for the purposes of the final valuation of MMT's work. Indeed, given the nature of the task jointly undertaken by Mr Riley and Mr Hall, it would be quite wrong to suggest that these valuations were simply interim ones to be revisited, remeasured and reagreed on a later occasion. Importantly for the purposes of these proceedings, Mr Riley's working documents were kept on site and were therefore retained by ICI when MMT were dismissed from site in February 2015. It is therefore a task which, were it to be performed again, could not be performed by Mr Riley with the necessary level of detail available to him, or using his working documents.
146. I fully accept Mr Riley's evidence, which was given sensibly and clearly (and obviously truthfully) and which entirely accords with commercial common sense. I found him an impressive witness. Subjective intent is not an aid to contractual construction, and I have already addressed the legal status of such agreements. However, in my judgment I find that the purpose of this exercise was to reach final valuations for the purposes of MMT's entitlement under the contract on a final basis, not merely interim amounts. In contractual terms, and given it was not possible (because of the way that the works were instructed in the PMIs) for MMT to provide quotations in advance for compensation events, these valuations were agreed assessments by the Project Manager of the compensation events.
147. Regardless of their precise status in law, the fact that these agreements were reached present ICI with a considerable evidential hurdle, and one which in my judgment ICI simply cannot surmount. Those most closely involved in the works themselves, whether from MMT (who gave evidence before me), and ICI and PROJEN (who did not), all agreed at the time the appropriate valuations of the vast bulk of MMT's works, including rates and measures. These individuals all had very detailed knowledge of what the works were. These valuations are challenged by ICI on the basis of Mr Brownlee's exercise, which I have dismissed as being of no evidential value for the reasons explained above, and which is no longer relied upon even by ICI; and also on the basis of Mr Kitt's exercise, which I deal with below. Mr Kitt's work is plainly not based on any actual direct knowledge of the works themselves, their scope, the conditions under which they were performed, their effect on works that had already been done, the need to redo work, and the fact that the evidence shows (and I find) that a great amount of work was instructed on site directly. Indeed, Mr Kitt has been working in an evidential vacuum, so far as any direct evidence in ICI's favour that is contrary to the contemporaneous valuations is concerned. The evidence that exists is all in MMT's favour. No expert, even a quantum expert such as Mr Kitt, can recreate different primary evidence of fact. The primary evidence here all points in one direction, and that is that the agreements reached at the time by Mr Barton, Mr Hall and others for ICI, with MMT should form the starting point for the final valuation of MMT's works. This is for the evidential reasons that I have explained above. It is only matters that were not agreed (for example, waste, and preliminaries) that remained to be determined.

*Conclusion on the evidence of fact*

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148. In his oral Closing Submissions Mr Mort submitted that the behaviour of ICI/AkzoNobel amounted to bad faith. I am not prepared to consider such a finding, not least because Mr Mort had not put that point expressly to Mr Boerboom and so he had been given no opportunity to respond to it, and also because it is not pleaded. Both of those points are powerful ones against such a finding. Even if it had been pleaded, such an allegation should have been put. I have made sufficient findings against ICI, both in the liability judgment and in this one, to make it clear that I take an extraordinarily dim view of its conduct of the project with MMT, and certain aspects of its conduct of the litigation. In my judgment, it paints the board members of both ICI and AkzoNobel in a dim light that such behaviour was not only tolerated, but so far as the Steer Co approach to MMT in 2014 and 2015 is concerned, positively initiated.

**VIII ICI's application to adduce new expert evidence and further points on disclosure**

149. The first day of the trial was a reading day, and the evidence started on Tuesday 17 April 2018, which was thereafter termed Day 1 as it was the first day of the oral hearing. Late on that day, ICI served a document upon MMT, dated 17 April 2018, entitled "Supplementary Note" by Mr Kitt, the ICI quantum expert. Mr Bowdery explained this in the following way on the morning of 18 April 2018, which was Day 2 of the oral hearing:

"We have a supplemental note from Gary Kitt which we'd like to rely upon. I'm quite happy to deal with this. I would like to put this to Mr McGrady this afternoon."

150. The "supplemental note" was in reality a second expert report by Mr Kitt. It was a detailed analysis of some documents called Daily Task Registers, with which Mr Kitt had only been provided on 12 April 2018. A lever arch file of these documents was produced at the same time as this second expert report. Mr Mort for MMT objected to permission being given to ICI to rely upon this late and new expert evidence. The circumstances of Mr Kitt's new expert report were explored with Mr Bowdery on that first occasion so that I could gauge the circumstances that had led to its production at that late stage. The court was told the following:

1. The documents which Mr Kitt based this analysis on had been recently provided to ICI by PROJEN. That followed the disclosure application made by MMT on 28 February 2016, and an order made by me in relation to disclosure of PROJEN documents.
2. PROJEN had been chased by ICI's solicitors from December 2017/January 2018 for the documents which they held. PROJEN provided these "eventually".
3. The documents, which were MMT documents, were not included in MMT's disclosure, and should have been.

151. MMT did not accept what ICI told the court about the documents, and so I ordered evidence to be served by the solicitors in relation to these documents, and heard a contested application to adduce Mr Kitt's supplemental report on the morning of Day 4. I made clear that if it were admitted, further directions would be required (including, obviously, recalling Mr McGrady, although he was to be recalled in any event due to his 4<sup>th</sup> witness statement).

152. By the time of this application, the position regarding the documents on which Mr Kitt based his new analysis was as follows:

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1. PROJEN had forwarded these documents by email to Mr Hall of ICI on 16 March 2015. This was a date one month after MMT had been dismissed from site, and one month after ICI had assumed litigation would be likely. It was also after the decision in the first adjudication had been issued. ICI had therefore been in possession of these documents since then. This is a period of over three years prior to the quantum trial.
  2. The documents were also sent to Mr Brownlee at about the same time.
  3. ICI's solicitors had received the entirety of Mr Hall's email account "as part of the disclosure process for the second trial on quantum and on 15 September 2017 had uploaded the entire email account to our document hosting platform, Relativity". This is six months earlier than the quantum trial, and five and a half months before service of Mr Kitt's main report. However, the email did not respond to the search terms applied.
  4. After the order for disclosure was made on 28 February 2018 (following MMT's application for disclosure, which ICI opposed), no further documents were in fact received by ICI from PROJEN. ICI did however disclose the email and its attachments to MMT on 13 March 2018, together with other documents that had come from PROJEN. That new disclosure was also given to Mr Kitt, and that was how he had obtained the documents. This is disclosure that ICI had in its possession since March 2015.
  5. Some of the documents had been included in MMT's disclosure in 2016.
  6. The late receipt by Mr Kitt of these documents was not therefore something caused by late receipt of them from PROJEN, as the court was told on Day 2 of this trial. It was caused by a failure to provide him with them sooner by ICI and/or its solicitors.
  7. Documents of this nature appeared in the schedule of privileged documentation, produced after the specific review of privilege by ICI's counsel ordered by me on 28 February 2018, and were identified on that schedule but said to be privileged.
153. Further, the evidence provided by Mr Mills, MMT's solicitor, for this application stated the following information relevant to the application by ICI:
1. At 5pm on Tuesday 13 March 2018 he had received an email from Clyde & Co.
  2. Attached to that email were 4 excel spreadsheets containing lists of 26,063 electronic documents. Mr Mills "understood those documents to have been provided by Projen to ICI as a result of the court order of 28 February 2018." Certainly, based upon what was said at that point by Clyde & Co, that was a sensible understanding by Mr Mills. Mr Mills was certainly not told then the correct position (as now explained in Mr Morris' 6<sup>th</sup> witness statement), namely that nothing further had been received from PROJEN, and that ICI had been in possession of all those documents for years. The email expressly stated "Pursuant to paragraph 2.1 of the Order of Mr Justice Fraser on 28 February 2018, please find attached by way of disclosure lists of all documents created by Projen in connection with the project insofar as they are within the Claimant's possession and control".
  3. It was only when Mr Morris' 6<sup>th</sup> statement was received that Mr Mills realised that these many thousands of documents "had been in the possession of ICI for some time (i.e. since about 2015 or even earlier), but not previously disclosed." Indeed, given the terms of the email of 13 March 2018, which recited that disclosure was being given "pursuant to the Order" of 28 February 2018, it was not possible to know from that, that ICI and/or its solicitors had so many thousands of documents from PROJEN in its possession for so long. Mr Morris' earlier statement had said PROJEN documents were not being disclosed because ICI did not have them, and PROJEN would not provide them. That was plainly wrong. Given it was the basis upon which ICI had

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contested the disclosure application by MMT on 28 February 2018, such an incorrect statement is highly regrettable.

4. At about 4pm on 14 March 2018 Mr Mills received a USB stick containing 144,205 files relating to PROJEN documentation. The reason for the discrepancy in file numbers (144,205 compared with 26,063) was that the documents disclosed on the USB stick contained every page as a single image file. In addition, those files were duplicated by unformatted text files containing the same material. Unlike previous disclosure of electronic documents, ICI did not disclose these documents in native format which would have made it much easier to review. Mr Kitt appears to have been given these documents in native format, unlike the format in which they were given to MMT's solicitors.

5. The documents upon which Mr Kitt had based his analysis which formed his supplementary report were also included amongst the list of 26,000 documents referred to on the Excel spreadsheets provided by Clyde & Co on 13 March 2018, but were not provided to MMT on the USB stick which contained 144,205 files.

6. A substantial number of these documents considered by Mr Kitt were in any event in MMT's disclosure, and the more modest figure given by Mr Morris was incorrect and too low.

154. ICI accepted that what Mr Bowdery had told the court on Day 2 about the provenance of these documents, namely that Clyde & Co had received the documents from PROJEN, and that these documents were only received from PROJEN "eventually" (to use his term, and after PROJEN had been "chased" from December 2017/January 2018) was not correct.

155. It should also be remembered that MMT's application for disclosure, which was heard on 28 February 2018, had specifically sought PROJEN documents. That application was contested on the basis that ICI did not have these documents, had no right to them, that PROJEN would not provide them, and the hyper link which used to give access to them was no longer active. This was stated in the following terms in Mr Morris' 4<sup>th</sup> witness statement:

"6. ....ICI has no contractual right to demand the documents from Projen. Mills & Co has had sight of our client's consultancy agreement with Projen to confirm this for itself. We do not therefore understand Mills & Co's reference to it being ICI's 'duty' to seek to secure copies of the documents. Furthermore, the duty to preserve documents only refers to documents within a party's possession and control. In any event, and as set out in our letters to Mills & Co of 18 January 2018, our client has taken all reasonable steps to secure the documents. Notwithstanding this, we have as promised to Mills & Co reached out once more to Projen for these documents. Projen have not responded to this latest request.

7. We have also asked Blake Newport to locate the email from Andy Barton of Projen to John Copley of Blake Newport sent in April 2015 and containing the download link to the documents which MMT has requested. Blake Newport has now located this email (please see Exhibit 2 of JWM4). Moreover, we have contacted the link provider directly and enquired as to the irretrievability of documents downloadable from expired link (please see Exhibit 3 of JWM4).

8. We do not believe there is any more we can do and MMT's application to the court in this regard is not going to advance matters."

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156. It turns out to be the case, therefore, that ICI had in fact had all of the 26,063 electronic documents sent to Mr Mills, and the 144,205 files on the USB stick, all along, and so far as the documents upon which Mr Kitt's new report was based, had had them for three years. Further, none of these were obtained from PROJEN as a result of the order I had made on 28 February 2018. Not only that, but when these documents were sent to Mr Mills of MMT's solicitors, the way this was done gave the impression that all of these thousands of documents had been obtained from PROJEN very recently, and as a result of my order. Indeed, that was the same statement made in open court on Day 2 by Mr Bowdery in respect of the documents used by Mr Kitt in his analysis. Mr Bowdery's instructions on Day 2 were being given to him piecemeal and under some pressure of time, hence these inaccuracies were not his fault. However, more could be expected of ICI and its solicitors, particularly in terms of the evidence about PROJEN documents placed before the court for the application on 28 February 2018.
157. Further, this sort of inaccuracy in respect of ICI's explanations about documentation are not, sadly, an isolated incident. I dealt in the liability judgment at [21] to [25] about the different accounts given to the court concerning Steer Co and the involvement of Ms Schoolenberg. I have dealt above at [108] with the Blake Newport documents, of which there were some 4,500 or so. I do not consider Mr Kitt can be criticised for doing an exercise based on documents he first received on 12 April 2018, but I do criticise ICI for failing to give him these documents after he was instructed; for failing to draw attention at an earlier stage that these documents had been in its possession for over 3 years before they were given to Mr Kitt; for failing to identify that the bulk of these documents were already in MMT's disclosure, which I find they were; for putting the application initially on the basis that MMT had not disclosed them; and for also doing so on the basis that PROJEN had only recently provided them to ICI. Absent Mr Kitt producing his supplementary report, neither MMT nor the court would have been any the wiser about the fact that all the PROJEN documents had been in ICI's possession all along. I also question why Mr Kitt was given these documents in March/April 2018 in a more usable format than the form in which they were given to MMT, just weeks before a major trial.
158. Two other points relevant to the application should also be identified. Firstly, Mr Kitt embarked upon this exercise with no notice at all to his opposite number, Mr Linnett. This is not co-operative behaviour. Mr Linnett should have been told that this was being done, and the documents could have even been studied together by both experts so that an agreed position could be produced by them on what the documents did or did not show, and the use to which they could or could not be put. I conclude that the only reason for keeping the fact that this exercise was underway, until after it was ready to be served after the trial had actually started, was to cause maximum disruption to MMT. This is a much discredited approach to civil litigation. I conclude that this can be the only explanation for giving Mr Kitt the documents in a more usable (and searchable) format than Mr Mills, MMT's solicitors. The explanation from Mr Morris in his 7<sup>th</sup> statement concerning this was "I understand that the documents were not disclosed in native format in order to ensure that privileged documents could not be accessed via native versions of non-privileged documents." I do not accept that explanation, which to anyone who understands how soft copy documents work, is technically flawed.

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159. These sort of litigation tactics are no longer fashionable (if they ever were), are not acceptable (and never have been), and are not in accordance with any element of the Civil Procedure Rules or the overriding objective. Mr Morris' 7<sup>th</sup> statement contained nothing to suggest that there was any appreciation that the way that ICI had behaved on this subject was simply not acceptable.
160. The second point is that had I granted permission for Mr Kitt's supplemental report, the trial would have been seriously derailed and Mr Linnett would have required some time to consider the exercise, and MMT would have required time to prepare evidence in respect of it. For all these reasons, I refused permission and said I would give detailed reasons for my decision in the judgment. The preceding nine paragraphs of the judgment are those reasons. It would have been fundamentally unfair in all the circumstances to have granted ICI permission.
161. There were other serious concerns about disclosure by ICI in this round of the litigation, which followed other serious deficiencies in this respect in the liability trial. Mr Boerboom gave evidence that he kept notebooks during his time on the project, yet had never been asked for these by anyone and these had now been destroyed. It is not necessarily the case that this is true; I have given by view of him as a witness above. However, if true, it shows an unacceptable approach to disclosure by ICI. Mr Morris, even as late as his 7<sup>th</sup> witness statement dated 22 April 2018 stated "As far as we are aware, MMT did not leave any hard copy documentation on site....". This statement does not comply with the rules because it does not identify the source of Mr Morris' knowledge. However and in any event, that awareness is plainly wrong, because there was and is ample evidence of fact, both during the liability and quantum trial, from all the MMT witnesses that all the hard copy MMT documents were kept on site, and ICI would not permit removal of these from site when MMT were forced to leave site on 15 February 2015. These include, ironically, a great number of working documents kept by Mr Riley and other MMT site personnel for which MMT are criticised by ICI for not being available to the experts.
162. Mr Morris' 7<sup>th</sup> statement also stated that "ICI brought Adjudication 2 in May 2015 due to having removed **all** of its project documentation from site in or around the beginning of September 2014....." (emphasis in original). This again is incorrect, and is also inconsistent with the findings I made in this respect in the liability judgment generally on this subject, for example at [162] and [257].
163. The number of incorrect statements about disclosure that have been made to the court by or on behalf of ICI in this case is considerable. Mr Bowdery attempted on instructions, in the face of strident criticism by MMT in written Closing Submissions, to clarify the situation concerning what documents were given to Mr Kitt by way of oral submissions/explanation on the last day of the trial. I was however left with the unavoidable conclusion that the majority of the criticisms raised by MMT were justified. ICI during this litigation have not conducted themselves in accordance with their obligations on disclosure. Further, ICI have had their solicitors (and on Day 1 in respect of Mr Kitt's exercise, their counsel) make incorrect statements in evidence to the court on several occasions. Mr Morris is a senior and experienced solicitor. I cannot imagine for a moment that he would have told the court in his 4<sup>th</sup> witness statement that PROJEN documents were not disclosed because PROJEN would not release these documents, had his clients ICI told him that they, ICI, actually did have

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these thousands of PROJEN documents in their possession, and had since 2015. His statement that “We do not believe there is any more we can do and MMT’s application to the court in this regard is not going to advance matters” was no doubt correct on the basis of what ICI was telling him. It does however show that ICI must have been prepared to keep the entire picture from their own legal team, either by accident or design. What the court was told, until day 4 of the trial, cannot be squared with knowledge ICI had that so many thousands of documents have been in their possession all along.

164. These failures by ICI are highly regrettable and are entirely out of the norm for commercial litigation.

**IX The expert witnesses**

165. There were two disciplines of expert for whom permission was given. These were quantum experts, who in this case were quantity surveyors, and accountants. I shall deal with each discipline in turn.

*The quantum experts*

166. ICI called Mr Kitt, and MMT called Mr Linnett. Both are highly experienced, both as quantity surveyors, and also as quantum experts. Ordinarily, in a quantum trial, one would expect the two quantum experts to meet, and agree at least one but usually more joint statements, as the areas of dispute between them narrowed or were resolved. Indeed, given the fundamental issues on the works were the proper valuation of the MMT works as at the date of the repudiation, and the fact that those works took place between the end of 2012 and February 2015, and were (even on ICI’s pleaded case) worth in excess of £10 million, the court would usually expect to rely heavily upon expert quantity surveying evidence to arrive at the correct valuation. No judge, even in the Technology and Construction Court, can be expected to embark him or herself upon a detailed valuation of every part of a contractor’s final account or final assessment, particular when the works were (as here) very detailed and the project had developed through numerous design changes over a long period of time.
167. However, in this case the Joint Statement by the Quantum Experts is a most unhelpful document. It is not possible to identify why that is, as discussions between experts are without prejudice. The Joint Statement essentially amounts to a recitation of each expert’s view, with the occasional exception where a minor item was in fact agreed. However, such items are few and far between.
168. The parties each produced what was called a Scott Schedule. The reason there were two was because the parties could not agree on a single one. No such document, which is akin to a pleading, was ordered by the court in this case, and, had I been asked at an interlocutory stage to make such an order, I would have refused. This is because in this case, with the parties at daggers drawn over practically everything, the use of such a document would not be effective in terms of narrowing disputes and enabling a saving of costs. I consider it would be contrary to that. Had I been asked to order one in this particular case, I would have found it contrary to the overriding objective in CPR Part 1. Even if I had been minded to order one, the format of the document would have been discussed, and either agreed or ordered, in a form that would have helped efficient resolution of the different items. As it is, certain issues

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that arose throughout the different items were extracted and separately identified as “Scott Schedule Sub-Issues” which form a separate part of this judgment.

169. There may be many reasons behind this unsatisfactory state of affairs. However, the significant reason is that the two quantum experts have approached their tasks in two starkly different ways. In order properly to understand how this has come about, it is necessary first to consider the position under the contract itself and also the position of the Project Manager. In the liability judgment, I made certain findings that were directly relevant in respect of the latter. I have summarised these at [9] above, but further to the resignation of Mr Barton, Mr Boerboom sought to become the Project Manager in Mr Barton’s place. I found in the liability judgment that this was invalid, in the following terms at [134] – [139]:
134. It is contrary to the whole way in which the contractual mechanism is structured, and intended to work, to have the employer seek to appoint itself (or one of its employees, or an employee of its parent) as the decision maker. As *Scheldebouw* [full case title *Scheldebouw BV v St James Homes (Grosvenor Dock) Ltd* [2006] EWHC 89 (TCC), a decision of Jackson J as he then was] makes clear, “the whole structure of the .... contract is built upon the premise” that the employer and the decision maker are separate entities, and “endless anomalies arise if the employer and the [decision maker] become one and the same”. It can be seen that, so far as the alternative argument put forward by the employer concerning contractual termination is concerned, the giving of notices under the termination procedures in clause 91 of the contract are required to be given by the Project Manager, not by the employer. If the employer and the Project Manager are the same entity, then notices would be coming from the employer in reality, but dressed up as though they were from the Project Manager, and notification(s) would be given by the employer (as though it were the Project Manager) to itself. This is not how the contract is designed to work, either by intention, or indeed by its terms.
135. In my judgment, one need go no further than the reasons in *Scheldebouw* at [45](1), (2) and (3) to conclude that the arguments by MMT on this point are plainly to be preferred. Such a situation is so unusual that an express term is required. There is no such express term here. The situation which ICI sought to impose upon MMT by appointing Mr Boerboom as the Project Manager was fundamentally different to that for which MMT tendered, and contracted. This is the case even though Mr Boerboom was formally employed by AkzoNobel and not ICI. AkzoNobel was and is the parent company of ICI, and he was acting as the project manager for ICI prior to his purported “appointment” as the Project Manager. He was the very opposite of independent on the facts of this case.
136. Mr Barton himself plainly realised the difficulties in the position in which AkzoNobel had placed him. Mr Conrad of AkzoNobel sent an e mail to Mr Barton on 8 October 2014 which stated the following:  
 “This e mail is an official instruction to you that any revision of assessments on PMIs with Merit Merrell will need to be signed off by myself and Theo Brugman before they will be included in the certification each month. This goes for upwards and downwards revisions.”

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137. In an e mail of reply dated 9 October 2014 copied Mr Conrad of ICI and copied to Mr Boerboom and Mr Brugman, Mr Barton stated:  
 “Further to your e mail below and the previous instruction from [Mr Boerboom] and [Mr Brugman] I believe that an amendment to the Contract is now required to give AkzoNobel full responsibility for the contractors.  
 As you are aware Projen plc are named in the Contracts with [MMT and others] as the Project Manager. Under the NEC3 Contract the Project Manager carries a lot of responsibilities in terms of the administration of the Contract. As I am no longer empowered by the Employer to carry out these responsibilities it is, I believe, time to change the Project Manager to AkzoNobel”.  
 Mr Barton was wholly correct; the instruction to him that AkzoNobel had to “sign off” – which means agree with – any revisions of assessments before they could be included in the monthly certification meant that AkzoNobel had removed certain (if not all) of the powers that were essential for Mr Barton to act as the Project Manager. He had no option but to resign.
138. As this and other similar correspondence shows, prior to PROJEN’s resignation AkzoNobel had interfered with the proper exercise by PROJEN of its duties and I find as a fact that this is why PROJEN resigned.
139. AkzoNobel and any of its employees or officers were not sufficiently independent – indeed, were effectively the employer under the contract by another name – to act as Project Manager. I find that no proper appointment was made of a replacement Project Manager under the NEC3 terms, following Mr Barton’s resignation which occurred on 9 October 2014 “effective immediately”. Further, I find that the purported appointment of Mr Boerboom as his replacement was a breach of contract by ICI.
170. Following Mr Boerboom’s “appointment” of himself as Project Manager, the project stuttered on, but with increasing difficulties for MMT. These included the 10 Point Letter agreement wherein ICI said a further payment of £2.5 million would be made to MMT if certain conditions were met, but internally had decided not to pay this sum regardless of satisfaction of conditions. Eventually, ICI dismissed MMT from the site with 24 hours’ notice, but supposedly in an act of acceptance of (non-existent) repudiatory breaches. The reason that this is relevant to valuation of MMT’s works as at 17 February 2015 is threefold.
1. Mr Boerboom engaged Blake Newport to perform what was called a Project Manager’s Final Assessment, but without the involvement of any Project Manager under the NEC3 Contract because there was none.
  2. There was no replacement Project Manager validly appointed at any time following Mr Barton’s resignation.
  3. Agreements previously reached between MMT and the Project Manager on a wide number of compensation events were simply ignored by Mr Brownlee, and treated as being of no consequence. Mr Boerboom said he did not tell Mr Brownlee about them, but even when Mr Brownlee learned of some of these in October 2015, he ignored them in any event.
171. Accordingly, the correct approach of the quantum experts to the proper valuation of MMT’s works should have been as follows. Firstly, to consider the liability judgment and take express note of the relevant findings as to how the role of the Project

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Manager was interfered with, leading to Mr Barton's resignation. Secondly, to consider the contemporaneous agreements reached between Mr Barton, others acting for ICI such as Mr Hall, and MMT. Thirdly, to consider the factual evidence (for example of Mr Riley for MMT, and any evidence from ICI) and to conduct at least alternative valuations on the basis that the court may accept such evidence. This would essentially consist of addressing outstanding quantum issues on the two different factual cases advanced by ICI and MMT, insofar as an alternative factual case was advanced by ICI. ICI's case was essentially contained within the assessment done by Mr Brownlee; MMT's case was contained within the valuation predominantly prepared by Mr McGrady, but also supported by other factual evidence such as that of Mr Riley.

172. The degree to which either Mr Kitt or Mr Linnett performed that task will now be considered. There were substantial differences in their approach.

*Mr Kitt*

173. Mr Kitt produced his Report dated 2 March 2018, the supplemental report for which I refused permission, and an Errata dated 23 April 2018. He is a Chartered Quantity Surveyor and has worked in the industry since 1983. He is a Fellow of the Royal Institute of Chartered Surveyors, a Fellow of the Chartered Institute of Building, and a Fellow of the Chartered Institute of Arbitrators. He is a Chartered Arbitrator, an Accredited Mediator and has a M.Sc. in Construction Law and Arbitration. He is accredited as an expert witness by the RICS and he is a member of the Academy of Experts. He is also certified as competent in cross-examination under something called the Bond Solon/Cardiff University Expert Witness Scheme. He is also a qualified barrister.
174. His instructions were included in an appendix and were to "examine all documents determined by you to be relevant in order to comment on the difference between the quantum actually paid to MMT in respect of work executed and the quantum which MMT would have recovered under clauses 90 and 93 of the contract so that the quantum of the overpayment, if any, by ICI to MMT can be calculated." As well as documents in disclosure – although not the PROJEN documents ICI had since 2015, which he did not receive until March 2018 as explained above – he was given the liability judgment. An extract concerning the conclusion to issue 10 in that judgment was drawn specifically to his attention. However, none of the passages dealing with the Project Manager's resignation, Mr Boerboom's interference, or the court's findings on the ineffectiveness of Mr Boerboom's purported appointment as Mr Barton's successor, were drawn to his attention in the same way (or at all). This is surprising. The conclusion to issue 10 simply dealt with the principle of ICI being entitled to recover an overpayment; it is possibly the least relevant of all the findings, and could almost be taken as read, given there was to be a valuation of MMT's works. Given Mr Kitt was being instructed to consider the correct valuation of MMT's works, the fact that any such overpayment was entitled to be recovered by ICI in principle was not of direct relevance. The findings regarding the Project Manager however were. He was also instructed in respect of certain heads of MMT's counterclaim.
175. Inherent within any valuation exercise of an expert nature in this case should be for that expert to take into account the agreements reached between MMT and Mr Barton

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(and Mr Hall and Mr Conrad, for that matter) during the course of the works. There is a legal issue as to whether those agreements are legally binding (in the sense that they cannot be opened up) and there is an evidential issue as to whether they should be weight because they represented the parties' contemporaneous view of the correct value for the numerous PMIs for the different works instructed in those PMIs. However, no expert could resolve either of those points. Any expert valuation exercise should however have taken account of the fact that MMT's points on their applicability could find favour with the court. In other words, even if it were only an alternative, a valuation taking those agreements into account should have been considered.

176. However, Mr Kitt chose entirely to ignore these agreements and by doing so took a position on what is an issue of fact and law for the court, that it is not within the sphere of an expert witness to do. Nor did he simply ignore the agreements altogether. On some issues, he mounted arguments positively in ICI's favour against those agreements being applicable. The clearest example in this respect is what he chose to do regarding rates.
177. The contract was an amended NEC3 form of contract. The form of contract was NEC3 option A, namely one with activity schedule (ie payment of lump sums against identified activities), but the original scope of work was for the installation of steelwork and was described in it by the general description "*steelwork and tank installation works*". It did not include pipework. The original steelwork package was the subject of an invitation to tender issued by PROJEN in August 2012 ("the ITT"), a tender issued by MMT, and a post tender or pre-contract meeting in December 2012 for which the minutes are available, and were expressly bound into the contract documents and made an appendix thereto. The contract dated 17 December 2012 was made up of (i) a lump sum element for the original steelwork, (ii) some rates for such part of the steelwork that was not fully designed, and a further sum (equivalent to about 3% of the contract sum) for MMT's preliminaries. The total contract sum at that stage was £1,984,257. The important point to note is that under the terms of the contract, the parties agreed to the use of a schedule of rates instead of the determination of actual cost for the valuation of compensation events. This is clearly set out in the Contract Data part two.
178. In Appendix B to the Contract documents, the ITT itself was included. Item 1.4 of the ITT read "Contractors Schedule of Rates: Tenderers are to submit a schedule of rates for people, plant, materials and equipment that will be required to perform the works and are to be valid for the duration of the contract works". Item 2.12 of the same document was headed "Schedule of Rates" and stated:  
"The tenderer shall provide the following schedules of his rates that are applicable to the subcontract works:
- Schedule of Rates for Labour
  - Schedule of Rates for Plant and Equipment
  - Schedule of Rates for Materials
  - Daywork Rates"
179. The Pre-Contract Review Meeting Minutes (the minutes from the meeting to which I have referred) were included in the contract documents and made Appendix G. These

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minutes clarified various matters arising out of the tender, together with other identification of nominated personnel (for example the PROJEN QS was identified as Mr Barton) and key MMT personnel were also identified. Importantly, so far as this dispute is concerned, item 4.0 was headed “LABOUR AND CONSTRUCTION” and at item 4.1 the following labour rates were listed:

**4.1 Rates of Pay (Hourly rates submitted, weekends o/t 1.5. and 2 x rates)****Normal working hours – 8am – 5pm Monday to Friday**

Supervisor/Foreman	£35.00/hour
Welder	£30.00/hour
Fitter/tradesman	£28.50/hour
Steelwork Erector	£28.50/hour
Banksman	£25.00/hour
Rigger	£23.50/hour
Mate/Labourer	£17.00/hour

**Saturday working Premium time rates;**

Time and half applies to hours worked between 8am to 1pm

Double Time applies to hours worked between 1pm to 4pm

**Sunday working Premium time rates**

Double Time applies to hours worked between 8am to 4pm”

180. I find that these are the agreed Schedule of Rates for Labour identified in the first bullet point in the tender. Indeed, this is not a difficult point of construction. The fact that the heading is “Labour and Construction” followed by labour rates, and does not use the specific phrase “Schedule of Rates”, does not, in my judgment, matter. These are clearly the rates provided by MMT to the Project Manager, at his request, for labour. They are the rates requested in items 1.4 and 2.12 of the ITT.
181. These rates were used by MMT throughout the project, and this use was approved by Mr Barton. Further, the agreements reached in September and October 2014, and the re-submitting of PMIs in agreed figures, to both of which I have already referred, used these rates without objection from PROJEN.
182. However, Mr Kitt has decided not to use these rates. He decided to value the MMT works using actual cost. There is no contractual basis for this whatsoever. It is a wholesale departure from the contract terms. It is to ignore the Contract Data part two. Further, and even if it were right to adopt a valuation method entirely outwith the recorded written agreement of the parties, he did not in his report produce a valuation using these rates at all. In other words, there is no alternative valuation provided by him for use by the court if the ICI position (and Mr Kitt’s position) on the non-applicability of these rates was not accepted. There is no good reason for this wholesale omission.
183. Mr Kitt decided that the rates to which I have referred were what both he, and Mr Bowdery, insisted on calling “daywork rates”, and that these should not be used. In his executive summary he said “I... am of the view that the subcontractor quotations relied on by MMT do not bear close scrutiny when the work content is considered. One of the reasons for this is that MMT’s valuation of numerous PMIs relies on labour claimed on a “Daywork” basis, albeit without any contemporary evidence that the allocation sheets were signed.” When this was explored in cross examination, it

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was obvious that the entry in the Pre-Contract Meeting Minutes further on in that document, in respect of a different item namely item 5.2 was being relied upon to justify this stance. This stated “All daywork sheets to be presented daily for signature by Projen Site Construction team; actual name of relevant Supervisor to be advised”. This was the only reference to dayworks in that document. Certainly the word was not used at all in the section dealing with rates.

184. With respect both to Mr Kitt and Mr Bowdery, who put this point to the MMT witnesses with remarkable enthusiasm, this is a very bad point. Item 5 is concerned with Quantity Surveying, as the heading makes clear. All the entries in item 5 are concerned with the procedures to be adopted, and not the valuations themselves. Further, the word “dayworks” does not appear in Item 4 at all. The hourly rates at item 4.1 are clearly what they say they are, namely “rates of pay” for “labour and construction”. These minutes were signed by all the parties, and were contract documents. It is of course acceptable for Mr Bowdery to run this point, and make submissions based upon it. It is not acceptable for an independent expert to decide that it is the correct approach to the contract, and wholly ignore the other approach – in other words, to decide for himself (and put some effort into persuading the court) that this was the correct interpretation.
185. Mr Kitt justified his approach, namely calculation of what he said was actual cost, on the basis that to do otherwise would represent what he called a “windfall” to MMT. He expressly said at paragraph 3.2.9 of his report: “Whilst interpretation of the Contract is a matter for the Court to decide, I am of the view that the rates that I propose to use, representing what I believe to be MMT’s actual costs, are more reflective of the true cost to MMT, whereas the ‘Daywork’ rates proposed by MMT would, in my opinion, provide MMT with a windfall.”
186. This is not the type of evidence that an independent expert, complying with their duty to the court, should be giving. This is for the following reasons in this case:
1. The contract between the parties was not one where cost incurred by MMT was part of the contractual payment mechanism. That way of valuing the works (which is a potential option under the NEC3 contract form) had expressly not been adopted, in favour of the one that was adopted, namely Schedule of Rates.
  2. Nowhere in the Particulars of Claim was it pleaded by ICI that MMT was to be paid on the basis of its actual costs. ICI’s pleaded case was that an overpayment was due on the basis of MMT’s contractual entitlement as assessed by Mr Brownlee’s exercise.
  3. By embarking upon this exercise, Mr Kitt was attempting to rewrite the parties’ contractual bargain. He was also failing even to consider the pleaded issues. He was creating new issues that prior to his involvement did not exist, namely a novel approach to valuing the MMT works, on the basis of actual cost, and not the Schedule of Rates.
  4. He chose to ignore express entries in signed minutes that were clearly contract documents, and the “daywork rates” argument was wholly artificial and contrived.
  5. He also completely ignored the acceptance of these rates during the project itself by PROJEN and Mr Barton. In fact, on his approach, nothing Mr Barton had done in terms of valuations (whether interim assessments or agreements on the different PMIs) was relevant.

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6. His understanding was somewhat sketchy, and at one point said “Could I just perhaps ask a question? Is that -- are we saying that's part of the contract, the invitation to tender?” If there were any genuine doubt in his mind on such an important point, he should have asked his solicitors for guidance on this long before coming to give his evidence (and preferably before writing his report, in which he could have recorded what he had been told was the status of the ITT).

7. His use of the term “windfall” made it clear that he had adopted a different method of valuation to that included in the contract, and agreed by the parties, because he felt that to use the correct contractual approach would result in MMT being paid more money than it ought to have been. This is diametrically opposite to the exercise in which he should have been involved, and has echoes of the way that Mr Brownlee had worked towards a number, rather than doing a proper valuation working towards ascertaining the correct figure using the contractual mechanism. It also suggests that he may have done some valuations using the Schedule of Rates, and was unhappy with the result, so had used a different method.

7. It was also directly contrary to his understanding of what had been done during the works, as he accepted during cross-examination in the following terms: “My understanding was that PMIs were issued instructing MMT to carry out, for example, further pipework, and then it would be valued if it could using the schedule of rates, and if there wasn't a rate, the parties would look to agree a different rate.” Given this was Mr Kitt’s understanding, his decision to depart from this, ignore rates, and calculate actual cost (even if that is an accurate term for what he was doing) is inexplicable.

8. This method of valuation was verging on being upside down, back to front, or any other descriptive term that demonstrates a method whereby one works towards a desired result, rather than having the end result emerge from the overall components of the valuation exercise.

187. I do not consider that Mr Kitt should have embarked upon such an approach, which is not one that an independent valuation expert should have adopted. MMT in its written Opening Submissions described his exercise as “the fourth attempt by ICI to bash MMT and its account”. Although expressed in somewhat informal terms, I accept that characterisation of it.

188. There are a number of other respects in which I found Mr Kitt’s approach to his evidence wholly unsatisfactory. There was factual evidence from MMT’s witnesses that the majority of the steelwork which was the subject of the contract, prior to the instruction of further work in PMI03, was outside the building. He refused to accept this, and said this was a “common misconception”. Given MMT’s witnesses, Mr Wells and Mr McGrady, were witnesses of fact and had been involved at the time, it is a surprise to me that Mr Kitt believed himself to be in a better position than either of them on matters of fact, or saw fit “not to agree” with their factual evidence on matters of fact.

He took a view on most things, preferring his own even to other contemporary references, even those from the Project Manager. For example on preliminaries, when something Mr Barton had stated in a contemporaneous document was put to him, he said “That's what he's [ie Mr Barton's] saying. I must admit I would have formed a different view -- have formed a different view by looking at the documents.”

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189. Nor was his approach consistent. For some compensation events he used actual costs, for others he did not. His explanation for this was not persuasive.
- “Q:....No, the issue, Mr Kitt -- which I would invite to you agree with -- is that what the parties are agreeing here is that they will use a schedule of rates for valuing compensation events. That's what they're agreeing to, isn't it?
- A. Well, as I've said before, my Lord, I understand these rates to be what I would call daywork rates for modifications, not for valuing, for example, time-related staff members on a prolongation claim.
- Q. But that's not by reference to anything in any document, agreed?
- A. No, I think there's a -- I think when the parties were discussing the prolongation or preliminaries claim, my understanding is that it was Mr Barton who referred to a cost base valuation, a global cost I think he said.
- Q. In terms of contract documents, sorry, Mr Kitt?
- A. Sorry, no.
- Q. If we turn on in the bundle, the E bundle, on to internal page 59, sorry, bundle page 61, so if we could go into the bottom half, please, this is still in the invitation to tender, Mr Kitt.
- A. Yes.
- Q. I'm just putting this to you. This is all incorporated into PMI 3 albeit that then becomes a PMI, but these are all of contractual effect, agreed? The documents and all these terms, are all of contractual effect for PMI 3, is that your understanding?
- A. Yes, I believe so.
- Q. That's how you have approached the valuation exercise.
- A. Yes, I've approached valuation of pipework and modifications like that applying the rates.
- Q. And compensation events?
- A. Not all compensation events. I haven't valued all compensation events applying these rates.
- Q. You haven't?
- A. No.
- Q. So how have you decided, from a quantity surveying point of view, whether to adopt the process described here, which is to delete the schedule of cost components, and instead use schedule of rates for ascertaining actual cost, how have you decided when to follow what the contract says and when to use a different method for valuing compensation events?
- A. The answer to that, my Lord, is if we're talking about the additional preliminaries, what I've done, I've actually provided a valuation using what I believe were MMT's actual cost rates.”
190. This is even though it was put to Mr Kitt, and he accepted, that one of the principles behind the NEC3 contract was that all compensation events be valued on the same basis. There is no sensible or rational explanation for this inconsistency by Mr Kitt.
191. There are a number of other respects in which I found Mr Kitt's approach to what was supposed to be an independent exercise wholly unsatisfactory. There were competing valuations on many items, namely the MMT one and that by Mr Brownlee. As an example of the way in which he would prefer ICI's valuation, his approach to PMI 169 is illustrative.

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192. He examined this at section 6.5 of his report. The difference between the parties on this item was £88,287, as MMT were claiming £111,884 and ICI (from Mr Brownlee) had a figure of only £23,597. Having analysed the details of the PMI, Mr Kitt concluded “in the light of my comments above, whilst unsatisfactory, I am unable to support either parties’ valuation”. However, he then continued “and I can do no better than to include ICI’s valuation if a finally binding agreement was not reached.” When questioned about this by Mr Mort, he could provide no satisfactory answer, and in fact spent approximately 3 pages of transcript not really providing an answer at all. This was despite the fact that there was a Project Manager’s assessment of this item, and he accepted that he was “potentially” (as he put it) in a “considerably worse position” than the Project Manager.
193. He made two witness statements in support of ICI’s (unsuccessful) application for disclosure against MMT. In these, he identified documents that he said were required in order for him to perform his expert function. It is very surprising to read witness statements from an independent expert supporting an interlocutory application by a party in litigation. Usually – if not invariably – the arena is left to the parties in this respect, and the independent experts of any discipline work with that they have. That was not the approach of either of the ICI experts in this trial, either Mr Kitt or Mr Thompson, both of whom lent their support to a fiercely contested application for an order against MMT.
194. Mr Kitt provided two witness statements supporting this application by ICI for disclosure from MMT. In order to put what follows in context, it is relevant to identify that part of the MMT claim for steelwork relied upon an agreement with Mr Barton that MMT would be paid its costs incurred in having a particular steelwork sub-contractor called FJ Booth Ltd perform such work. The categories of document which Mr Kitt stated he required in order properly to value MMT’s works were of staggering breadth. His witness statements supporting this application were dated 21 February 2018 and 13 March 2017. He had been instructed in September 2017. A letter from Clyde & Co dated 13 February 2018 described the experts’ views that the documents sought were “vital...in order to understand and opine on the issues before them.” If these documents really were “vital” one would have expected Mr Kitt to have identified this before February and March for a trial due to commence in April. However, so far as categories of documents were concerned, these included (appended to Mr Kitt’s witness statement) a list of categories such as individual payslips for PAYE staff, evidence that payments had actually been made to FJ Booth, daily allocation reports (which show who was doing what work where on the site on what particular day), copies of invoices showing that overtime had been paid to operatives and “allocation sheets evidencing the hours claimed.” Another category is “all test packs”, which relates to the testing carried out on enormous quantity of welds. Quite apart from the point above about allocation sheets having been in the possession of ICI since 2015, these types of categories demonstrate an investigative exercise of an audit nature, and is far more comprehensive than could reasonably be required for a valuation exercise. Nor can such categories sensibly be described as “vital” for an expert “to understand and opine on the issues”.
195. I refused to make the order sought by ICI on the interlocutory application for disclosure. That was not appealed. I did not on that application, and do not now, consider that documents of such wide-reaching categories are even necessary, let

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alone vital. In addition to that, it is clear that the nature of this investigative exercise upon which Mr Kitt was involved, and these allegedly “vital” categories of documents, entirely ignored the similar exercise performed (again, contemporaneously) by Coppa. This exercise is dealt with at [121], [122], [181] and [236] of the liability judgment. The following text appears at [121]:

“121. ICI instituted an audit of MMT’s account, and this was performed by a practice called Coppa Associates. This was therefore called the Coppa audit. There may have been a hope at AkzoNobel that this would uncover something that could be used against MMT. Instead, it did not, and broadly vindicated MMT’s financial account. In the assessment performed internally by AkzoNobel dated 6 January 2015, when the first round of the Coppa exercise was either completed or nearing completion, Mr Shuttleworth wrote in an e mail the following:

“Assuming Coppa are correct and based on invoice value from [MMT], we owe [MMT] £6.12m. The Capex budget allows for £3.2m for further [MMT] spend ..... [AkzoNobel] can only pay [MMT] a maximum of £3.2m.”

196. Mr Kitt appeared not only to be wholly ignorant of the express finding that the Coppa Audit “broadly vindicated” MMT’s costs and account, but also sought to perform a similar audit exercise all over again. In my judgment, that approach by him to the valuation of the MMT works cannot be justified.
197. Other passages of his report demonstrated a failure to grasp the essential requirement of his task, namely perform an independent valuation of the works, and not argue the case for ICI, or adopt points in a partisan fashion. In paragraph 11.5.3 in relation to the claim for extra testing he stated:  
 “I am of the view that Merit had ample opportunity when pricing PMIs subsequent to PMI 3 to include the amount that it believed was required to reflect any potential additional cost of testing. This is no different to, for example, MMT adjusting its rate for welding to reflect welding being carried out on site rather than in the fabrication shop. In my opinion, MMT would have been aware of any different testing requirements at the time of preparing its drawings and its quotations and should have made allowance as necessary.”
198. This passage constitutes not only Mr Kitt taking a position on an issue of fact, but his creation of such an issue of fact where there was none. All the factual evidence from MMT was that the scope of the works was not known and indeed the text of PMI03 makes that clear, as do the number of PMIs issued afterwards. The pipework was instructed over a lengthy period and the design changed, and changed often, and the design models simply did not show the extent and scope of the work that in the end proved necessary. How Mr Kitt was able to interpret that as MMT having “ample opportunity” to include the potential further scope of testing required, and to be aware of the different testing requirements at the time of preparing drawings for each PMI is something of a puzzle. It is contrary to the evidence of fact. This is a clear demonstration of Mr Kitt adopting a partisan, and in my judgment unsustainable, position in ICI’s favour. No independent expert should do this.
199. I do not consider that Mr Kitt prepared his valuation evidence in this case with sufficient attention to his duty to the court as an independent expert. His evidence was not entirely wasteful and of no assistance in the sense that he highlighted some

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duplication and other errors in calculation, which he unearthed as a result of the examination of the underlying documents which he considered. However, overall his expert evidence favoured ICI at the expense not only of ICI's pleaded case (which he did not support) but also at the expense of providing any impartial assistance.

*Mr Linnett*

200. Mr Linnett is a Fellow of the Chartered Institute of Arbitrators, a Fellow of the Royal Institution of Chartered Surveyors or RICS, has a Diploma in Arbitration and a B.Sc in Quantity Surveying. He, like Mr Kitt, is an experienced expert and also sits as an arbitrator and adjudicator. Since 2003 he has been in sole practice as an adjudicator, arbitrator, expert witness and adviser on construction disputes.
201. His instructions were "to consider and form a view as to the proper value of works carried out by MMT and the loss of profit MMT suffered on other projects by reason of reduced payments negotiated on those other projects." Mr Bowdery sought to challenge Mr Linnett's approach as being different to Mr Kitt's, and failing to attempt a valuation of MMT's works. He also criticised Mr Linnett for not valuing each and every item. Mr Linnett's answer was as follows:  
"One of the things that I think distinguishes my report from Mr Kitt's -- and I note this morning that Mr Kitt said he didn't address every point of every item -- but I focused on what parties were claiming on the one hand and what the defendant was saying on the other hand, and I tried to assess the quantum based upon the arguments of the parties. I certainly didn't understand my instructions to be open up, review and revise everything in the account, even if it's apparently agreed and not in dispute."
202. That answer encapsulated the different approach of the parties' two quantum experts. If ICI and MMT had agreed a particular PMI, then Mr Linnett did not revalue that item in order to come up with a further, new, and different valuation that was not contended for by either party. Indeed, it is difficult to understand why any independent expert would wish to do so, notwithstanding the great enthusiasm with which Mr Kitt embraced exactly that task. Mr Bowdery then approached the same point by suggesting that Mr Linnett had approached the task as though he were an adjudicator. Mr Linnett rejected that criticism and so do I.
203. Mr Linnett confirmed that there were no limits put on his investigations, and also it was clear, both from his expert's report itself and also his cross-examination, that where he felt he could not give any relevant evidence or assist the court, he said so. For example, in his paragraph 28, he made clear that he did not have time to address the second limb of his instructions and deal with the loss of profit MMT had suffered on other projects where it was said by the MMT witnesses reduced payments were negotiated. He did not therefore do so, and although he expected to produce a second report dealing with this item, "things moved on" as he put it, and he did not do so. He did not feel he could provide expert evidence on that point.
204. He was also criticised for not performing an exercise to the same degree of detail as Mr Kitt. Given the criticisms I have made of Mr Kitt above, Mr Linnett's lack of audit investigation to the same degree cannot stand as a criticism at all, in my judgment. I find he approached his task thoroughly. Another criticism of Mr Linnett was made in respect of his approval of the valuation of PMI 126, which depended upon the correct arithmetic total of four invoices. Mr Linnett added these up and reached a total of

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approximately £65,777 (ignoring the pence). Mr Kitt came to a different total, namely £54,443. However, it is not unusual to find isolated arithmetic errors, and a single one such as this does not undermine my confidence in Mr Linnett. Not only that, but MMT accepted that there was such an error and corrected the amount claimed for PMI 126. I do not consider that this amounts to justified criticism of Mr Linnett for not performing his task properly, which was the way that Mr Bowdery for ICI sought to elevate this.

205. I found Mr Linnett a reliable and independent expert witness. His exercise had two considerable advantages over that of Mr Kitt (in addition to the other points I have made about Mr Kitt above). These are firstly, that he took as his starting point the contractual agreement between the parties, which is essential if one is attempting to perform a valuation under a contract; and secondly, that he performed his exercise independently. He had made an arithmetical mistake, which I have referred to at [204] above, which related to the addition of figures on four separate invoices. However, isolated matters of that kind do not undermine the central reliability of his exercise. I prefer Mr Linnett's evidence to that of Mr Kitt.

*Conclusion on quantum experts*

206. There was a remarkable contrast between the quality of the expert valuation evidence from the two quantum experts in this case. For the reasons explained above, I prefer the expert evidence of Mr Linnett to that of Mr Kitt in all respects. The arithmetical error to which I have referred was corrected by MMT.

*The accountancy experts*

207. ICI called Mr Thompson from Grant Thornton, and MMT called Mrs Barker from KPMG. Their approaches and instructions were, again, rather different to one another. The question of permission for such evidence was raised by the parties following the liability judgment. MMT issued an application dated 21 July 2017 which, as well as seeking to amend the counterclaim (some of those amendments being permitted, some refused) sought permission to call expert evidence "to address such accountancy issues as arise out of [MMT's] counterclaim". The evidence in support from Mr Mills, MMT's solicitor, stated "it is also necessary to call an accountancy expert witness to support the aforesaid business losses". In the Order of 26 July 2018, I did not make such an order but allowed the parties time to consider whether such an order was necessary, given permission was only given for some of the amendments. Permission was subsequently given in an Order of 22 December 2018, that order stating "permission is given to the parties to rely upon the evidence of an expert witness specialising in accountancy in order to address such accountancy issues as arise out of the Defendant's counterclaim".
208. The witness statement supporting that application (which was made by consent) was Mr Mills' 6<sup>th</sup> statement. This stated that there were certain issues that required specialist accountancy evidence that were outside the scope of expertise of a quantity surveyor, and also expressly stated in paragraph 12:
- "The issues that the expert will address are:
- a) The cost of professional advice arising out of the repudiation including the need for that advice and whether those costs are reasonable.
  - b) The cost of management time arising out of the repudiation including the need for that time to have been expended.

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- c) Whether it was necessary for the Defendant to negotiate reduced payments on other projects and whether that action was reasonable.
- d) The additional cost of financing, credit insurance, lost trade discounts and lost trade rebates arising out of the repudiation.
- e) Additional tax liabilities arising out of the repudiation.”

209. This permission was granted. I agreed that the issues identified by Mr Mills required an expert accountant rather than evidence from the quantity surveyors (for whom permission had already been granted). It might therefore be thought that the instructions given to the expert accountants would at least be framed on the issues identified by Mr Mills.
210. However, this was not the case as will be seen.

*Mr Thompson*

211. ICI called Mr Thompson, who is a chartered accountant and a Director at Grant Thornton UK LLP. He was at KPMG LLP for 27 years, moved to Grant Thornton in 2013 and so has over 30 years of experience. He has specialised in forensic accounting for the last 25 years.
212. His instructions formed part of his report and ICI’s solicitors drew his attention both to the Order giving permission for such evidence, and also specifically instructed him (in paragraph 4.5 of his instructions) to opine on losses at paragraphs 115(3) to 115(8) of the Re-Amended Defence and Counterclaim. These broadly matched the categories identified in Mr Mills’ 6<sup>th</sup> witness statement.
213. However, paragraph 4.6 of his instructions stated the following:  
“In relation to the foregoing heads of loss, you are instructed to opine both on the quantum of the loss claimed and on the extent to which such losses might be considered, from an accountancy perspective, to arise as a consequence of ICI’s repudiation of the Contract. In particular the extent to which MMT’s financial position post the repudiation of the Contract (and the losses it says flowed therefrom) resulted from the repudiation.”
214. These instructions clearly sought to have Mr Thompson give his opinion on causation to the court. The inclusion of the phrase “from an accountancy perspective” in the first sentence of the extract above does not dilute that fact. The final sentence asking for his opinion on “the extent to which MMT’s financial position post the repudiation of the Contract (and the losses it says flowed therefrom) resulted from the repudiation” could not, in my judgment, be a clearer request (actually, an instruction) for Mr Thompson to opine on causation. Given these were Mr Thompson’s instructions, it is difficult to criticise him unduly for following them, although the way in which he did so can, as will be seen, justifiably be criticised. Criticism is however justified for the instructions themselves. Whether losses flowed from a repudiation and other similar matters of causation in this case are matters for the court. They are not matters for accountancy expert evidence, and they were not an area in which permission was given for accountancy evidence. The proper approach was not to excise those matters from his report, but to leave the report and for me as the trial judge only to consider those parts that were admissible. This is consistent with the dicta of Henry Carr J at [4] in *Moylett v Geldof* [2018] EWHC 893 (Ch) and Thomas

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LJ (as he then was) at [117] in *Secretary of State for Business Enterprise and Regulatory Reform v Aaron* [2008] EWCA Civ 1146. This is the approach I adopted.

215. One of the heads of claim advanced by MMT in its counterclaim relates to costs incurred by MMT as a result of having to switch its banking facilities from April 2015. It had banked, prior to that, with Bank of Scotland. Given its financial predicament, once the payment (in gross terms, £9.1 million) due from ICI under the decision in Adjudication No.1 was banked, that Bank immediately withdrew all of MMT's credit facilities. The overdraft facility previously available had been £4 million. Mr Wells gave cogent evidence on this subject in the liability trial. MMT then (and after some time) managed to switch to Santander, but on less beneficial terms.
216. Mr Thompson dealt with this in Section 22 of his report. Statements demonstrating Mr Thompson taking a partisan stance on matters of fact pepper his report, for example at paragraph 22.2 where he stated "it is not evident to me how these costs are linked to the repudiation". At paragraph 22.7 he stated "MMT claims that Bank of Scotland made the decision because of ICI's repudiation of the Contract" and at paragraph 22.12 "Without further disclosure, it is unclear to me whether the repudiation on 17 February 2015 was the reason for Bank of Scotland deciding to review its facility with the Merit Group....."
217. This evidence from an expert who is supposed to be independent is wholly surprising. Firstly, it is taking a view on the facts. Secondly, however, and more important, this specific point was the subject of a specific finding in the liability judgment at [55], when dealing with the consequences of MMT being required to leave the site and the effects of that when I found:  
 "It was undoubtedly a major reason for MMT's bank to withdraw its borrowing facilities the moment that the money from ICI in satisfaction of Adjudicator's Decision No.1 was banked".
218. Mr Thompson was asked in cross-examination about this wholesale ignoring of the liability judgment. He accepted that he had been given the judgment, said he had read it carefully, thought it "might" be binding, but said that he had read it towards the beginning of performing his exercise. When [55] of the judgment was put to him, he said he had forgotten the detail of it. The exact question and answer was as follows:  
 "Q: So you read that, but then you put it to one side and your thirst for knowledge about accounting matters caused you to forget the detail of it, is that what happened?  
 A. Yes."
219. He explained in his own words "I read the judgment, but that was at the start of the case, and the instructions were to look at the heads of the counterclaim made -- pleaded by MMT and to assist the court from an accountant's perspective in those heads of counterclaim."
220. There are other examples of his wholly unhelpful approach, and the way in which his report approached the issues presented for him to deal with a partisan way. He completely omitted to deal with the fact that following the proposed CVA in early 2015 (and before receipt of the funds from ICI paid under the decision in Adjudication No.1) MMT's ability to institute adjudications on other projects was

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directly and obviously damaged as a result of the principles applied by the court on enforcement in respect of companies whose financial situation has significantly deteriorated. He produced a graph of MMT's financial position, heavily relied upon by Mr Bowdery, that had completely omitted to identify that between March and May 2015 MMT had no overdraft facilities whatsoever. He commented on an internal email that he found in disclosure dated 13 December 2016 from Mr Mills to Mr Wells and Mr McGrady (and others) and stated in conclusion:

"I understand this paragraph to say that following ICI's payment of £9.1 million on 17 March 2015, the cash flow position had been resolved."

221. This conclusion was not an accurate summary of the email, was directly contrary to the findings in the liability judgment, and was directly contrary to the evidence being adduced by MMT by its factual witnesses. Expert witnesses should not embark upon such primary challenges to the facts. If there are two versions of the facts, experts should consider them both. They should not choose which version is correct; that is the function of the court.
222. Mr Thompson has been subject to judicial criticism before. In *Genesisuk.net Ltd v Allianz Insurance Ltd* [2014] EWHC 3676 (QB) he was said by HHJ Mackie QC to have ignored the business context of certain accounting issues and presented an "over-optimistic picture". This was put to Mr Thompson who said that this was not a fair criticism. Simply because an expert has been criticised by a court before does not mean that they cannot give reliable and helpful independent evidence in other cases, of course. However, this previous judgment demonstrates two things. Firstly, that Mr Thompson had presented a one-sided picture before, favouring one party over another. Secondly, the criticism that he had done so had not led to him changing his approach. Judges do not lightly criticise independent experts. If criticism is made, in whatever terms, the expert in question ought to review matters and reconsider their approach. If criticism by an impartial tribunal is simply dismissed as "unfair", then remediation of an expert's approach is unlikely to occur, with, as here, presentation of evidence to the court in future cases that remains partisan.
223. Another aspect of his evidence that was, rightly in my judgment, heavily criticised by Mr Mort was his direct factual inaccuracy concerning his opposite number. He recited in paragraph 1.22 of his report that "Mrs Barker agreed that further information was needed to fulfil her own instructions..." The accurate situation was rather the opposite to this. Mr Thompson took some time to arrive at his eventual answer on this point, but the final relevant passages of his cross-examination were as follows:
- "Q: So what you mean, Mr Thompson, is that it is your opinion that Ms Barker does not have the information she needs to fulfil her instructions. This is not something she has agreed, it is your assessment.
- A. Not in words in the joint statements, but I felt it was implicit for us having to pursue further information to do the work. What we were doing at the time of the joint statement is working consensually. We had, you know -- I think we had four calls. And what I wanted to do as part of the joint statement process in fact was to agree with her an additional disclosure request, so we could exercise some proportionality as to what information we needed. But given that the joint statement was before we did our reports, I felt, and I think Ms Barker would agree, that it formed an important part of the process in getting to what information we'd need to

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fulfil our report. I wanted to agree with her an additional disclosure request, but because of her instructions she wouldn't agree with me.”

224. This shows that, directly contrary to what Mr Thompson expressly stated in his report, he knew (because the Joint Statement came before the reports) that he wanted to agree this with Mrs Barker, but she “wouldn’t agree with him”. Quite how that was then changed by him into an express statement in his report that she *did* agree with him is unclear, remarkable, highly regrettable, and simply a demonstration of the further lack of reliability of his evidence. One expert should not misrepresent the views of their opposite number in such a way.
225. Finally, Mr Thompson was not helped by the lack of communication to him from ICI’s solicitors about potential further documentation he could review. In a letter dated 3 January 2018 MMT’s solicitors explained, in relation to a request by Clyde & Co for a very considerable quantity of documentation:  
"It is a massive and disproportionate task for our client to extract thousands of invoices and applications for payment to match the project across a detailed report. If your client would like to visit our client's office in order to spot check and audit the project cost detailed report, then facilities can be made available."
226. This offer was never communicated to Mr Thompson, who was unaware it had been made.

*Mrs Barker*

227. The expert accountant called by MMT was Mrs Barker. She is a partner in KPMG and is a Fellow of the Institute of Chartered Accountants. She has been an accountant for 23 years and has worked in the Forensic Accounting team for 20 years. She is now the Head of KPMG Forensic in the North of England.
228. Her approach was far more balanced and independent than that of Mr Thompson. She simply made assumptions that both the CVA and the liquidation of MMT were caused by the repudiation, and expressly made those assumptions clear in her report. She did not take a position on disputed matters of fact.
229. Mr Bowdery sought to challenge her independence by pointing out that a different department of KPMG had advised MMT at one stage in relation to financial restructuring, and fees in respect of this formed part of the counterclaim. Mrs Barker wholly satisfied me that this did not affect her independence, and that she had had nothing to do with that aspect of the case. Effectively there was a Chinese wall between the financial restructuring department and the one in which she was involved. Mr Bowdery sought to elevate this to her having a conflict of interest. Given the size of KPMG and the way that she had approached her task – as was clearly shown in her report itself – I consider this to be a weak point. He also relied upon the fact that she had provided some advice to Mr McGrady on the way the management time claim should be structured; she explained that this consisted of an explanation of how such a claim should be presented, the giving of examples to him of other claims in other cases. I do not accept that this involvement by her casts any shadow on her conclusions, or her independence.

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230. The difference between the parties' approach to their respective accountants' exercises can be shown from the way that Mrs Barker was criticised in her cross-examination for not doing the same as Mr Thompson had done, so far as taking a position on factual causation was concerned:  
"Q: But if one is investigating as to what caused MMT to go into liquidation, one does need to look at their financial position.  
A. I haven't been asked to investigate why MMT had gone into liquidation. I was told to assume that MMT had gone into liquidation as a consequence of the repudiatory breach."
231. This demonstrates the gulf between the two parties on this issue. I prefer the approach of Ms Barker (and MMT, in terms of instructions) in this respect, which is entirely conventional, in line with the expert accountancy issues as presented to the court when permission was sought, and orthodox.
232. I also prefer the expert evidence of Mrs Barker to that of Mr Thompson. Her evidence did not suffer from any of the structural defects of her opposite number, was not given from a partisan standpoint, and appeared to be entirely in keeping with the principles of expert evidence and the fulfilment of her duties to the court. In all instances therefore, where their evidence does not align, I prefer her expert evidence.

**X Conclusion on expert evidence generally**

233. There is one further matter. I have considered each of the expert disciplines separately, and specifically not allowed my conclusion on any expert to impact upon my assessment of the evidence of any of other others in this respect, which has been reached independently of my conclusions on others. It is, however, the case that my considered conclusion on each of ICI's experts is that their evidence is not sufficiently independent of the party who has instructed them, and that the evidence of their opposite numbers is to be preferred.
234. This happens to match my broad conclusion on Mr Millwood, one of the ICI welding experts in the liability trial, in respect of whom I said at [74] that "an expert's role is not to decide issues of fact themselves, and choose what facts to believe and what not to believe". I also criticised him for attempting to construct a case on reliance by ICI upon MMT, which was not even pleaded. Other criticisms of both of the ICI's technical experts in that trial are at [71] to [86] in the liability judgment. It cannot pass unremarked that all four of the different experts called to substantiate ICI's case in these proceedings have all been found to have been lacking in independence. That number excludes, for obvious reasons, Mr Brownlee, who although professionally qualified, was not called as an expert but as a witness of fact.
235. I do not know whether this preponderance of lack of independence on the part of a number of experts called by ICI is a coincidence. If it is a coincidence, it is a remarkable one. Whether it is coincidental or not, of those involved at the time, one important independent (in the sense of not being an officer or employee of either MMT or ICI) person involved in the project was Mr Barton. His views, which have the evidential weight that I have explained, have been roundly ignored by ICI and by ICI's experts. The circumstances of Mr Barton's departure from the project have been dealt with fully. The only other independent evidence is from MMT's experts.

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236. It is also a matter of concern that in a TCC case, with the sums at stake exceeding 10 million, there should be such a preponderance of partisan experts, all called by the same party. In *Bank of Ireland v Watts Group plc* [2017] EWHC 1667 (TCC) Coulson J (as he then was) stated the following:

“69. ....In my view, this was yet further evidence of unreasonableness, an expert insisting on making criticisms which the Bank have deliberately chosen not to plead.

70. The duties of an independent expert are set out in the well-known passages of the judgment in *The Ikarian Reefer* [2000] 1 WLR 603. For the reasons set out above, Mr Vosser did not comply with those duties and I was not confident that he was aware of them or had had them explained. For him, it might be said that *The Ikarian Reefer* was a ship that passed in the night.”

237. The principles that govern expert evidence must be carefully adhered to, both by the experts themselves, and the legal advisers who instruct them. If experts are unaware of these principles, they must have them explained to them by their instructing solicitors. This applies regardless of the amounts at stake in any particular case, and is a foundation stone of expert evidence. There is a lengthy practice direction to CPR Part 35, Practice Direction 35. Every expert should read it. In order to emphasise this point to experts in future cases, the following points ought to be borne in mind. These do not dilute, or change, the approach in *The Ikarian Reefer*. They are examples of the application of those principles in practice.

1. Experts of like discipline should have access to the same material. No party should provide its own independent expert with material which is not made available to his or her opposite number.

2. Where there is an issue, or are issues, of fact which are relevant to the opinion of an independent expert on any particular matter upon which they will be giving their opinion, it is not the place of an independent expert to identify which version of the facts they prefer. That is a matter for the court.

3. Experts should not take a partisan stance on interlocutory applications to the court by a particular party (almost invariably the party who has instructed them). This is not to say that a party cannot apply for disclosure of documents which its expert has said he or she requires. However, the CPR provides a comprehensive code and it may be that disclosure is not ordered for reasons of disproportionality. However, if documents are considered to be necessary, and they are not available (for whatever reason), then an opinion in a report can be qualified to that extent.

4. The process of experts meeting under CPR Part 35.12, discussing the case and producing an agreement (where possible) is an important one. It is meant to be a constructive and co-operative process. It is governed by the CPR, which means that the Overriding Objective should be considered to apply. This requires the parties (and their experts) to save expense and deal with the case in a proportionate way.

5. Where late material emerges close to a trial, and if any expert considers that is going to lead to further analysis, consideration or testing, notice of this should be given to that expert's opposite number as soon as possible. Save in exceptional circumstances where it is unavoidable, no expert should produce a further report actually during a trial that takes the opposing party completely by surprise.

6. No expert should allow the necessary adherence to the principles in *The Ikarian Reefer* to be loosened.

It is to be hoped that expert evidence such as that called by ICI in this case, and also in *Bank of Ireland v Watts Group plc*, does not become part of a worrying trend in

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this respect. There are some jurisdictions where partisan expert evidence is the norm. For the avoidance of any doubt, this jurisdiction is not one of them. Not only experts, but the legal advisers who instruct them, should take very careful note of the principles which govern expert evidence.

**XI The Scott Schedule sub-issues**

238. Each of Issues 1(a) to (h) were split into sub-issues by the parties. They are as follows. My observations and findings follow. They are all component elements of the high level Issue 1, namely “what is the value of the work carried out by MMT as at 17 February 2015?” In the list that follows below, I have omitted the notes and references to worksheets.

*a. What is the value of the Contract Sum?*

**Sub-issue 1:** Is this work to be remeasured and if so what is its value? This applies to:

- i. 2.94m Level
- ii. 3.99m Level
- iii. Main Access 5.99m
- iv. Upper Access 9.50m
- v. Secondary Stairs

**Sub-Issue 2:** Did MMT carry out this work? This applies to the silo support.

*b. What is the value of PMIs 003 and 003a?*

**Sub-issue 3:** Did MMT undertake the work in question? This applies to PMI MM 003 Co-Ordination.

**Sub-issue 4:** Are the prelims for PMI 3 a fixed amount, or do they fall to be adjusted to reflect increased / reduced measures? This applies to the items:

- i. Prelims (as GB3 para 153)
- ii. PMI 003 Changes
- iii. Prelims at 26.9897%

*c. What is the value of the Steelwork PMIs?*

**Sub Issue 5:** Whether this item falls to be valued in accordance with subcontractor valuations plus preliminaries and rates? This applies to all steelwork PMIs.

**Sub-issue 6:** PMI 19: Should the measurement fall to be reduced to take into account voids in the floor of the steelwork?

**Sub-issue 7:** PMI 78: Was the acceleration work approved by Projen in PMI 168?

*d. What is the value of the Pipework PMIs?*

**Sub-issue 8:** These PMIs raise the question whether the rates, measures and values were agreed as set out in, by way of example only, Mr. McGrady's 10 October 2014 email at

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[Q/2/1265]. This issue applies to PMIs 15, 29, 31, 47, 57, 115, 118, 120, 190, 204, 239 and 240.

**Sub-issue 9:** These PMIs are those which ICI / Mr. Kitt have reduced primarily because it is alleged there are a lack of allocation sheets. This issue applies to PMIs 208 and 214.

**Sub-issue 10:** These PMIs are those which ICI / Mr. Kitt have reduced because it is said there is a lack of build-up. This issue applies to PMIs 35 and 125.

**Sub-issue 11:** Were the welds carried out in situ? This issue applies to PMI 16.

**Sub-issue 12:** What is the correct measure? This applies to PMI 137.

*e. What is the value of the Design PMIs?*

**Sub-issue 13:** What is the correct rate for a CAD Designer - £46/hour or £39.34/hour.

*f. What is the value of the Mechanical PMIs?*

**Sub-issue 14:** Has MMT provided sufficient substantiation? This applies to PMIs 93, 139, 183 and 247.

**Sub-issue 15:** Should Preliminaries be added? This applies to PMI 69.

**Sub-issue 16:** Has MMT provided sufficient build-up? This applies to PMI 46.

**Sub-issue 17:** Is MMT entitled to be reimbursed for surplus stock? This applies to PMI 185.

**Sub-issue 18:** What is the rate to be applied? This applies to PMI 201.

**Sub-issue 19:** What is the labour uplift rate to be applied? This applies to PMI 166.

**Sub-issue 20:** What rate should be applied? This applied to PMI 155.

*g. What is the value of the SIs?*

**Sub-issue 21:** Does this SI fall to be valued by reference to the subcontractor valuations, plus rates and preliminaries?

**Sub-issue 22:** ICI says that there are no allocation sheets to support the claim.

**Sub-issue 23:** Can these SIs be valued on a material lump sum basis?

**Sub-issue 24:** ICI has deducted items without specification, saying only a "supply only" item.

**Sub-issue 25:** Is MMT to be remunerated for the diesel?

**Sub-issue 26:** Has MMT provided sufficient information?

**Sub-issue 27:** Can MMT recover for generators beyond the three mentioned in SI 283?

**Sub-issue 28:** Reason for deduction not specified by ICI, but not on the basis it is a "supply only" item.

**Sub-issue 29:** How should the 3 skids be valued?

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This applies to PMIs:

- 273 – Secondary Supports
- 274 – Additional Preliminaries
- 275 – Additional Testing
- 278 – Design
- 280 – Waste
- 284 – Skids
- 285 – AMS header rework
- 286 – Anticipated Re-work
- 287 – Accommodation Move
- 289 – Disruption
- 293 – Audit
- 294 – Lack of efficiency

*(a) The value of the contract sum*

239. The parties are only £20,000 apart on this item, based upon Mr Kitt's High Valuation and Low Valuation contained in his errata, which was introduced in his evidence in chief. Even though I have rejected Mr Kitt's approach as a partisan one, this shows that even on his exercise (with its inherent lack of assistance to the court on the exercise in question) the difference between the parties is not a large one in financial terms.
240. The difference relates to whether MMT in fact carried out works to the silo support, for which MMT claims £6,461, and also whether other works should be remeasured. The two sub-issues can be dealt with together.
241. The origin of the first of those items of dispute related to supporting sheets not being updated or provided in one of the last interim applications for payment by MMT, hence ICI would not in these proceedings accept that the work was done. However, Mr McGrady's evidence before me is that this work was in fact completed and I accept that. Further, I reject Mr Kitt's evidence that the works he identifies in the five parts of sub-issue 1 should be remeasured, and even if that were right (which it is not) there is no direct factual evidence to this effect in any event. I accept MMT's measures and accordingly, I resolve both of those sub-issues in MMT's favour and allow this part of the claim by MMT.
242. The total for this part of the valuation of MMT's works is therefore £1,984,257.

*(b) The value of PMIs 003 and 003a*

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243. It will be remembered that PMI03 was the mechanism adopted whereby ICI instructed pipework to be performed by MMT, the original contract not having included this. PMI03 therefore added a very substantial quantity of works to the project so far as MMT was concerned. PMI03a was the value of adjustments to the works instructed under PMI03. A large part of the difference in the parties' position on this head of the account is explained by their position on preliminaries.
244. ICI's case is that certain parts of the works instructed under PMI03 and 03a (as the matter is phrased in sub-issue 3) were not in fact carried out. Sub-issue 3 expresses the matter as one of co-ordination. Mr Brownlee made an omission for work on P&ID4356 F50 as well, but that is not relevant in my judgment. There is nothing to justify that omission. However, and in both cases, MMT's factual evidence is that this work was in fact actually carried out, and there is no direct evidence of fact from anyone at ICI actually involved with the detail of the works who gives any factual evidence to the contrary. *If* such evidence did exist, and *if* it consisted of evidence to the effect that the work was *not* carried out, then there would be a dispute of fact on the evidence which the court would have to resolve. However, all the direct evidence is in MMT's favour, and is to the effect that the work was actually done. I find that the work was done.
245. Sub-issue 4 is more substantial, and goes to a fundamental difference between the parties about how preliminaries should be valued. Essentially the question is whether preliminaries should be paid to MMT as a fixed amount, or whether they should rise (or fall) – in other words be adjusted – to reflect changes in the measures.
246. The first point to be made is that Mr Barton, the Project Manager, accepted MMT's valuation for these two PMIs. That is therefore, in my judgment, the correct figure to adopt for the reasons explained in the body of this judgment. Nobody involved in the case for ICI before me was in any better position than Mr Barton was in this respect.
247. Accordingly, the correct value is the one allowed by him at the time. This was subject to some correction by MMT and the figure claimed for this in the final version of the Scott Schedule was £1,637,661.79. This is the figure that I award.
248. A subsidiary second point to be made is that ICI seek to assess the preliminary figure as a percentage, rather than a fixed figure, and then have the fixed sum for preliminaries adjusted to reflect the additions/omissions. There is nothing in the agreement within PMI03 (or 03a for that matter) which justifies treating the figure for preliminaries as anything other than a fixed figure. Had a percentage been expressly agreed, which it was not, it would have been specified. I accept MMT's case on this point in any event.

*(c) The value of the Steelwork PMIs*

249. There are 60 different PMIs in this section of the account, of which only four are agreed. The same issue affects some 49 of the 56 not-agreed PMIs, and this relates to an agreement in respect of how the works the subject of these PMIs should be valued.
250. The evidence of fact before me from MMT was as follows. The original contract works were substantially outside the building, and the additional works instructed by the majority of these PMIs were for works within the building. Mr Barton expressly

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agreed that these additional packages of work were not of a similar nature of work, and he also agreed that MMT would be paid its sub-contractor costs (predominantly those paid to MMT's own sub-contractor, FJ Booth) plus the fee specified in the contract of 12.5%, plus preliminaries costs.

251. I find that such an agreement was made, governs the way this work should be valued, and that this is the amount to which MMT is entitled. Had the agreement not been made, MMT would have had the opportunity to consider different sub-contractors, or different ways of doing the works. Given Mr Barton was prepared to pay MMT the FJ Booth invoice cost, with an uplift for fee and preliminaries, means that at the time MMT did not need to explore other ways of doing this work. The fact that the email from Mr Barton states that the costs are subject to a "sanity check and review" does not undermine this. Firstly, there is nothing to suggest that such a sanity check and review, which I find was performed by Mr Barton, led to his reconsidering the figures. Certainly there is no documentary evidence of his raising any concerns at all following such a process. Secondly, Mr Linnett, whose evidence I accept, subjected these figures to such a process himself, and in his independent expert opinion the figures pass such a process in any event. The answer to sub-issue 5 is therefore that the items do fall to be valued in the way contended for by MMT. PROJEN valued these items, and included 10.37% for preliminaries.
252. One of the categories of documents sought on disclosure by ICI was payment records to FJ Booth, as though MMT were advancing a claim for sub-contractor costs that had not been incurred by it at all. Firstly, there is no reason not to accept the invoices raised to MMT by its sub-contractors at anything other than face value. Fraud was not pleaded against MMT, and there was no challenge of the type that the invoices were not genuine documents. Secondly, the evidence was that Mr Barton knew that MMT would be using sub-contractors for this work, approved of this, and agreed to pay their charges with an uplift. There would be no reason for sub-contractors such as FJ Booth not to charge MMT the amount shown on the invoices, or for MMT not to pay FJ Booth the amount invoiced. By attempting to obtain disclosure of records showing that MMT actually did pay FJ Booth the sums on the invoices, ICI was on a fishing expedition that did not relate to any pleaded issue, and was also in my judgment attempting to impose upon MMT a massively disproportionate and expensive disclosure exercise. Finally, this is just the sort of point that would have been pursued in the lengthy Coppa Audit. Coppa found no cause for such concerns. For these reasons, I refused to order such disclosure. The absence of those records does not have any bearing upon MMT's entitlement to be paid the FJ Booth costs, plus the fee plus preliminaries as agreed with Mr Barton.
253. The answer to sub-issue 5 above is determinative of both sub-issues 6 and 7 which are said to be miscellaneous points in the alternative to issue 5. Given the way I have answered sub-issue 5 they do not arise. However, I will address sub-issue 6 as it provides a useful illustration of ICI's approach. It is illustrative of the unreality of Mr Kitt's approach to matters of valuation. Because of the way Mr Kitt approached the measure, if a steelwork plate was installed with a square meterage of  $x \text{ m}^2$ , and then had a void then cut out of it measuring  $y \text{ m}^2$ , Mr Kitt would only allow for the meterage left in situ after the cutting had taken place. Therefore MMT would only be paid for installing the lesser area of  $(x - y) \text{ m}^2$ . In this way, ICI would pay nothing for the installation of the larger

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area, or for the cutting out of the smaller area. ICI would therefore pay less for the installation that it would have done if there had been no void removed at all. This is wholly illogical, and is a good demonstration of Mr Kitt's partisan approach. I know of no method of sensible valuation that wilfully ignores the way that the works are actually done.

254. I find that the correct figure for the amount of this part of the account is therefore the amount claimed by MMT, which in the final version of the Scott Schedule was £1,616,690.23.

*(d) The value of the Pipework PMIs*

255. The difference between the parties on their pleaded cases in respect of this part of the account was £722,209.35, based on the final version of the Scott Schedule. Of the 32 different PMIs, only five are agreed.

256. The origin of the sizeable disagreement lay in a refusal by Mr Brownlee to accept that MMT had provided sufficient allocation sheets. However, Mr McGrady's evidence – which I have accepted – is that the pipework itself was measured in a way agreed with Mr Barton. This was along the centre line and across fittings, in a way accepted by Mr Linnett as being in accordance with what he described as “normal trade customs”. I accept Mr McGrady's evidence that the values of PMIs 15, 29, 31, 47, 57, 115, 118, 120, 147, 190, 204, 239 and 240 were agreed with Mr Barton. As explained earlier in this judgment, and due to Mr Barton in any event being someone with detailed knowledge of the work, and ICI's lack of direct evidence generally (but also specifically any evidence at all from ICI that the agreed measures were wrong), I accept MMT's evidence in full on this category. This disposes of sub-issue 8 in MMT's favour.

257. The lack of allocation sheets, which is an issue which attaches to PMIs 208 and 214, is another good illustration of ICI's unreasonable behaviour. As Mr Linnett explains, it has the effect of disallowing costs in respect of “additional work, that had been instructed and carried out”. This disallowance of work is also done where there is no express requirement in the contract for such documentation as a “clear pre-condition to payment”. This disposes of sub-issue 9 in MMT's favour also.

258. I accept that the work the subject of PMI35 and PMI125 was done by MMT, I find that the alleged lack of build-up and/or supporting documentation (which ICI relied upon simply to reduce, arbitrarily, the amount claimed) is of no consequence. There is no direct evidence from ICI to justify this reduction, and the unfounded assertion (in relation to PMI125) that the work was really only “minor alterations” has no evidential substantiation. This resolves sub-issue 10 in MMT's favour.

259. I also find, in accordance with the factual evidence of MMT and Mr McGrady, that the correct rate for the welds the subject of PMI16 was the higher in situ rate, and there is no reason to conclude that MMT were attempting to obtain a higher rate (for in situ, or on site, welding) than the lower rate for welding in the fabrication shop. Mr Brownlee raised this as an issue, without any factual foundation and without any involvement whatsoever in the works. He simply seems to have decided that a lower rate for welding in the fabrication shop should have been applied, even though the welding was done on site. There is no logic to this, and the evidence of fact from

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MMT makes it clear the welding was done in situ and not in the fabrication shop. This resolves sub-issue 11 in MMT's favour.

260. Finally, the claim for PMI137 is resisted by ICI. Mr Linnett did a valuation and comparison exercise at paragraphs 339 to 341, demonstrating that of the 24 items included, ICI did not accept 23 of them. The differences were both on measure and rate. On some of the items, ICI had chosen a quantity of less than one. This is somewhat difficult to fathom. All of the rates were acceptable to Mr Linnett, and also were taken from the agreed Schedule of Rates to which I have referred which formed part of the contract. This disposes of sub-issue 12; in my judgment the correct measure is that provided by MMT.
261. Given that I accept all of MMT's evidence on this element of the valuation, I find that the valuation of the Pipework PMIs is the amount claimed which in the final version of the Scott Schedule is £5,814,346,61. This was a corrected amount which took into account a transposition error that occurred in respect of PMI147.

*(e) The value of the Design PMIs*

262. This is a very simple issue, as PMI278 is dealt with under the separate section "claims" below.
263. The issue is whether the correct rate for a CAD Designer should be £46 per hour (the rate now contended for by MMT) or the lower figure of £39.34 (now contended for by ICI). The hourly rate difference affects PMI56 and PMI199.
264. The central issue relating to this is the agreement between the parties which Mr McGrady deals with in his evidence. Originally MMT claimed £47 per hour, but Mr McGrady has accepted that MMT should be paid on the rate expressly agreed, which was, incidentally, agreed in an e mail of 18 April 2013 at £46 per hour in relation to the Skid works, referred to in Mr McGrady's statement as the "Skid purchase order Design rate".
265. I accept that a specific agreement was reached on the rate, and in my judgment it is a binding one. Even if it were not, those involved at the time on behalf of ICI had a far better grasp of what was a reasonable rate than any of the ICI personnel now involved in the case, and a better idea than either of the experts. There is nothing before me by way of evidence to lead me to question the reasonableness of the rate agreed at the time of £46 per hour. This disposes of sub-issue 13 in MMT's favour.
266. I therefore allow MMT's claim under this sub-issue. The amount claimed was in the sum of £331,179.69, but the parties in their agreed issues stated that all the Design PMIs were being valued collectively under "Claims" under Issue 1(h). The actual outturn financial figure for this therefore needs to be agreed as none is provided.

*(f) The value of the Mechanical PMIs*

267. There are seven sub-issues in respect of this part of the valuation. The total claimed for all of these by MMT is £2,911,483.14. There are a total of 44 PMIs in this section, but the value of 13 are not in dispute. The total figure of 44 counts PMI33 as two separate PMIs, namely 33.1 and 33.2.

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268. The different sub-issues reflect the essence of the many different challenges to MMT's valuation. Lack of substantiation, insufficient build-up, the correct rate to be applied – all are covered, to some extent or another, across a number of different PMIs.
269. A great many of the differences across a large number of PMIs relates to the way in which preliminaries are valued. MMT included preliminaries at a rate of 10.37%, a rate that ICI allowed in respect of some PMIs, but not for others. Mr McGrady has given evidence, and I accept it, that this method and rate of dealing with preliminaries was agreed. For completeness it should be noted that two rates of preliminaries were agreed, namely 26.5% for all MMT direct work, and 10.37% for all work that MMT subcontracted. Although Mr Brownlee settled on his own rate of 18.4% for design work, for example, this was never agreed. The agreed rates for preliminaries to which Mr McGrady referred in his evidence was applied by the Project Manager during the project itself in the interim valuations. There is no good reason for not applying those rates for preliminaries in any event, and Mr Linnett supports them.
270. I consider that MMT has provided sufficient substantiation for PMIs 93, 139, 183 and 247, and I accept the factual evidence of MMT in this respect. I also consider that MMT has provided sufficient build-up for PMI46 to justify the amount claimed. I consider that ICI appear to have simply applied the wrong rate for preliminaries, but whether that is correct or not, I accept MMT's figure for this PMI in the sum claimed. I also consider that preliminaries should be added in the agreed percentage, namely those set out in [269] above. These are 26.5% for all MMT direct work, and 10.37% for all work that MMT subcontracted. Those findings dispose of sub-issues 14, 15 and 16.
271. There is a separate sub-issue whether MMT should be entitled to be reimbursed for surplus stock. The PMI to which this relates is PMI185 but the point is, again, an illustrative one of the gulf between the parties, demonstrates ICI's unreasonable approach, and its failure to observe agreements reached during the works. It also, in this case, demonstrates the way ICI ignores direct evidence of fact.
272. Mr McGrady gave evidence that due to the way in which the works were developing piecemeal, and with so many changes, there was a timing issue in terms of MMT ordering materials only after instructions were in fact issued. If MMT waited for the actual instructions, and only then placed the order, the lead-in time for the materials ordered would cause delay to the works. The way forward that was agreed by the parties, including Mr Conrad of ICI, in February 2014 (which is one year before the repudiation) was that MMT would go ahead and order more material than was at that point instructed – in other words, order material in advance – and would be paid for any left over. This is specifically evidenced in emails. Not only was this sensible, but when Mr Barton agreed to this, he knew more material would be needed because of the way the design was developing. It simply was not possible for MMT to know in advance how much material was needed because ICI had not developed the design sufficiently to be able to anticipate all the instructions.
273. This material was indeed ordered by MMT, delivered and paid for. There is direct evidence that it exists, that it is held at MMT's fabrication shop, and Mr Linnett has actually seen it. Photographic evidence of its existence has been provided by MMT.

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However, notwithstanding that, ICI do not admit that MMT is entitled to be reimbursed for it. I find that MMT is entitled to be paid at the rates agreed for this material. It will then, as a matter of transfer of property, become the property of ICI. I am confident that arrangements for its physical transfer to the site will be possible, should ICI actually want to take possession of it. To avoid yet further disagreement, and without hearing submissions on the point, the costs of such a transfer would, absent agreement, have to be paid by ICI. What ICI is not entitled to do is entirely ignore the agreements reached, by both Mr Barton and Mr Conrad, which were to its benefit to avoid further delay in the project, and leave the material unpaid for. This resolves sub-issue 17 in MMT's favour.

274. The dispute on sub-issue 18, which relates to a very small amount of money in any event, concerns whether there would be two welds or one per elbow, and the rate. I accept the evidence of Mr McGrady on this point, and also the correct rate to be applied is the rate agreed with Mr Barton for the reasons explained earlier in this judgment.
275. Although a large amount of money hinges on PMI 166, the subject of sub-issue 19, the issue is very self-contained and very simple. It relates to an increase of labour rates. The original contract completion date was 7 October 2013. The works went on well after that, and the repudiation itself did not take place until February 2015. From October 2013 MMT was on site for far longer than was intended at the time of contract.
276. An uplift of 8.2% to the labour rate was expressly agreed by MMT with Mr Barton. This was in the context of another company in October 2013 called Offshore Group Newcastle Ltd hiring a great many welders for offshore work. This was a major project and this company required many welders. It was recruiting in the same geographical area as MMT was located. Mr Barton asked Mr McGrady to demonstrate the date from which increased rates were paid by MMT to the welders employed there (to retain them and avoid losing them to Offshore Newcastle) and he did so. There is direct evidence to this effect from Mr McGrady. It was also agreed that 46% of the pipework PMIs would be treated as constituting labour.
277. I consider these agreements to be binding. However, even if I am wrong about that, I see no reason to disturb them for the reasons explained earlier in this judgment. The increase in labour rate to be applied is therefore the one agreed with Mr Barton, namely 8.2%. This resolves sub-issue 19 in MMT's favour.
278. The final sub-issue in this section of the valuation relates to PMI 155, namely a claim for overtime hours for the period 8 December 2013 to 26 October 2014. This point is expressly dealt with in the Appendix to the contract itself, namely Appendix G, which is the Pre-Contract Meeting Minutes. These rates, expressly identifying the uplift for overtime, were expressly agreed by the parties, recorded in the minutes, and the minutes were appended to the contract. Mr Linnett has considered the rates for the personnel not specifically identified in that Appendix, namely Weld Inspector or Administrator, but he approves the total figure claimed for this PMI and I accept MMT's evidence in this respect. The correct rates to use are plainly those in Appendix G, and those for the Weld Inspector or Administrator are those claimed by MMT. I find that the amount due is £742,252.89.

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279. There are 271 Site Instructions or SIs, of which 88 are agreed (the total value for those 88 being only £40,924.90). The overall total said by MMT to be the correct value for the SIs originally was £642,924.86, although by the end of closing submissions the total claimed by MMT for the SIs was £611,085.41 (referred to as the “MMT Current” figure). The agreed element of only £40,000 is therefore not a great part of the amount in dispute. ICI, on the face of the schedule, advances three figures for the value of the SIs. Mr Brownlee’s assessment for these is £227,000; Mr Kitt’s High Valuation is £312,000; and Mr Kitt’s Low Valuation is £232,000.
280. By value, therefore, only 6.36% (of the original higher total) of these SIs are agreed, which rises to 6.6% as a percentage of the £611,085 claimed in the “MMT Current” column. Of the 183 SIs in dispute, only 14 involve a value greater than £5,000 for each individual SI. This part of the account is therefore made up of a very great number of extremely small different items.
281. Mr McGrady and Mr Wells gave detailed evidence about the way that the MMT works in this section were valued. Mr Linnett has considered a great many – but not all – of the SIs by dealing with all of what he called the “Major SIs”. This was the term adopted by him to refer to those with a value above £5,000. Of the remaining so-called “Minor SIs”, Mr Linnett points out that ICI allowed exactly half the value of each one. He describes this as “no coincidence” and I agree. A decision was obviously taken somewhere, by somebody at ICI, to adopt a straight 50% valuation across the board of this enormous number of SIs without any justification or sufficient explanation. About 55 of the SIs are worth only hundreds of pounds, each lower in value than £1,000. This demonstrates the extraordinary lack of proportionality in the exercise of going through and valuing each one of the 183 SIs separately. Mr Linnett examined a sample, and I find that this was a representative sample and his conclusions can safely be applied to all the SIs. Nor do I consider that the lack of a particular PMI in relation to work instructed by means of an SI is an adequate justification for not valuing the works. MMT is not to blame for such a failure to issue a PMI. MMT received an instruction on site – namely each SI – to do particular work; the fact that this instruction did not evolve into a PMI does not mean ICI is entitled to the benefit of that work for nothing, or that MMT has to do such work at its own cost.
282. I have referred earlier in this judgment to the fact that not even all the SIs were dealt with in the quantum experts’ reports. Nine issues were identified as SI issues in the Scott Schedule, which have now become sub-issues 21 to 29. Some of these issues affect more than one SI, and some SIs are affected by more than one issue – for example SI 141 is affected by both ICI relying upon a lack of allocation sheets to justify not allowing the full amount claimed of £624.79 (for fabricating a stainless steel plate to cover a hole in the Dromont area of the plant) and also whether this work can be valued on a lump sum basis. All of these issues are addressed, but that does not mean that each and every SI can be considered in minute detail and a value for each arrived at separately in this judgment, particularly when the experts themselves have not even done this exercise.
283. I propose therefore to answer the sub-issues. The financial effect of those sub-issues upon the different SIs and the total for this section will have to be worked out by the

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parties. This should be a simple (though tedious) exercise for counsel to do jointly, and should result in a total figure for this section of the valuation of the MMT works. I accept Mr Linnett's conclusions on both the Major and the Minor SIs, and I find that the sample that he has considered is a representative one. I reject ICI's approach simply to allow 50% of the amount claimed, and I also find that MMT's evidence generally is to be accepted. When these principles are applied to all the SIs in the manner I have explained, the final figure which is agreed is likely to be very close to the £611,000 claimed by MMT.

284. Sub-issue 21 concerns the same issue as to whether MMT is entitled to have the work valued in accordance with the subcontractor valuation plus preliminaries and contract fee. This issue arose in respect of the steelwork PMIs. The SIs that are associated with steelwork should be valued on the same basis as the steelwork PMIs for the same reasons. It was agreed with MMT that it would be entitled to be paid in this way, and there is no reason to interfere with that agreement. The answer to this sub-issue is that MMT are entitled to have the work valued in this way. These are SIs 6, 152, 171, 464, 474, 490, 495, 496, 497, 498, 567, 570, 591, 593, 602, 604 and 634.
285. Sub-issue 22 relates to the lack of allocation sheets, and whether this means that MMT should not be paid for this work (or more accurately, given the payment under the two adjudication decisions, whether the value of the work should be included in the valuation of works). This is an artificial issue that I consider ICI have raised simply as a means of reducing the valuation of MMT's works. Such documents were not required by PROJEN during the course of the works themselves, and I do not consider that their absence is a legitimate reason for the value of the work the subject of these SIs to be ignored (or not valued). There was no specific contractual requirement for daily allocation sheet, individual timesheets or the other "supporting documentation" the lack of which is relied upon by ICI in this respect. Further, there has been ample evidence that site documents remained behind after MMT were dismissed from site on 15 February 2015. MMT were not permitted by ICI to remove documents when they left. Further, I have no reason to doubt that the SI itself (or SIs themselves, given there are many of these) accurately represents the works, or that the value claimed in respect of these (which I have already explained, are for insignificant amounts individually) is inflated, or relates to work not actually done (which could be the only reason for requiring such documents as daily allocation sheets or timesheets).
286. Anyone who has ever been involved in a detailed final account-type exercise in a case in the Technology and Construction Court, or actually on a project, will know that it is possible for any quantity surveyor to seek deeper and deeper layers of substantiation. Materials and labour records can be sought; then actual allocation sheets, showing which person was performing which tasks on which day (and in which area of the site); then even overtime claims, PAYE records and pay slips, showing how much each person was to be paid; then bank records, showing payments out of a contractor's account; and so on. This exercise, which is essentially one of attrition, can be conducted almost to an unlimited degree. It is sometimes justified, but is not justified in respect of MMT's works on this project. In any event, in this case Mr Linnett, who has satisfied me of his independence, has concluded that substantiation has been provided by MMT for all of the Major SIs (as defined by him) and a great many of the Minor SIs too. I am satisfied that the work the subject matter

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of these SIs was done and such lack of some contemporaneous items of paperwork does not matter. Sub-issue 22 is therefore resolved in MMT's favour.

287. Sub-issue 23 is whether some of the SIs should be valued using a material lump sum. This only affects 20 SIs which together have an aggregate value of only £4,750. I find that they can be valued in this way and that there is no rational justification for doing otherwise. Further, and as a matter of proportionality, I consider that these should be valued in the way contended for by MMT in any event. They are SIs 141, 157, 165, 168, 182, 183, 292, 454, 500, 560, 575, 581, 582, 585, 603, 629, 646, 650, 753 and 765. On the balance of probabilities, the amounts claimed are due for the works identified on each SI. This resolves sub-issue 23.
288. Sub-issue 24 relates to deductions made by ICI on what appears to be an arbitrary basis, stating that the particular SI is a "supply only item". There is no direct evidence to this effect on ICI's behalf whatsoever to justify or explain that the works in each SI were for supply only. Absent such direct evidence, the phrase itself is inadequate, in my judgment, to constitute a cogent reason to conclude that the works were for supply only, and/or to disallow the SI in the amount claimed, particularly as the claim for works in each instance make it clear that the SI in question is *not* a supply only item. This affects SIs 52, 58, 59, 60, 65, 68, 73, 78, 82, 83, 88, 92, 93, 95, 96, 116, 129, 151, 154, 155, 251, 252, 255, 256, 258, 262, 268, 271, 275, 276, 277, 279, 284, 285, 287, 295, 296, 351, 353, 357, 359, 361, 363, 366, 375, 377, 379, 380, 382, 384, 385, 386, 387, 457, 485, 486, 489, 493, 561, 566, 610, 614, 622, 623, 627, 635, 636, 639, 644, 648, 764 and 770. I find that MMT is entitled to have its works valued including labour and materials claimed for these SIs.
289. Sub-issue 25 affects SI 260. It also appeared to have a modest effect on SI118 where ICI sought a reduction of £125, but this is not supported even by Mr Kitt. The value of SI 260 is approximately £19,600 and relates to diesel. There were a total of 19 different SIs (including this one) that related to instructions given to MMT to obtain diesel. The issue effectively comes down to whether such an instruction was given in fact, and whether MMT ought to be remunerated for the diesel that was obtained by it in respect of each such instruction. I find that the answer to the first part of that is, with respect to ICI, beyond obvious. The instruction itself actually exists, is dated 28 June 2013 and is even contained within the soft copy quantum e-bundle. The fact that such a point of fact is still formally in issue is very surprising. The second point is similarly obvious; there is no good reason for concluding that MMT ought not be paid for this instruction, or that ICI ought to have the benefit of almost £20,000 worth of diesel provided by MMT, for nothing and without paying for it. Provision of fuel such as diesel at MMT's costs is something that could have been agreed by the parties, and included in their contract. Given it was not, payment to MMT by ICI for the diesel provided after MMT received an instruction to obtain such fuel is required. I resolve this sub-issue in MMT's favour.
290. Sub-issue 26 is whether MMT has produced sufficient information. This affects only 24 different SIs, none of which are for very much money. The largest is £3,575.25 for SI 566, and the least valuable is SI 609, removing Valve XV01608 from line SH-100-LAA-0161 in the sum of £215.27. Mr Linnett's sample exercise – which I have accepted – makes it clear that the claim by ICI of lack of sufficient information is not justified. I resolve this modest sub-issue in MMT's favour.

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291. The next sub-issue relates to SI 283 and is sub-issue 27. This was for the hire by MMT of three generators and was instructed on site on 6 September 2013. The instruction is available, and originally ICI disallowed this on the basis that there was no PMI and no substantiation. The lack of PMI as a valid point has been dismissed by me at the beginning of this section of the judgment, and there is nothing in the lack of substantiation point either. Mr Linnett has examined the total number of invoices relating to this SI, which are 125 different invoices. They total £30,972.28, with the balance of the amount claimed (the total being £39,148.01) being made up of the preliminaries claimed as a percentage of 26.4%. I have dealt already with the principle of applying the agreed percentage for preliminaries. I am satisfied that the invoices studied by Mr Linnett justify the claim for this SI and I resolve this sub-issue in MMT's favour.
292. Sub-issue 28 is a sub-species of the deduction for "supply only item", but this time has no explanation whatsoever. It affects three SIs, namely 294, 455 and 552. I accept that the works, instructed by each of these SIs, were in fact instructed and were in fact performed, and that MMT is entitled to be paid the sums claimed in respect of each of them. There is simply no direct evidence whatsoever from ICI to the contrary. This sub-issue is resolved in MMT's favour too.
293. Finally, in this SI section, there is sub-issue 29 which is how 3 skids should be valued. This is SI 622 and relates to the location of three skids, T730, T731 and T732. The amount claimed is £2,099.14. Mr Kitt has both a High and Low Valuation for this item in the same amount, namely £1,440.96. The difference is therefore £658.18 if Mr Kitt's valuations are taken; ICI's figure prior to Mr Kitt's exercise was a round figure of only £750 reached by no obvious method or logic.
294. I have rejected Mr Kitt's approach for the reasons explained earlier in this judgment. However, the parties are agreed that this is an SI specific issue that relates solely to this SI, and this SI does not form part of the sample of Minor SIs taken by Mr Linnett. Accordingly, therefore, and in respect of this SI only, I consider it proportionate simply to split the difference between the parties and reach a figure of £1,770. There is very limited information available on this item, and it is simply not cost-effective or proportionate to do anything else in these circumstances. I do not consider that this approach is one that is justified for any of the other SIs or as a result of consideration of any of the other sub-issues in this section.

*(h) The value of the Claims*

295. There are twelve separate PMIs which each raise specific and individual issues. These are PMIs 273, 274, 275, 278, 280, 284, 285, 286, 287, 289, 293 and 294. There was another one in this section, PMI 272, a so-called "mop up" PMI, but that is now agreed.
296. Each of the PMIs in this section raise separate issues. However, in respect of some, ICI has the same considerable evidential difficulty as elsewhere, namely that it lacks direct factual (or any) evidence to support the arguments mounted on its behalf.

*PMI 273 – Secondary Supports*

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297. MMT values this amount at £1.171 million. During the works, the sum of £600,000 was allowed in respect of interim valuations for this, but this was reduced by Mr Brownlee in his exercise to about half of that, namely £326,057. Mr Kitt provided Low and High Valuations of approximately £326,000 and £379,000. The heading used by ICI in its written Closing Submissions is “Secondary Steel” but the claim relates to secondary support steel for pipework. The PMI number is the same.
298. This was claimed as a separate PMI. Mr Wells gave extensive evidence about this. Initially MMT was to install pipework outside the building, which did not need secondary support as the pipes were to be supported off (or built into, to use a different expression) the pipe bridges. When it became obvious from an early PMI in March 2013 that MMT would be required to perform secondary support works within the building for pipes that were to be installed inside, a meeting was held. It is contained in the minutes of that meeting that MMT and Mr Barton would work together to agree “an acceptable solution” in terms of the valuation of these works. The problem was that the extent of work required was not known, as the design of the pipework was not finalised. Due to the lack of information it was impossible to price or quantify the amount of secondary steelwork required.
299. Two on account payments were made by ICI from October 2013 into the summer of 2014. These works were then removed by request of Mr Barton and put into this separate PMI. After a meeting on 22 May 2014 to resolve this matter, MMT believed they had an agreement that “at least” £750,000 was to be allowed for these, including the brackets. However, Mr Barton was not at that meeting. Mr Bowdery embarked upon an attempt in cross-examination to show that Mr Barton *was* at the meeting – as there had been another meeting on the same day, at which Mr Barton was present – but I find that he was not, and I accept Mr Wells’ account. Given Mr Barton had himself sent an e mail contemporaneously complaining “also who organised the meeting and why was I not invited?” it is highly unlikely he was there. He was hardly likely to complain about a meeting, and/or send an e mail in those terms, had he known about the meeting and/or actually been there. He plainly found out about the meeting, and what was agreed, after it had taken place, and he also had not been invited to the meeting. However, Mr Conrad was present at that meeting and agreed the sum of £750,000 on behalf of ICI.
300. Notwithstanding that agreement, a sum of only £600,000 was “allowed” from September 2014 in the interim valuations. A detailed remeasure was suggested by Mr Barton and rejected by MMT. Even the sum of £600,000 was not actually paid, as Mr Wells explained in his evidence. By now, Mr Boerboom was heavily involved and interfering with all and any payments to ICI, which explains why this agreement was not honoured. Mr Brugman, at the two day commercial meeting on 7 and 8 October 2014, suggested a payment to MMT based on an European approach of payment per kg. Mr Wells offered £25/kg and Mr Brugman suggested what he considered was a more reasonable rate of £22/kg. It is this rate that has been used by Mr McGrady to build up the valuation of this PMI.
301. The three issues identified in ICI’s Closing Submissions under this PMI are whether certain items are included in MMT’s rate for brackets, in which case they should be removed from the claim for secondary supports; whether part of the design claim should be removed, because design is claimed separately under PMI 278; and whether

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any allowance be made for the brackets MMT were not able to measure, given they were dismissed from site when the repudiation by ICI occurred. The claim by MMT is also criticised on the basis that “this claim is not based on any records of time actually spent doing so-called secondary support work”. Such a submission is wholly misplaced. The work was plainly done and no part of ICI’s pleaded case is that no such supports were provided. Indeed, were they not provided, the part of the 42,000m of pipework that is within the building would barely be supported at all.

302. The basis of the attack on whether the Unistrut items are included in the rate for brackets was an exercise performed by Mr Kitt, who had found an internal document in MMT’s disclosure that included a non-contractual and internal build up for a rate that showed Unistrut. This document was never provided either to ICI or the Project Manager. There are three problems with this approach by Mr Kitt. Firstly, the document was an internal draft only. Secondly, it was never shown or provided to ICI or the Project Manager at any time during the works. Thirdly, ICI agreed a rate for brackets in any event. The documents deployed by MMT during the trial, including photographs which Mr Wells spoke to, clearly show the way that the pipes were hung from these secondary supports including Unistrut. I consider MMT are entitled to be paid for the Unistrut. In any case, the rate in PMI 03 was not to be applied to such works within the building, and when PMI 15 (the first such PMI on this subject) was issued none of the parties at the time considered the PMI 03 rate should be used. This is one of Mr Kitt’s methods of artificially driving down the value of MMT’s works.
303. MMT included £150,000 for brackets it could not measure due to the repudiation. No alternative figure was provided by ICI at the time, or even during Mr Brownlee’s exercise, and there is no direct evidence to justify any different figure in any event.
304. The rate proposed by Mr Brugman, and agreed to by MMT, in October 2014 did not require any component breaking out, or the rate being reduced, for supposed design costs being recovered elsewhere. I accept MMT’s evidence on this PMI and find that MMT is entitled to the sum claimed in respect of it. The correct rate is £22/kg – this was the amount expressly offered to MMT by Mr Brugman, and accepted - and the correct amount for the PMI is the amount claimed by MMT.

*PMI 274 – Additional Preliminaries*

305. This is the biggest single claim item and is £2.543 million. Mr McGrady reduced the claimed figure following further refinement done by him on the component elements of it, after reading certain criticisms in Mr Kitt’s report that showed some errors of calculation within the claim as it was originally presented. I consider these reductions to substantiate the credibility both of Mr McGrady and the claim – they show that sensible criticisms (such as the one Mr Kitt made regarding duplication of some figures) were assessed, considered and accepted. Mr Bowdery seized on these reductions as evidence almost of something sinister, but I reject that interpretation. If an error in a calculation is pointed out – something has been counted twice, for example, or if an item is included elsewhere – and the person who has performed the calculation takes that point on board and corrects the error, I fail to see how that damages the credibility of that person. Certainly in this case, on this calculation, and on this claim as performed by Mr McGrady, it does not. It shows a sensible, reasonable, logical and credible approach both to calculations and arithmetic.

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306. There are certain outstanding issues which affect the valuation of this PMI. It was agreed by the parties during 2014 that preliminaries should be extracted from the other PMIs and put into a separate PMI; this was so that the substance of those other PMIs could be agreed, absent what was a contentious issue about preliminaries. The three issues that remain are:
1. Which resource (personnel) should be included in the preliminaries claim (as opposed to head office resources);
  2. Whether the claim should be valued on the basis of MMT's actual costs or on the basis of rates (whether actual or analogous);
  3. Whether MMT is entitled to payment for salaried preliminaries personnel in excess of 1725.2 hours / year
307. It is common ground that further calculations will be required by the parties in respect of preliminaries after findings are made concerning this PMI in this quantum judgment.
308. There is, again, a stark difference of approach. MMT relies upon the contract documents which define site preliminaries resources, whereas Mr Kitt relies upon an internal MMT document, earlier than the contract formation, which was not provided to ICI by MMT. MMT submits that Mr Kitt's position "appear close to ridiculous". Certainly, it pays scant (if any) regard to the contract agreed by the parties. I accept MMT's approach in this respect, which is wholly logical and orthodox. MMT's information was provided both with its tender (and indeed was sought by ICI in the Invitation to Tender) and also further information was provided by way of e mail dated 16 January 2013. These documents were incorporated into PMI 03. They are contract documents. The contractual status of PMI 03 was accepted by both parties for the liability trial, and one need read no further into the liability judgment than [2] and [3] to see the references to it. Indeed, the contractual nature of PMI 03 was a thread throughout the entire liability judgment, as the testing regime contractually agreed (which was the major substantive issue in that trial) was contained within the PMI itself. There is no sensible basis for Mr Kitt's alternative approach to PMI 03, which is simply to ignore it. His resolute refusal to use the rates agreed by the parties, and calculate rates based on what he calculated as actual costs, is wholly outwith the contract and wholly outwith ICI's pleaded case. I reject it as the correct approach for both those fundamental reasons.
309. I find that the roles included in MMT's Closing Submissions at paragraph 409(1) "Project Manager", through to and including all those up to 409(13) IT, and those at paragraph 410(1) "managing director", through to and including all those up to 410(8) "Materials controller/storeman", as well as "Assembly & Fabrication" are to be recovered, as well as the other following miscellaneous people/roles. These are the additional planner included pursuant to Mr Barton's express request; and Mr Tobin and Mr Gallucci, who were performing quantity surveying duties and who were plainly (and I find) a cost which is to be attributed to site based works; and Mr Curry.
310. Mr McGrady's direct evidence on this head of claim wholly supports the claim, and ICI's challenges cannot survive that evidence. For example, Mr McGrady explained that Mr Curry was the fabrication shop manager and was working the vast bulk of his time on this project, which used up a huge amount of the time spent at the fabrication

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shop. The vague challenges to this were simply that – vague and speculative. I accept Mr McGrady's evidence on this point, and this evidence emerged from the cross-examination wholly intact. Further, I also accept that the design element of this claim which was claimed under the separate PMI for design, namely PMI 278, was correctly performed by Mr McGrady as part of the exercise that he advanced which underpinned his 4<sup>th</sup> witness statement.

311. I find that the correct valuation for this PMI is the sum advanced by MMT in the final version of the Scott Schedule, which is £2,543,634,72. There was a typographical error made by MMT in the figure for this identified in its Closing Submissions, but I am satisfied that the figure in the Scott Schedule is the correct one.

*PMI 275 – Additional Testing*

312. The value attributed to this by MMT, which was submitted during the works themselves, is over £700,000. The actual figure as at closing submissions was £770,745, whereas in June 2014 a sum was provided for the next interim valuation to the Project Manager of £789,273, which was £311,199 for testing already done, the balance as a budgetary allowance for testing yet to be done, together with an allowance for £50,000 for loss of production arising from nightshift working. ICI, and both of Mr Kitt's High and Low Valuations, are all in the same figure, namely £2,247.56.
313. There is over 42,000m of pipework in this project. Extensive testing was required, at a variety of pressures and locations, for all of that pipework. The documents relating to June and July 2014 on this subject show that testing in the sums of many hundreds of thousands of pounds was not only submitted by MMT, but expected by the Project Manager. If the position of ICI was in reality a genuine and credible one, Mr Barton in June 2014 would not have tolerated for a moment a claim for testing in the sums submitted and broadly adopted by him for interim valuation purposes. When he was faced with interim applications with such high figures for such detailed and lengthy testing, he did not respond and challenge those figures, pointing out that testing was either not something that should be charged for at all, or should be claimed in a sum only of less than £3,000. He seemed broadly content. Added to this is the fact that ICI does not have a shred of direct evidence in relation to testing at all to support its case on this item. Mr Kitt could not provide an alternative rate, but his observations were taken into account by Mr McGrady who amended the rate claimed. I find that ICI's position on testing is wholly unrealistic and excessively low to an extraordinary degree, and I reject it.
314. MMT expected to have tested the pipework in one go, and would usually have been given free rein in terms of test points. On this project, the physical circumstances in which testing came to be done were very different to those that could have been reasonably expected by MMT. In those circumstances, the only feasible figure is that contended for by MMT. Given that in any event I have accepted the MMT factual evidence that underlies this PMI, I find that the correct figure is the one contended for by MMT and explained by that evidence.

*PMI 278 - Design*

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315. This PMI does at least (and unusually in this case) have an element of substantial agreement to it, in that the number of hours are agreed, namely 19,029 hours. The only matter of dispute is literally the rate that should be applied for a CAD Designer. MMT advance a rate of £46 per hour. ICI advance a lower rate, namely £39.34, which is a rate that Mr Kitt has built up using the tender build up documentation for PMI 03.
316. The main difficulty with that approach by Mr Kitt and ICI is that it ignores Mr Barton's express agreement that the rate for a CAD Designer should be £46, as this was initially agreed for work for skids, and then adopted and used widely throughout the project. Mr Barton obviously considered it is a reasonable rate in all the circumstances, and neither ICI now, Mr Kitt, nor even the court, is in a better position now, than the Project Manager was then. He had extensive knowledge of all the works, the tenders, the contract terms, and what was a reasonable rate for such a CAD Designer.
317. I find therefore that the correct rate to be used for this PMI to be that agreed and used at the time by Mr Barton the Project Manager, namely £46 per hour. That should be applied to the agreed hours of 19,029.

*PMI 280 - Waste*

318. This, also, contains a very self-contained and simple issue, and that is whether MMT is entitled to 10% for waste. ICI submits in its Closing Submissions that there is some confusion about what Mr McGrady did when adjusting this claim, which was £109,945 but rose slightly to £113,800. However, I accept that occurred because he removed waste from some other PMIs, in order to avoid double counting in those PMIs, which were themselves reduced. He explained this in his oral evidence and I accept his evidence in this respect.
319. The evidence of the commercial meeting of 7 and 8 October 2014 was that Mr Barton wanted the measurement demonstrated to him, not that he objected to the addition of waste in principle, or to the use of a percentage in principle, or that he objected to 10% as being too high a percentage. Based on the factual evidence provided by MMT, 10% accords with MMT's usual practice and I find that it is reasonable.
320. ICI submits that to do this properly one would need the tender model, and then would also need to do a material take off from that model and check it against MMT's measures. This approach is flawed for two main reasons. Firstly, all the evidence in this trial, and the liability trial, is that the tender model changed dramatically. If I may express myself in this way, that is part of the reason (if not the whole reason) that ICI got itself into such a muddle on this project in the first place; namely that the design was not remotely finalised to start with, and the tender model not remotely accurate. The original steelwork contract was for only £1.9 million and included no pipework. Even PMI 03 was for pipework substantially outside the building. In the event, 42,000m – the exact length, more or less, of a marathon course – of pipework of different dimensions was installed, substantial amounts of it within the building. None of that would be shown on the tender model of December 2012, by definition, because it had not been designed. A great many changes were instructed directly on site. These would not be on any tender model either. The second reason that the suggested approach is flawed is it assumes that there is something wrong with MMT's measures, and that some sort of check has to be done (against, for these purposes, non-existent

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information), before those measures can be accepted. Neither expert had done this exercise but it would not, for the reasons I have outlined, have been of any use in any event. I find the MMT measures to be accurate, even though they have not been checked in the way contended for by Mr Bowdery.

321. I accept the MMT methodology of applying 10%, I accept the evidence of measure, and I accept MMT's valuation of this PMI.

*PMI 284 - Skids*

322. The subject matter of this PMI is the offloading and moving of skids, after they had been delivered to the site. Mr McGrady gave direct evidence about this. There was some duplication between this PMI and PMIs 15 and 29, but that was removed. The claim is for £56,549.99. A picture was grafted into Mr McGrady's 2<sup>nd</sup> witness statement which showed the size of these pieces of machinery. They are of a significant size and are used for process pumps.
323. The work associated with this was, in summary, upon delivery of the skids, as follows. Directing and escorting the driver on site, reporting to the supervisor, contacting the telehandler driver, positioning the telehandler, obtaining a pallet, lifting and positioning the equipment, identifying the location required, moving the equipment to that location, checking the final position against drawings, and installing and securing the skid. Not all of the skids were offloaded directly from deliveries, but all were moved around the site and all were required to be moved to particular positions that had to be checked.
324. ICI allows precisely zero as payment for this work, which is work that I accept was (and is very obviously) extra to the work originally contracted for. The rate claimed under this PMI is £380, the amount agreed under PMIs 15 and 29, together with an additional £184 which is said to be based upon a time and motion analysis of unloading, moving around and positioning the skids. The rate agreed for PMIs 15 and 29 was only for positioning and bolting down, and not for off-loading and moving into position. This £184 is made up of 6 hours involving 2 fitters, and a supervisor at £30.67 per hour.
325. This build-up of the extra £184 to be added to the agreed rate of £380 was reported to Mr Barton on 9 October 2014. However, as that was the very day that he resigned as Project Manager, and given he was never validly replaced, the matter was not advanced. It might be that had Mr Barton remained, a different and lower amount would have been agreed to be added to the £380. Some element had to be added to that rate, as it did not include for any of the work included for the skids that had to be offloaded and moved. Double and triple skids were also involved.
326. ICI is the architect of its own misfortune in respect of this add-on rate of £184. It deprived itself of the ability to agree (or have agreed on its behalf) a lower add-on than £184 by virtue of Mr Boerboom's interference, Mr Barton's resignation, and his non-replacement. In the circumstances, and based on the fact that in my judgment MMT are plainly entitled to something above the agreed rate for lesser but similar work of £380, I find that the correct amount for this PMI is the higher rate of £564 for the 144 skids that were the subject of this PMI, together with preliminaries, and I am satisfied that MMT's valuation is to be preferred to that of ICI.

Approved Judgment*PMI 285 - AMS Header Rework*

327. The amount under this PMI is £33,088.75. 31 different lines were affected by the height of the AMS Header and had to be reworked. The amount claimed per line is between £985 and £1,155. £188 of each of those line costs is claimed in respect of CAD work. ICI propose a value of £10,000, and Mr Kitt's Low Valuation is the same as that, with the High Valuation being the global figure of £30,000.
328. The work plainly had to be done and MMT sent an Early Warning Notice or EWN reference 075 to ICI on 7 February 2014 in this respect. This PMI was valued by Mr Barton in an interim valuation in the sum of £30,000, although the March 2014 interim valuation only allowed 95% of that. Conventionally that would be because not 100% of the work was done by that stage.
329. The figure of £30,000 is the amount to which I find MMT is entitled as a result of this PMI. It is a contemporaneous record of the Project Manager's view. I accept that this work was done. Although it might be said that the figure chosen by the Project Manager was more of a global assessment rather than a scientific build up of the eventual cost, any under recovery by MMT of the amount claimed is, in my judgment and in these circumstances, de minimis.

*PMI 286 - Anticipated Rework*

330. This relates to some isolated pieces of work that are related to changes to what are called the ISO lines. This PMI was used as a home for various isolated and different amounts on different lines. It was first included separately in April 2014, and was to cover then-anticipated cost of work necessary due to design changes.
331. In order to demonstrate ICI's approach to this whole exercise, I am going to produce an extract from ICI's Closing Submissions regarding this PMI:  
 "As Mr McGrady has already conceded that there was over £100,000 of duplication in the Mop-Up claim, it is submitted that there could also be duplication with the material claimed here; however, without evidence as to what the quantities claimed relate to, there is no way of identifying what is duplication....."
332. The concession of £100,000 on the Mop Up PMI is wholly separate to this one. It was a sensible and credible response by Mr McGrady to a point he accepted on an entirely different PMI. The submission above made as a result on this PMI is wholly speculative. In any event, it also ignores Mr McGrady's direct evidence on this PMI. Incorrect design information was provided and that meant that this re-work was necessary. Mr Linnett has looked at the 33 different build-ups, which he states are for "relatively minor omissions and additions" and he has also identified that it appears that ICI have not taken these alterations into account.
333. I accept MMT's evidence on this PMI and I find that the valuation of the MMT works should include the amount claimed by MMT.

*PMI 287 - Accommodation Move*

334. The amount claimed for this PMI is £1,512.97, arising out of additional works performed by MMT in connecting cabins, a canteen, site lavatories, meetings rooms and drying rooms to the utilities such as drainage, water and electricity. This site

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accommodation was originally at the front of the building, but had to be moved to a new compound located at the rear.

335. ICI values this work at nil. The work was done as a matter of fact, there is evidence about it from Mr McGrady, and I find that the amount that should be included is the amount claimed by MMT. Quite why ICI consider no amount at all should be allowed for this is wholly unclear. The site accommodation was installed in one place, operated from there for a time, then the development of the project required it to be moved.

*PMI 289 - Disruption*

336. This relates to disruption experienced at the fabrication shop. Mr Kitt accepted in his cross-examination that in principle such disruption would be a compensation event under the NEC3 Contract Form. No alternative valuation to the amount claimed by MMT – which is £229,381 – was advanced by ICI who assessed it as Nil, although Mr Kitt did provide a figure of between £25,000 to £30,000.
337. That some disruption was caused is not in doubt, and indeed Mr McGrady gave evidence about this. There are multiple documents that evidence it in the soft-copy quantum trial bundle, and Mr McGrady gave compelling evidence about it in his oral evidence when he was cross-examined. It was put to him that it was a theoretical desk top analysis. His answer was as follows (“iso” is shorthand for isometric drawing): “This is not a theoretical desktop analysis. So this is based on disruption in the fab shop, so what happens in a fab shop, Projen issue the design, Merit CAD people draw the isos, the isos are delivered to the fab shop, the fab shop decide which ones to do. They take the iso, which has a number of spools on it. One person would be allocated one spool. They will go and get their materials, they will go to and start the manufacture of that spool. That spool is no more than three or four metres long at a maximum and maybe has half a dozen welds on it. So they will start that spool and if it isn't finished that day, it most certainly will be finished the day after because the welds don't take that long, they're not that big spools, it's not big pipe, it's all small pipe. So the analysis that was done was based on the weld information, the weld packs that are now in Clyde & Co's offices, and the information was reviewed and where a spool took more than two days from start to finish to manufacture, and you can see that very clearly from the date that the welds were done, then those spools were said to be disrupted, and that disruption would take many forms, I think as I set out in here, which would include Projen putting the design on hold, Projen changing the design, the valves not being available from ICI to enable us to complete that spool, and, therefore, there was a lot of disruption in the fab shop.”
338. I accept this evidence. All of the direct evidence available is that there was such disruption. I accept Mr McGrady's calculation of the correct figure to be included in the MMT valuation for this PMI. The alternative figures proposed by Mr Kitt are simply arbitrary and way too low. Further, ICI have chosen not to use the documentation in its own possession (the weld packs) to embark upon a more analytical exercise than the one performed by Mr McGrady. Finally, the valuation of Nil, part of ICI's pleaded case based on Mr Brownlee, is another illustration of the wholly unreasonable approach to the valuation of MMT's works by ICI.

*PMI 293 – Audit*

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339. In late 2014, as part of the campaign orchestrated by Mr Boerboom, Coppa Associates undertook an audit of MMT contract. This has been referred to throughout the proceedings, and in both trials, as the Coppa Audit. It is not known what Mr Boerboom thought such an audit would uncover. Regardless of his hopes in this respect, the exercise broadly vindicated MMT's cost records. It was initiated in September 2014, and then took place from then through into December 2014 and January 2015, although it was rapidly overtaken by events, because after MMT commented upon certain of its findings, it appears to have been discontinued at about the same time as ICI decided to repudiate its contract with ICI. MMT fully cooperated with it.
340. The Coppa Audit is referred to in the liability judgment at [121], [122], [181] and [236]. I will not repeat my findings here, but in summary it showed that ICI owed MMT many millions of pounds still (the first draft report by Coppa showed a figure in excess of £6 million, a later draft showed £10 million) and its conclusions were accepted by different senior personnel within AkzoNobel. The conclusions were not accepted by those at ICI running this litigation, who seem entirely to ignore its conclusions. Indeed, the whole of Mr Kitt's exercise could be seen as a re-run of the Coppa Audit. Regardless of that, this PMI relates to the costs incurred by MMT in cooperating with it, and it should be remembered that ICI was contractually entitled to have such an audit undertaken. It does however have to pay the relevant amounts incurred as result of doing so under clause Z55.2 of the NEC3 Contract Form.
341. The differences between the parties on this PMI come down to the following two, namely the rate to be attributed to Mr Wells' time and whether the claim should attract preliminaries. MMT's Closing Submissions make no mention of the challenge made to Mr McGrady's hours (his rate is much lower at £114.28 and is accepted).
342. Dealing with these points in turn, the amount claimed for Mr Wells is £519.75 per hour. Both experts agree this is a high rate. However, MMT were given a very short period to respond to the Coppa Audit report. Coppa were given many months to prepare it. The amount that Mr Wells is actually paid is a matter of fact, whether high or not. A response was expected from MMT on the Coppa Audit and a response was required. This was part of the audit process. The involvement of the MMT Managing Director was not only justified, it was in my judgment essential.
343. ICI advanced a number of other lower hourly rates that it argued should be applied in preference to the ones claimed, but I am not persuaded that this is the correct approach. Mr Brownlee in his exercise reduced both Mr Wells' rate and Mr McGrady's hours, but these were dealt with in his 3<sup>rd</sup> witness statement which ICI did not adduce in evidence because it contained almost entirely his opinion and there was no permission for such opinion.
344. There was a vast amount of work involved on MMT's part in cooperating with the audit exercise. I find that Mr McGrady's hours claimed were all spent in doing so, and that these are adequately substantiated. I find the rate claimed for Mr Wells, although high for management generally (even a managing director) is the correct rate in the circumstances, particularly given his particular remuneration package and the cost to MMT the company. It is the cost to MMT that is relevant, as he had to spend his time dealing with the Coppa Audit, rather than with other matters.

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345. So far as preliminaries are concerned, the agreement with Mr Barton was that preliminaries for PMIs would be dealt with on a percentage basis. I see no reason to deal with this PMI any differently to the others in this respect. I reject ICI's attack on the preliminaries that attach to this PMI. Therefore Mr Wells' time should be valued in the rate claimed, and preliminaries should be paid too, on the percentage basis.

*PMI 294 – Standing Time or Lack of Efficiency*

346. This relates to the period from 6 October 2014 to 15 February 2015. The first date was when an instruction was given to suspend welding operations. The latter date was when the repudiation took place and MMT were required to leave site.
347. The instruction to suspend welding operations was given against the following factual background. The commercial meeting to which I have extensively referred elsewhere in this judgment was held on 7 and 8 October 2014. Mr Boerboom and ICI had been massaging the figures for interim valuations since September 2014, although nobody told MMT that. There were widespread complaints by ICI about defects which I have found were not justified, as they were made against a “standard” for testing the welds that was expressly not adopted by the parties when the costs for PMI 03 were discussed and agreed in 2013, and were inflated in any event to suit ICI (and Mr Boerboom's ulterior purpose). An agreement in principle was made with MMT (evidenced in the 10 Point Letter of 19 November 2014) that MMT would be paid £2.5 million, but a decision taken behind the scenes not to do so (and authority to make such a payment was withdrawn by AkzoNobel without MMT being told). It was known by both ICI and AkzoNobel that the ongoing cashflow problems would push MMT close to insolvency but this was seen as a positive benefit. These matters are dealt with extensively throughout the liability judgment, but [33] and [40] are useful reference points.
348. Throughout this period, however, MMT believed works would recommence, and I find that this was reasonable given the suspension of welding, and the fact that ICI knew and allowed MMT to believe that the 10 Point Letter was being used as a working template to allow MMT to resume work. MMT therefore maintained its labour force. It was never given an instruction to demobilise, and Mr Barton had previously in 2013 agreed an increase in labour rates specifically to keep the skilled labour MMT had acquired at MMT, rather than losing them to other highly paid jobs in the locality. Welding is a skilled operation and MMT's welders were all highly skilled (avid readers of the *ICI v MMT* saga may remember lack of qualifications being an allegation made by ICI which was dismissed in the liability judgment). Had MMT not maintained the labour force, they would not have been able to comply with the contractual obligation to recommence work, were such an instruction as that to have been given.
349. I find that this is a compensation event and MMT is entitled to have this valued at contract rates, a point accepted by Mr Kitt. MMT did reduce its labour force and I find that MMT acted reasonably in all respects in the circumstances. The best evidence available to the court is that of those who were actually there at the time, namely Mr McGrady. I accept his figure of only 25% efficiency, based upon his actual knowledge and contemporaneous involvement. ICI submitted that Mr McGrady “could (and should) have done better than relying upon mere assertion” but I reject

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that submission. Mr McGrady provided a sensible – and I find reasonable - percentage assessment based upon his direct knowledge.

350. I also find the rate applied to be the correct one in the circumstances. Mr Kitt in his cross-examination broadly accepted that the Schedule of Rates should be used and although MMT originally calculated this claim using a rate of £34.85 (which I would have rejected) Mr McGrady re-cast it using the correct contractual rate, namely £28.50. This is the rate identified in Section 4.1 of Appendix G for a “fitter/tradesman” which I find is the correct rate.
351. It therefore follows that I accept MMT’s figure for this PMI.

## **XII Answer to Agreed Issue 1: The total value of MMT’s works**

352. I am acutely conscious, in the course of drafting this judgment and making detailed findings on each section of the valuation of MMT’s works, and then reviewing them, that I have in practically every case accepted MMT’s evidence and figures. That is because, in a great many if not all cases, ICI’s alternative (if that is the correct word to use) suffers from the same, and repetitive, structural faults. These faults are:
1. ICI wholly ignored agreements reached by Mr Barton the Project Manager, and from others at ICI, such as Mr Hall and also Mr Conrad.
  2. ICI entirely ignored the contractual Schedule of Rates.
  3. ICI attempted to rely upon what were said to be lack of substantiating documents to justify providing no figure at all. In many cases such documents existed; in others, such documents would have been left on site when MMT were dismissed, and their absence (if relevant) is due to ICI, not MMT.
  4. In many cases, ICI advanced a figure of nil for works that had in fact been done.
  5. Speculative challenges such as “there might be duplication” were mounted, with no evidential basis.
  6. Wholly unrealistically low valuations were suggested by Mr Kitt, again with no evidential basis at all.
  7. ICI simply had no witnesses involved at the time, other than Mr Boerboom, whose reliability (or lack of it) I have dealt with above, and who was not involved in the detail of the works in any event.
353. A substantial amount of evidence from the liability trial was to the effect that ICI and AkzoNobel knew (although did not tell MMT) from September 2014 onwards that MMT was still owed many millions of pounds for its works. The Coppa Audit concluded that MMT was still owed many millions of pounds for its works. Mr Linnett’s exercise was to the same effect, although “owed” is not the correct term given the two adjudication decisions in MMT’s favour in respect of payment redressed the cash flow position.
354. Some personnel at ICI such as Mr Boerboom may, perhaps, genuinely believe that the valuation of MMT’s works under the contract is as low as £10.9 million (Mr Brownlee’s figure) or even £16 million (Mr Kitt’s High Valuation figure). The exercise undertaken in the quantum trial demonstrates that it clearly is not. The whole exercise in these proceedings seems to me to have been designed by ICI to give as low a figure for the valuation of MMT’s works, regardless of contractual entitlement, to fit a plea that ICI substantially overpaid MMT and to justify the litigation. Indeed, some of the submissions made on behalf of ICI – such as the invitation to prefer Mr

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Kitt's wholly non-contractual exercise and ignore the contract rates – reminded me of the similar approach urged upon the court by ICI, almost to the very end of the liability trial, regarding the non-contractual testing regime of X-ray testing. ICI, throughout this litigation, have paid scant, if any, regard to the contract terms.

355. Whether there has been an overpayment or not requires the necessary figures to be put to the findings above to give a final outturn figure for the valuation of MMT's works as at the date of the repudiation. Regardless of that final outturn figure, the result of having the Technology and Construction Court resolve the final valuation of MMT's works as at 15 February 2015 in the way adopted in this case can only have been a massively expensive and wholly disproportionate exercise.
356. There is then the total amount already paid to MMT to take into account (in terms of the accounting), in order to provide a conclusion on the value of the works, and whether MMT has been overpaid, or ICI has underpaid MMT for the works. That precise conclusion, and the arithmetic, must await the necessary input from the parties. However, it is obvious to me from my awareness of the figures that even if MMT has been overpaid, it is by an amount nowhere near the scale of the many millions alleged.

### **XIII The Counterclaim**

357. There are a number of different heads of counterclaim but they are all said to flow from, and to have been caused by, the repudiation which occurred in February 2015. The repudiation was dealt with in the liability judgment. Some heads of the counterclaim are conceded by ICI, referred to as the Primary Heads of Claim. These are the return to MMT of retention monies; payment for work performed as at 15 February 2015 that had not been included in any interim assessment as at that date; and payment and loss of profit for work already instructed to MMT as at the date of the repudiation. These were three separate PMIs, namely 147, 148 and 153. There is an issue in terms of what the profit percentage should be on that latter Primary Head of Claim, because different rates are advanced by the parties. This can be resolved shortly. The Contract Data Part Two included an express figure for MMT's fee in a percentage of 12.5%; that is similar to the gross profit margin MMT achieved across the whole of its business. 12.5% is also the rate pleaded in MMT's Particulars of Quantum of the Counterclaim. There is no basis for choosing a different rate to the one specified in the Contract Data, or the one pleaded. The evidence of Mr McGrady was that the profit margin across the contract as a whole was 38%. Mrs Barker agrees with this figure in her expert report. That figure can be "tweaked" in that if one considers solely non-steelwork related items, it rises to 43%; if costs related to the legal dispute are removed, it increases to 40%; and on steelwork alone it is a far lower figure, approximately 10%. I find that the correct figure to use is the rate in the contract itself, namely 12.5%.
358. The principles to be applied to recovery by MMT of the different heads of counterclaim are conventional ones. As stated by Lord Scott in *Golden Strait Corp v Nippon Yusen Kubishika Kaisha* [2007] UKHL 12, the rule is to ensure that MMT, so far as money can do it, is placed in the same situation as if the contract had been performed by ICI. This means as if there had been no repudiation. ICI has deployed a variety of authorities to justify its submission that none of the heads of the counterclaim, other than those at [357] above, are conventional or recoverable. ICI

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refers to these as “the Additional Heads of Claim”. The most useful is *Hughes-Holland v BPE Solicitors* [2017] 2 WLR 1029, which although a case concerning negligent misstatement includes dicta of wide application. Lord Sumption JSC at [20] explained that “effective or substantial causation is a familiar example of a legal filter which serves to eliminate certain losses from the scope of a defendant’s responsibility. It is an aspect of legal causation.”

359. However, there is one very important aspect of the factual matrix of this project that cannot be ignored, although ICI do their best in submissions to portray a completely counter-factual picture in this respect. At paragraph 270(b) of ICI’s Opening Submissions the following is stated:
- “Secondly, no claim has been pleaded and no evidence has been adduced to suggest that [ICI] knew that by delaying or refusing payment there was a likelihood of MMT being unable to trade. In *Bentley Construction Ltd v Somerfield Co Ltd (2001) 82 Con. LR 163* a contractor claimed damages representing sums withheld by its own debtors as a consequence of the employer’s breaches of contract in deliberately ‘starving’ it of payments in order to force it to cease trading. Once rumours spread of the contractor’s financial difficulties, its debtors postponed payment as a form of self-protection or in the hope that they would never have to pay. Judge Richard Seymour QC struck out the claim.”
360. Regardless of the applicability of that decision as any authority for the scope and extent of an economic tort – which is what that case concerned -- no such tort (or damages in respect thereof) are sought here by MMT. However, it simply cannot be stated by ICI that there is no evidence that ICI “knew that by delaying or refusing payment there was a likelihood of MMT being unable to trade.” Such a submission is contrary to a vast amount of the evidence adduced in the liability trial. One of the presentations made to Steer Co during the project addressed insolvency of MMT as an option in terms of keeping expenditure on the project to a lower level. The liability judgment sets this out at [5]:
- “MMT’s explanation – and this is supported to a certain extent by some of the documents obtained on disclosure – for everything that happened is that certain people at AkzoNobel decided to push MMT into insolvency. This was considered in order to achieve a more cost effective outcome for AkzoNobel than would otherwise be the case on this project. ICI’s explanation for what occurred in the autumn of 2014, running into early 2015, is that the work MMT had performed was of quite dreadful quality – one witness spoke of “the worse welding I had ever seen” – and MMT were said to be unable and/or unwilling to resolve such issues. That analysis of the welding quality is advanced by ICI relying upon both evidence of fact and also expert evidence. The allegations by ICI of such widespread defects is challenged strenuously by MMT.”
361. Findings in this respect are at [40]:
- “I find as a fact that part of the strategy adopted by AkzoNobel/ICI – perhaps from November 2014, but certainly from December 2014 onwards - was one aimed at driving MMT from site. I use the term AkzoNobel/ICI because at the time there were no separate ICI personnel in any decision making roles. All decisions on ICI’s behalf were being made by personnel and senior management at AkzoNobel. The hope was clearly that MMT would simply leave; the fact that MMT’s expectation of a sizeable

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payment of £2.75 million to MMT (and its non-payment) was potentially going to push MMT close to insolvency was seen as a commercial benefit.”

362. Pushing a company into insolvency, or pushing a company “close to insolvency”, is tantamount to that company being unable to trade, particularly in the construction industry. The expression “cashflow is the lifeblood of the industry” has been used so many times that it has almost become a cliché, but it is not less true for that. For ICI to submit that there is no evidence that this was the strategy adopted by ICI is an entirely misplaced submission, wholly ignores the evidence for the liability trial, and is also to ignore the findings at [40] set out at [361] above. No economic tort is pleaded by MMT. Punitive damages for breach of contract are not available in English law, and are not sought either. However, the awareness on ICI’s part of the likely consequences of the strategy adopted by Mr Boerboom is, in my judgment, obvious. I find that Mr Boerboom knew that there was a strong likelihood that the behaviour by ICI towards MMT would push the latter into insolvency. Losses flowing from the repudiation have to be analysed by reference to conventional principles, and knowledge at the time of breach is not the same as knowledge when the contract was formed, but history ought not to be rewritten in the way ICI seek.
363. A different approach in the quantum trial, but one to the same end, which was adopted by ICI was to portray MMT’s cashflow problems as all having been caused by the SCL and Murphy contracts, for example in paragraph 291 of its Opening Submissions. However, that again is to rewrite history (as well as ignore findings from the liability judgment itself). Although some MMT contemporaneous documents such as those called “the cost trackers” showed the overall position on individual projects as actual direct costs, it cannot be ignored that until the second half of March 2017 ICI was holding on to nearly £8 million of money (ignoring VAT) that on the face of Interim Valuation No. 22 MMT was actually owed by ICI for this project. MMT did eventually obtain that money but this was about four, or even five, months later than it ought to have received it. Throughout that period MMT had to pay all its employees their wages, pay all its other monthly liabilities, and run its business (including purchase of materials and so on). Its overdraft limit was £4 million, and the amount unpaid by ICI alone amounted to almost exactly two times that maximum figure of borrowings available from MMT’s bank. Anyone with the sketchiest grasp of business reality would realise the potentially catastrophic effect of such deliberate, and wholly unjustified, non-payment. This would also have been known at ICI at the time the contract was formed. The failure to pay that sum by ICI was not only a breach of contract (in amongst the other breaches by ICI) but was also directly contrary to statute, given no payless notice at all had been served. MMT was therefore lawfully entitled to that sum. To ignore that, as Mr Bowdery did when cross-examining on this point, and concentrate on far lower sums due on other contracts is to fail to see the wood for the trees.
364. So far as causation is concerned, there are the following four areas that I consider to be relevant to the counterclaim as a whole. These are:
1. The repudiation itself and its immediate effect upon MMT;
  2. The short-term impact, by which I mean the immediate shockwaves experienced by MMT which lasted until mid-2015;
  3. The medium-term impact;
  4. The liquidation of MMT in 2017.

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365. However one refers to the legal filters to be applied to the losses that arose in each of these four areas – effective cause, causation, remoteness, damages not in the contemplation of the parties, and so on – the basic approach remains the same. Simply because what occurred on this project up to and on the date of repudiation was a breach of contract by ICI does not fix ICI with legal responsibility for everything that occurred thereafter, up to and including the liquidation of MMT. Each head of loss must be considered separately. With those first principles in mind, I turn to each of the four areas to which I have referred.
366. The first of those four areas has been dealt with in the liability judgment and I made numerous findings in respect of this. Mr Bowdery invited me to reconsider my findings. Firstly, I have no jurisdiction to do so. The submission that I should do so is fatally flawed as a matter of law.
367. *In re. L and another (Children)(Preliminary Finding: Power to Reverse)* [2013] UKSC 8 the Supreme Court re-stated that a judge has the power to reverse his or her decision at any time before the order is drawn up and perfected, which under the CPR means when the order is sealed by the court. In this case, that was done in July 2017. Secondly, even if I did have such power, I would not be minded to exercise it in any event. There is absolutely nothing in terms of evidence or any other material that has emerged during the quantum trial to persuade me to do so. If anything, the evidence at the quantum trial has reinforced MMT’s case.
368. I also found in the liability judgment that ICI had been in repudiatory breach by failing validly to appoint another Project Manager after Mr Barton resigned, as the purported appointment of Mr Boerboom was invalid. That repudiatory breach was not accepted by MMT and so was of no effect. However, that does make clear that ICI was in breach of its obligations well before the final date on site of 15 February 2015. That factual situation cannot be wholly ignored when considering the losses which MMT says it suffered.
369. Turning to the second area, the short-term impact and immediate shockwaves were experienced by MMT during a time when the first adjudication was underway, and resolved in MMT’s favour by a decision for a gross payment of £9.1 million. ICI had treated its statutory obligations under the Housing Grants, Construction and Regeneration Act 1996 (as amended) in exactly the same way that it treated its contractual obligations to MMT. It had wholly ignored them. No payless notices had been served for either Interim Valuation Nos. 22 or 23. The first of those was the most sizeable and resulted in a decision dated 4 March 2015 in MMT’s favour.
370. The most surprising point was taken by ICI in cross-examination of both Mr Wells and Mr McGrady that MMT had an incredibly strong case to bring against ICI on the Interim Valuation No.22. This was done in the context of a broad challenge along the lines of “MMT cannot blame ICI for what occurred”. The expression used for the strength of MMT’s position on the claim for nearly £8 million at one stage was an “unassailable case”. The reason I find this surprising is this was not ICI’s position at the time. The submission seemed to emerge from an alternative reality. This adjudication was actually contested at the time by ICI. Nor was the submission reflective of ICI’s position immediately after the decision on 4 March 2015, when it

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was clear it had lost the adjudication. MMT had to issue proceedings in the TCC, given Action No. HT-2015-000161, to enforce the adjudicator's decision. A hearing date was even fixed for 16 April 2015. The usual order for expedited directions was made by Edwards-Stuart J, then the Judge-in-charge of the TCC, and sealed on 12 March 2015. Paragraph 119 of Mr Morris' 2<sup>nd</sup> witness statement dated 23 March 2017 lodged with the court in these proceedings states that the payment in respect of this adjudication was received by MMT from ICI on 17 March 2015. That is one day short of two weeks after the decision.

371. However, during this period – and the documents show from the very beginning of 2015 – the MMT directors had to seriously consider MMT's economic and business future. This is not unsurprising, the directors (given the financial condition of the company) are required to do so. MMT had not been paid at all since September 2014 on a major and high profile project. Wholly unfounded criticisms of the quality of its work were being raised, very extensively, by a high profile client who is a household name in the UK, ICI, on a major project. At one stage the amount said by ICI to be due to it for defects caused by MMT reached £5 million. There were said to be extensive defects in the welding performed by MMT. I find that this caused very serious (and obvious) impact upon MMT's business as a whole.
372. Within this period, MMT took professional advice from various sources relating to a proposed Company Voluntary Arrangement or CVA. However, this is high stakes territory for a company. This is because creditors have a chance to vote on a CVA; that is the whole point of such an arrangement. By putting a CVA to creditors, a company is highlighting to all its creditors its own financial difficulties. I find that the consideration of a CVA was justified in the circumstances and was reasonable.
373. In practice, and particularly in the construction industry, rumours and gossip often presage such formal steps. The phrase I used in the liability judgment for this feature of MMT's problems generally at [55] was "industry gossip". All of these matters meant that both creditors, debtors and others changed their attitude to MMT in the first quarter of 2015.
374. The pendulum of economic fortune began to swing very dramatically for MMT in March 2015. MMT decided to initiate the proposed CVA. Then the adjudication funds were received from ICI; together with VAT, this amounted to £9.1 million. The CVA was no longer necessary. However, the very day in March 2015 that these funds were banked, the Bank of Scotland withdrew all of MMT's banking facilities, which means its access to any credit. MMT, which had operated perfectly well with an overdraft limit of £4 million for a substantial period of time, had no credit available to it at all until 26 May 2015, and after that only in reduced amounts and on much more onerous terms than before, for a strictly limited period of 12 months only, and in a reduced facility amount. Eventually banking was obtained at Santander UK, but on much worse commercial terms than had been the case before the repudiation. This dramatic development upon MMT's banking facilities (regardless of what caused it) was wholly ignored by Mr Thompson in a graph heavily relied upon by ICI in its Opening Submissions, and during cross-examination. Quite why an expert forensic accountant should ignore such a major point entirely is not clear. The fact that he did speaks eloquently of Mr Thompson's approach to his task in this case. His graph originally showed MMT's overdraft continuing serenely uninterrupted from February 2015 until

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May 2016. It was later corrected but this is a fundamental error that should not have occurred.

375. The Directors of MMT decided to use the holding company, Merit Holding Ltd or MHL, as the trading company instead of MMT. Thus the so-called “hive up” occurred, namely payment of a dividend to MHL by MMT and a transfer of assets and liabilities from MMT to MHL on 31 March 2015/1 April 2015.
376. Turning to the medium-term impact, MMT was owed significant sums on other projects from other customers. The most significant were J Murphy Ltd (“Murphy”), Bouygues and SCL. The latter related to a project in India. The amounts which MMT considered it was owed on each of those projects was (in approximate terms) £4.8 million from Murphy, £61,131 from Bouygues and €8 million from SCL. Problems with Murphy started in January 2015, and Murphy stopped paying MMT on 4 February 2015. The lack of payment, or under payment, by SCL, related back to a project that had been performed somewhat earlier in time in 2012.
377. MMT maintains that it had to settle both of the disputes with Murphy and SCL at an under-value to their true worth, and had to do so as a direct result of the problems caused by the repudiation by ICI on this project. It therefore seeks the amount of underpayment as damages from ICI.
378. Finally, MMT was voluntarily liquidated in early February 2017. Mr Morris of ICI’s solicitors gave detailed evidence in his 2<sup>nd</sup> witness statement about the background to, and holding of, the relevant creditors’ meeting which was held on 17 February 2017, and which was preceded by the relevant notification on 10 February 2017 in the London Gazette pursuant to section 98 of the Insolvency Act. The meeting in fact took place on 3 March 2017. Mr Matthews of Leather Matthews Restructuring LLP was appointed as the liquidator. Mr Morris and two other partners of the insolvency department of Clyde & Co attended that meeting. ICI maintained it was a creditor of MMT in the sum of £16 million, but that was disputed by the directors of MMT, and for the purposes of voting rights ICI was admitted as a creditor in the sum of £200,000. MMT seek the costs of the liquidation as damages from ICI in the counterclaim.
379. It is necessary to come to a conclusion on causation in respect of the different heads of the counterclaim, before considering the amounts claimed. In my judgment, and taking into account all of the evidence on these matters, the following findings are relevant to the counterclaim.
380. The steps taken by the directors of MMT in the period following the repudiation in considering the company position, taking professional advice both from law firms and insolvency practitioners, and preparing for the CVA, are all recoverable from ICI which caused these losses. The effect of the events of the last quarter of 2014, the immediate effect of the repudiation, and thereafter the short-term impact, upon MMT was considerable. Recoverable too are the extra costs associated with what happened to MMT’s banking facilities, and the increased costs of borrowing. These were, in my judgment, very plainly caused by the repudiation.

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381. The undervalue of the settlements with Murphy, Bouygues and SCL have each to be considered on their facts separately. There is no issue of principle that governs them all, other than to say that they are in principle recoverable if established by the application of conventional principles for damages for breach of contract. The answer might be the same in each case, but will not necessarily be the same.
382. I consider that the costs associated with the liquidation cannot be recovered. These are those of Leather Matthews LLP and Bond Dickinson (the liquidator's legal advisers). In my judgment they are too remote, both factually, temporally, and as a matter of causation, to have been caused by the repudiation. This is for the following reasons:
1. The repudiation occurred in February 2015. The liquidation occurred over two years later.
  2. The financial impact of ICI under-paying MMT was resolved, in terms of the obvious effect upon MMT's cashflow, and the profit and loss account (and by extension the balance sheet) of MMT, by the two adjudication decisions that resulted in payments being made to MMT, namely Adjudications No.1 and No.4. The most substantial payment was the first one; the second one was still sizeable (although less than £1 million) and was in December 2016. That 4<sup>th</sup> adjudication could have been commenced 22 months earlier – the Act gives a party a right to adjudicate a dispute “at any time”. Indeed, this case demonstrates the powerful effect of adjudication in ameliorating the cash impact upon a party such as MMT when faced with an employer acting as ICI did here. Given the funds were paid to MMT, there was no financial effect of underpayment by ICI leading to the liquidation, because the underpayment was resolved by these two adjudications (and in particular by the first one, Adjudication No.1).
  3. Although there was business and reputational damage to MMT caused by these events, that was no longer suffered by MMT after the so-called “hive up” because MHL became the trading company after 1 April 2015. Therefore, any lingering, or ongoing, such damage to trading after that date could not have been suffered by MMT after that, because it was not doing any trading. As MMT put it in its Closing Submissions “creditors and customers (existing and/or new) wanted to trade with ‘Topco’”. Mr Mort submitted that in reality there was “no distinction of any meaning between the companies that formed part of the Merit Group” at paragraph 289 of the MMT Opening Submissions. I disagree with that approach. ICI did not contract with the Group, it contracted with MMT. The counterclaim is one by MMT for damages caused to MMT by ICI's repudiatory breach of contract. The fact that the directors of other companies in the Group are broadly the same people as the directors of MMT does not matter.
383. The liquidation occurred very closely before the start of the liability trial, in relative terms. There is no doubt that the directors of MMT took professional advice, the liquidator has conducted the litigation since then, and no points of the propriety of the liquidation were put to either of the MMT directors in cross-examination. However, the impact of the litigation must have had some effect upon MMT during 2016 and 2017. Whatever that impact was, it was not a breach of contract for ICI to litigate – it was lawfully entitled to do so. The costs of the liquidation are sought as damages for breach of contract, on the basis that these losses were caused by the repudiation by ICI and the matters before that, and not by the litigation. Whatever the impact upon MMT of the litigation, the impact cannot have been negligible. The liquidation of MMT may, for the Group, have been sensible but the costs of it are only recoverable

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if it was caused by the repudiation in February 2015. This liquidation in March 2017 was not.

384. MMT also mounts a sizeable claim which has different component parts, but were added by re-amendment to the counterclaim at paragraph 115(4) to (8), including management time (a claim of in excess of £3 million alone on the pleadings, that has fallen to £748,790) and additional tax liabilities. These are miscellaneous and I deal with them separately below.
385. I will now turn to the different heads of loss advanced in the counterclaim. Some of them are agreed by the expert accountants.

*Professional fees excluding those relating to the liquidation in 2016*

386. I consider that it is artificial to exclude costs incurred in January 2015 – or even December 2014 – because at that time MMT was beginning to experience a serious cash flow squeeze. I have disallowed recovery of the fees of the liquidator and his legal advisers' fees above. I also exclude recovery of forecast costs, as these relate solely to those two professional firms.
387. There is an issue in relation to invoices for professional fees being addressed to other companies in the Merit Group, such as MHL or MPE (another member of the group) rather than MMT. Professional advisers, whether accountants, lawyers or otherwise, are usually careful about the entity to whom they address their fee notes or invoices. Mrs Barker has assumed that costs invoiced to companies other than MMT within the Group, such as MPE, can also be recovered. I do not accept that is the correct approach without any exception, but the point only appears substantially to arise within the liquidation costs which I have disallowed in any event. The exception to which I refer is the period up to the end of May 2015. In that period – and the professional fees really start being incurred in January 2015 – some invoices for professional fees for potential restructuring are addressed to MHL and MPE, and not MMT. I find that during that period, invoices addressed to those companies represent fees that can be recovered by MMT in this litigation. This is because during that period MMT was under extraordinary financial stress, and this was what caused the advice to be taken. It would have made no sense for the directors of MMT to have taken such advice, on MMT's behalf, yet to have added to that financial stress by imposing upon MMT the burden of paying for those fees at the time. However, although MHL and MPE received the invoices, they could have chosen to recover the fees from MMT as the advice was obtained on MMT's behalf. The same directors controlled the different companies would (in so recovering the fees) have borne their duties to the individual companies in mind. I therefore find that professional fees contained for all invoices dated up to 31 May 2015 can be recovered by MMT, even if those invoices are addressed to MHL or MPE. The rationale for this no longer applies after 1 June 2015, therefore invoices addressed to either of those companies after that cannot be recovered by MMT.
388. The total, based on what Mrs Barker and Mr Thompson accept as actually and reasonable, but adjusted to remove liquidation costs, is therefore £239,369, and I find that MMT can recover this amount in professional fees.

*Additional Costs*

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389. The figure for personal guarantees (required in respect of the banking facilities changes), Bank of Scotland legal fees, increased bank costs, legal fees for the replacement bank Santander, the increased costs of bonds and the legal costs of Ward Hadaway is a figure agreed by the two accountancy experts. It is £168,599.08.
390. Increased interest is not agreed. Mrs Barker's figure is £15,111 and Mr Thompson's is £13,927.57. The difference is only £1,183.43 but as I prefer her evidence to his, I find her figure is the correct one. A credit in an agreed figure of £9,679 needs to be applied to take account of what the normal bond cost would have been (the increased bond cost having been included in full).
391. There is a figure for estimated legal fees "going forwards" for Santander of £10,000 but I am not sure to what this relates. If it is the same figure as the £9,630 referred to by Mr McGrady in his 2<sup>nd</sup> witness statement, this is addressed to MHL from Square One Law in an invoice dated 31 May 2016 and is not recoverable for that reason, not being addressed to MMT.
392. There is a VAT loan agreed by the experts in the sum of £58,994 which was necessary for cash flow purposes as explained by Mr McGrady and I allow MMT to recover this.
393. Finally, under Additional Costs, there is the separate issues of lost rebates. Mrs Barker has calculated this amount in the sum of £180,000. The rationale for this is that higher purchase costs were incurred by MHL than would have been the case had the same items been purchased by MMT, the entity that would have been the customer absent the hive-up of business to the holding company. It is an incidental cost of the hive-up, but is a loss suffered by a company other than the one that is the party to these proceedings, namely MMT. I reject it.

*Reduced payments or settlements on other projects**SCL*

394. The first of the three different projects was situated in India and was for the India Department of Space. Although Mr Wells did not descend to dates concerning the actual project in his witness statement, which was surprising, the actual dispute related to 2012 and this can be gleaned from the correspondence on the subject. Notice of Arbitration was served by MMT on 9 April 2014. MMT found both the project itself in India, and the process of commercial arbitration, difficult. As an example, it was not until June 2015 that SCL, the other party to the dispute, appointed their arbitrator, so the tribunal itself was not constituted for over one year after the Notice was served.
395. The hearing was to take place in India in June 2016. On 4 March 2016 SCL made an offer to settle the claim by MMT (and the counterclaim by SCL) in the sum of €2 million, against the amount that Mr Wells considered "MMT would succeed in proving an additional entitlement of approximately €8 million". Mr Wells' evidence is that MMT was not in a position to fund both this arbitration, alongside the litigation with ICI. He also knew and was advised that the arbitrators' award might come many months after the hearing itself had been concluded, even if MMT were successful. His evidence was that the financial stress imposed upon MMT by ICI meant that there was no reasonable alternative but to accept the offer of €2 million. He listed the

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reasons for this acceptance in paragraph 270 of his 3<sup>rd</sup> witness statement. There are four. They are:

- “1. The offer made by SCL was time limited.
  2. Merit was in desperate need of cash.
  3. Merit did not have an agreed bank facility in place beyond May 2016.
- and
4. Merit feared that their deteriorating financial position would render completion and enforcement of the arbitration impossible.”

396. Point 1 is not relevant to the claim to recover this head of claim from ICI. SCL made an offer of a type usually referred to as either a sealed offer or Calderbank offer, and these are usually (if not invariably) time limited. Point 2 is not relevant. Adjudication Decision No.1 had been satisfied well before SCL made this offer, and ICI had paid this. If MMT had wished to do so, it could have started another adjudication for sums due (it did in any event do so later in 2016 in Adjudication No.4, the decision being made in that adjudication on 11 September 2016 and MMT recovering £816,000 as a result). Point 4 is just a sub-point of Point 2.
397. The only point that could be said to be due to ICI is Point 3, but by this stage MMT had stopped trading. Essentially the point that Mr Wells has is a commercial and logical one, namely the considerable disadvantage and logistical challenge (as well as the expense) of fighting SCL and ICI at the same time. It was a classic example, in the litigation context, of fighting a war on two fronts. As a number of historians would doubtless explain, this is not a sound strategy and rarely ends well.
398. However, ICI was not in breach of contract by being in litigation with MMT. ICI had the right to do so. Litigation, and arbitration, are long and expensive processes. Being involved in TCC litigation with ICI, and also fighting an international arbitration against SCL in India, would have been gruelling. It was entirely sensible to settle the SCL arbitration and accept the SCL offer. However, that does not mean that the decision to settle the SCL dispute at the level agreed entitles MMT to recover the balance of what Mr Wells says would have been recovered had MMT been successful in that arbitration. In my judgment, that shortfall does not constitute a sum that can be recovered from ICI as damages for breach of contract caused by the repudiation. MMT might not even have won its arbitration against SCL. I find that this sum is not recoverable.

*Murphy*

399. The facts of the Murphy dispute are rather different to that with SCL. MMT was the mechanical and electrical sub-contractor to J Murphy and Sons Ltd for a combined heat and power station project in Beckton in East London. Murphy was the main contractor. Problems with Murphy on that project started in January 2015, near the very end of the project, with Murphy stopping payment to MMT on 4 February 2015. This period is directly when the ICI project was approaching its end point, with the last couple of months of MMT attempting to obtain payment and widespread allegations of £5 million worth of defective welding. I find that Murphy would have known of this situation from about mid-December 2014. The repudiation finally occurred on 15 February 2015. Both prior to, and immediately following, that period, MMT was taking advice about the CVA that did not ultimately occur.

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400. Murphy was given a copy of the CVA documents by another creditor of MMT. It was expressly referred to by Murphy when MMT raised, as a means of enforcing the sum said to be due to MMT, the threat of adjudication against Murphy.
401. Murphy were not much impressed with the risk of adjudication being commenced by MMT. This was because Murphy knew that MMT would have considerable problems in enforcing any decision in its favour in any event, even if that adjudication was won by MMT. This is because of the principles governing stays of execution upon adjudication enforcement. These are set down in the well known case of *Wimbledon Construction Company 2000 Ltd v Derek Vago* [2005] EWHC 1086 (TCC) [2005] BLR 374 where HHJ Coulson QC (as he then was) set out the principles that apply. He did so by drawing together the different strands in all the cases that had arisen in the context of adjudication enforcement and stay of execution of summary judgment. In that case he granted summary judgment. The defendant had also sought a stay of execution, the basis for which was said to be concerns that the claimant would be unable to repay the sum if the defendant were successful in an arbitration on the substantive issues. The application was refused and a stay of execution was not granted.
402. The judge considered all the relevant authorities as at that point, and set out the principles that applied at [26] in a section headed “Applicable Principles”. Those principles have been applied time and again since then, and that passage in his judgment is generally accepted as being the foundation for consideration of whether a stay of execution of an adjudicator’s decision should be granted or not. Although it was under RSC Ord 47 and not CPR Part 83.7, the same principles apply. The test for a stay would be under Part 83.7(4) which is “if the court is satisfied that (a) there are special circumstances which render it inexpedient to enforce the judgment or order.... then .... the court may by order stay the execution of the judgment or order.” The judge stated the following:
- “26. In a number of the authorities which I have cited above the point has been made that each case must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court’s discretion when it is considering a stay of execution in adjudication enforcement proceedings. Those principles can be set out as follows:
- a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
  - b) In consequence, adjudicators’ decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.
  - c) In an application to stay the execution of summary judgment arising out of an Adjudicator’s decision, the Court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind.
  - d) The probable inability of the claimant to repay the judgment sum (awarded by the Adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay.
  - e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted.

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f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

(i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made; or

(ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator."

(emphasis added)

403. The financial difficulties in which MMT found itself at the time, caused by ICI and as demonstrated by the CVA documents, would have led to a very great difficulty in enforcing an adjudication decision against Murphy (or anyone else, save ICI). Murphy knew this, and MMT knew this. For this reason MMT suspended the adjudication that had been commenced on the Murphy account in order to mediate the dispute. MMT really had no option other than to do that; a victory in an adjudication in a decision that cannot be enforced is completely Pyrrhic. I find that Murphy's behaviour from the end of 2014 onwards, in raising a sizeable dispute on a contract that had worked perfectly well until then, and refusing to pay MMT any more money after January 2015, which was purely opportunistic, it was caused as a result of ICI's conduct on the project and was to take advantage of the grave difficulties caused to MMT by ICI's breach of contract.
404. Mr Wells made an offer to Murphy the day after the unsuccessful mediation to settle the final account at an outstanding balance of £1.9 million. This was accepted. The amount that had been discussed by the parties prior to the repudiation was an agreed final account figure which would have given a balance due to MMT of £3.2 million (the actual total MMT was seeking was originally £4.8 million but Mr Wells' discussions had moved that figure downwards to £3.2 million). Mr Wells' evidence is that there were no other disputes between Murphy and the other sub-contractors on the project.
405. The correspondence is illuminating on this subject. Murphy did not dispute liability, and I conclude that Murphy was simply doing the best it could do commercially, to reduce the amount it would pay to MMT, because it knew MMT were in deep trouble as a result of the ICI project, and could not adjudicate with any confidence of funds being actually received by it in any favourable adjudication decision. This was because of the necessary exploration by MMT of the CVA, its preparation, and this meant that a decision could not be enforced. Both of those situations were directly caused by ICI's breach of contract. Murphy also knew that MMT could not sensibly engage in protracted and expensive litigation with it. MMT essentially had no real prospects of enforcing its entitlement from Murphy, whether in adjudication or litigation. In my judgment, the offer that Mr Wells made to Murphy was a reasonable one in all the circumstances in that it represented the most that MMT could recover from Murphy in respect of the outstanding balance due to it for its works at the time and in the factual circumstances.
406. In those circumstances, and given the direct and measurable loss between the amount Murphy was prepared, prior to January 2015, to agree for the final account balance payment due to MMT of £3,200,000, and the amount in fact recovered of £1,900,000,

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in my judgment the balance of £1,300,000 is recoverable from ICI as damages for breach of contract. I find on the facts that causation is established between this difference in recovery from Murphy, and ICI's repudiatory breach of contract. Indeed, whichever "legal filter" is applied (to use Lord Sumption's phrase from *Hughes-Holland v BPE Solicitors*), this loss satisfies that test. Further, if one considers the contemplation of the parties at the time of contracting, this loss would satisfy that test too. Absent ICI's breach of contract, I find that Murphy would have settled the claim by MMT for the outstanding balance due in the sum of at least £3,200,000.

407. There is another head of cost associated with this contract, namely legal fees associated with the Murphy dispute of £173,368. I am not prepared to award this. This is because there is no direct evidence at all from Mr Wells about it, Mrs Barker has not considered it at all and the amount attached to it by Mr Thompson is zero.

*Canning Town*

408. The third, and much smaller, amount under this head of loss related to a well known French contractor called Bouygues and a project MMT performed at Canning Town. The sum claimed is approximately £61,000. This is a balance due on an agreed final account. The reason that Bouygues are not prepared to pay MMT is directly, and expressly, due to the liquidation of MMT. This is not causally linked to ICI's breach of contract. It also appears to be a function of the liquidation itself, on Mr Wells' own evidence. I do not consider that this is recoverable in these proceedings.
409. The total therefore for this head of claim under paragraph 114A(5)(a) of the Re-Amended Defence and Counterclaim is £1.3 million.

*Management time*

410. The figure originally claimed for this was £3,000,000, but the amount sought by MMT by the time of trial had fallen; this head of claim was by the end of the trial claimed in the amount of £748,790.88. The claim has been compiled by Mr McGrady. It was a head of counterclaim added by amendment in July 2017, and was at that stage pleaded simply as "loss of management time". In the Particulars of Quantum of Counterclaim served on 2 December 2017, the particulars simply stated "the cost of management time: £3,029,811." No period of time or other details were provided. That larger amount of £3.029 million included expenses (dealt with below) and rebranding costs (which are not pleaded and which I have disallowed). However, there has still been a sizeable reduction.
411. The evidence of Mr McGrady on this head of counterclaim makes it clear that the period from which this claim was calculated was 1 April 2015, running until "the end of the case in May 2018" (in one paragraph) or "the end of April 2018" in another. There are 18 bullet points identified in paragraph 643 of his 2<sup>nd</sup> statement stating what work this consists of. Some are simply tasks that management would be expected to undertake anyway – for example the four adjudications and the litigation. Some are activities that I have concluded are not causally related to ICI's repudiation, for example dealing with the liquidator.
412. There are two different approaches in respect of the calculation. One is a financial assessment "based on salary alone" of the MMT management. The other is "based on salary and underperformance of Merit" and is a higher figure, because as Mr

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McGrady explained in his evidence “this increases...when based on the underperformance of Merit against its budgets caused by the reduced focus Tony Wells was able to give his key normal role of winning new contracts for the business. Tony Wells has a key role in the whole tender process....and is the individual who converts tenders into contract wins. As a result of his spending a significant amount of his time attending to adverse matters that had occurred as a direct result of the repudiation, the group experienced a downturn in its trading performance.”

413. The amendments to the counterclaim which I refused in July 2017 included one at proposed new paragraph 114A(4)(a) that MMT’s management was prevented from “winning work for the Defendant”. I also refused permission for MMT to add an entire proposed new sub-paragraph (5) which alleged that MMT’s position and reputation in the market, both for existing and prospective customers, was damaged, and that as a result MMT “was handicapped in winning new work”. That refusal by me of MMT’s application to amend was subject to an application to the Court of Appeal, who refused MMT permission to appeal. Jackson LJ refused permission to appeal the refusal of the amendments to which I have referred.
414. I consider that the higher way of calculating the management time claim, namely the one that seeks to factor in “the underperformance of Merit”, is not open to MMT to advance in these proceedings, given my refusal of these proposed amendments in July 2017, a decision which was upheld by the Court of Appeal in refusing MMT permission to appeal that order. The downturn in trading performance of the Group is simply using a different form of words that amounts to the same thing. Further, and in any event, trading performance of “the Group” could not, on the facts of this case, be recovered in any event. MMT’s own evidence from its two directors is that MMT itself ceased to trade as from 1 April 2015. There was a specific decision not to trade after that date. If MMT is not entitled, on the pleadings, to recover losses incurred because MMT’s management was prevented from winning work for MMT itself, it can hardly be permitted to recover losses said to be incurred as a result of the same people being prevented from winning work for another company or other companies in the group.
415. Turning therefore to the claim for “salary only”, the detailed working of this has been done by Mr McGrady. Mr Thompson values this head at zero and Mrs Barker provides an analysis that gives a range of figures. I accept that MMT management time is recoverable in principle as a head of damage. Such time is incurred as a direct and foreseeable result of the behaviour of ICI. I accept Mr McGrady’s basis of calculation using hours, salary, and his assessment of involvement based on his study of all the contemporaneous material including the many thousands of emails and how long he has assessed would be spent on each. I accept the different personnel. In the draft judgment I considered that Mrs Barker had broadly approved the rates used in her table 32 and paragraph 7.6.3 and 7.6.4. However, following distribution of that draft it became apparent that her view of the actual rates paid, removing an adjustment uplift of 12.5% added by Mr McGrady, were the rates included in her table 34. Those are therefore the correct rates to use in my judgment. They are £454.44 for Mr Wells; £103.07 for Mr McGrady; and £60.54 for Mr Conn.
416. However, I do not accept that this claim can go on into 2016, until 2017 and even 2018. Mrs Barker has not done a calculation for the period using the rates advanced

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by Mr McGrady, nor could she be expected to do so, given she did not know in advance that I would calculate the claim in the way that I have. She had done an analysis of hours, but that removed some hours in respect of adjudication which I have decided should be dealt with in a different way. The period for which I find MMT has suffered a loss under this head which is recoverable from ICI is up to, and including, May 2015. This is a period slightly longer than three months from the date of the repudiation itself. I consider that losses going on after 1 June 2015 are not recoverable as they are temporally too remote. However, in those three ½ months immediately following the repudiation, I find that all the necessary ingredients for recovery of management time as a head of counterclaim are satisfied.

417. This period also runs for two months from the date of the hive-up. I consider that it would be artificial to put an end date for this claim as at the date of the hive-up. However, a reasonable period after that is also, in my judgment, two months. There would have been management time spent by MMT's directors after the hive-up, which were still related to the business of MMT, and necessary dealing with the consequences of ICI's breach. The end of that two months is also the end of May 2015.
418. In order therefore to put a money figure on this head of counterclaim, it has been necessary for me to go into Exhibit MM9 to Mr McGrady's 2<sup>nd</sup> witness statement and do the necessary arithmetic. Summary pages for Mr McGrady are at D2/615; Mr Wells at D2/720; Mr Conn at D2/806; and Mr Riley at D2/844. Mr Riley has no sums attributed to him for this period so the amount in respect of him is zero. I allow nothing for the "other board members" who are claimed on a vague basis in the global sum of £40,000.
- The amounts for each of the three management personnel in the period I allow (subject to an adjustment to which I will refer) is therefore Mr McGrady £76,530.51; for Mr Wells £253,659.32; and for Mr Conn is £2,320.50. However, I consider that it is necessary to adjust these amounts for Mr McGrady and Mr Wells to take account of the fact that Adjudication No.1 took place during this period, and I do not consider that MMT is entitled to recover damages for such lost management time. Conducting an adjudication is something that management of a company should expect to do in any event, and recovery of such costs seems to me to be very similar to recovering costs in an adjudication. What follows can only be a broad assessment based on all the evidence, and doing my best to take a common sense view of how much time would have been spent during this period. Doing the best I can, I consider a reduction of 20% to each of Mr Wells and Mr McGrady's figures is justified to take account of time spent by each of them in respect of the adjudication.
419. I have invited the parties to agree this calculation. In the draft judgment I calculated the amount as a total made up of £77,565.50 for Mr McGrady; £262,754.80 for Mr Wells; and £261.70 for Mr Conn, which amounted to £340,582. However, there was a typographical error as the figure of £261.70 should have been £2,610.66. There was also another error as I had used Ms Barker's table 32 rates, and not those contained in her table 34. The parties made further submissions on this, and based on my findings above, the agreed figure is £266,472.36.

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420. There is also a very small claim for what are described as “expenses” in an amount of less than £10,000. These are agreed by the accountancy experts in the sum of zero. I do not award anything in respect of these to MMT.
421. There is also a vague claim for what are said to be “additional tax liabilities”; these are not dealt with by experts and I do not award anything in any event.

**XIV Answer to Agreed Issue 2: The Counterclaim**

422. The figures above, where I award MMT sums on its counterclaim, need to be aggregated. I prefer to leave that arithmetical exercise to the parties, who are to provide me with an agreed calculation. The answers to the sub-elements of Agreed Issue 2 above are as follows.

- a. The value has to be provided by the parties. The rate for loss of profit is 12.5%.
- b. Not to “each of the consultants”, because the liquidator’s fees are not recoverable, but broadly yes.

In particular:

- (i) Begbies for advice and assistance relating to the initiation and management of the CVA proposals. Yes
  - (ii) KPMG for advice and options if the CVA proposal was rejected by MMT’s creditors. Yes
  - (iii) Ward Hadaway for independent advice on the CVA proposals and directors’ duties. Yes
  - (iv) Deloitte for advice on, assisting with and managing the raising of additional finance following the repudiation and the impact on MMT. Yes
  - (v) 3V Partnership for due diligence for a preferred funder. Yes
  - (vi) Deloitte for renewing banking facilities and subsequently finding an alternative bank. Yes
  - (vii) Neil Matthews for liquidators’ fees. No
  - (viii) Bond Dickinson for independent advice to MMT’s liquidator and expenses. No
- c. Is MMT entitled to damages in relation to “the cost of management time” as pleaded in paragraph 21 of MMT’s Particulars of Quantum of Counterclaim and if so in what sum? Yes, £266,472.36.
  - d. Is MMT entitled to damages representing the alleged “reduced payment negotiated” on the SCL Project and if so, in what sum? No
  - e. Is MMT entitled to damages representing the alleged “reduced payment negotiated” (which for the avoidance of doubt includes a claim for legal fees) on the Murphy Project and if so, in what sum? Yes, £1.3 million.
  - f. Is MMT entitled to damages in the sum of £61,131.77, which represents the sum claimed in an invoice addressed to Bouygues dated 16 March 2016 relating to the “Canningtown Project”, that Bouygues has failed to pay MMT? No
  - g. MMT is entitled to recover the damages set out in this sub-issue in the amount agreed by the parties in the Counterclaim Table handed up on the Final Day, and in the sums identified above in relation to each item. The total figure has been calculated by the parties and appears in Schedule 1 to this judgment.

**XV Answer to Agreed Issues 3 and 4: Interest**

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423. In summary these issues relate to whether interest should be payable on any amount due under the Final Account prior to taking account of a set-off by reason of the counterclaim, or whether a set-off should be applied, with interest calculated only on the balance due. There is some limited authority on this point, for example *Kiteley v Allison* (unrep.) [1994] Lexis Citation 4242, a decision of HHJ Humphrey Lloyd QC, which concerned an appeal against an arbitral award on a point of law, under the Arbitration Acts that were in force prior to the Arbitration Act 1996, namely the 1950 and 1979 Acts. In that case, the arbitrator had applied interest to the final account sum due, and then deducted the counterclaim for defects from the balance. By dealing with interest in this way, prior to taking account of damages for defects due to the employer, the judge found that the arbitrator had made an error of law.
424. However, the point was not fully argued before me and, in the draft judgment I stated that depending upon the way that the figures on the final valuation of the MMT are totalled, it may not arise at all. I therefore did not address either of these issues at that stage in the judgment. I took the view that until the figures were finally calculated, neither the parties nor the court could actually know whether it was a real point or simply a hypothetical one. Following consideration of the draft judgment and the exercise of agreeing sums by counsel (including the exercise referred to in [283] above) it became clear that sums would be due to MMT both on its final account, and also on the counterclaim, such that this issue did not arise.

**XVI Conclusion**

425. There is always the scope for some litigation to seem never-ending, and these particular proceedings between ICI and MMT regarding this project are a case in point. The figures below, and those in Schedule 1, are subject to one possible minor correction following a period of 14 days which I have given ICI in order to allow the arithmetic (and calculation of preliminaries credit) checked by their expert, who could not be consulted prior to the handing down of the judgment due to the embargo.
426. Following distribution of the draft judgment to the parties in the usual way, counsel agreed the figures consequential upon my findings. All of these are included in Schedule 1 to this judgment. However, the summary figures are as follows, which shows a further sum due to MMT from ICI for the works (as distinct from the counterclaim) of £268,424.78. None of these figures take account of any further VAT which would arise in the normal course of events.
427. This is made up of the account for the works of £22,018,083.66 less the amount already paid of £21,749,658.88 which leads to a further payment of £268,424.78. There must then be taken amount the sum awarded on the counterclaim, which is £2,047,170, leading to a balance due to MMT of £2,315,594.78. Against that sum must be deducted the agreed sum consequential upon my findings in the liability judgment regarding defects, which was agreed by the parties to be £187,500 in ICI's favour. This must be deducted from the sum otherwise due to MMT. The balance overall therefore is £2,128,094.78 which I award to MMT in these proceedings.
428. This judgment may not be the final act in this long-running and bitter dispute. It is, however, the sixth first-instance judgment concerning this matter, and, one hopes, the last. This litigation also stands as something of an advertisement for adjudication. The amount of the MMT account for the works, finally determined after the expenditure of

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legal and experts' fees measured in millions of pounds, is barely 1% more than the amount awarded to MMT in the adjudications. The issue of who repudiated the contract was resolved in the litigation in the liability judgment with the same result as that given by the adjudicator in the 3<sup>rd</sup> adjudication. The only outstanding matters now are interest and costs. I will refrain from expressing the naïve hope that these matters might, perhaps, be agreed.