



Neutral Citation Number: [2018] EWHC 3124 (TCC)

Case No: HT-2017-000277

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

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 16/11/2018

**Before :**

**MRS JUSTICE JEFFORD DBE**

**Between :**

**CLANCY DOCWRA LIMITED** **Claimant**  
**- and -**  
**E.ON ENERGY SOLUTIONS LIMITED** **Defendant**

**Duncan McCall QC and James Bowling** (instructed by **Fenwick Elliott LLP**) for the **Claimant**

**Steven Walker QC and David Johnson** (instructed by **Pinsent Masons**) for the **Defendant**

Hearing dates: 9 to 12 July 2018

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
**MRS JUSTICE JEFFORD DBE**

**Insert Judge title and name here :**

### ***Introduction***

1. This dispute arises out of the Barts Square development, a substantial residential development, in central London. E.ON was and is involved in the development. This dispute arises out of a particular project for the installation by E.ON of an underground district heat network (UDHN) of insulated low temperature hot water and chilled water pipes to supply the development with heating and cooling using the by-product heat of E.ON's CHP (Combined Heat and Power Plant) at Citigen in West Smithfield.
2. The project involved the excavation of trenches along the route of various roads around Aldersgate Street and the Barts Square development to the south east. Pipework would be installed in the trenches. There is no specialist knowledge involved in my saying that this is an area where there were likely to be significant services below ground already and other potential obstructions, including everything from archaeological finds to unexploded bombs from the Second World War.
3. In broad terms, Clancy Dowcra Ltd. ("CDL") were engaged by E.ON to excavate the trenches (and then install the UDHN pipework). The Sub-Contract for these works was entered into on or about 19 November 2015, although CDL had commenced work in about October 2015. Until March 2017, CDL proceeded to carry out its works. From about February 2016, CDL encountered what I will generically call adverse ground conditions and in particular underground brick walls and brick rubble. Up until April 2017 the payments made by E.ON on interim certificates included approximately £341,000 for variations which CDL contend related to obstructions in the ground. CDL were also granted an extension of time of nearly 30 weeks although there is a dispute as to whether and to what extent this also related to ground conditions.
4. The matter became contentious in about March 2017. I make no findings of fact about what happened at this point – the issues are not before me and nor are any issues as to the validity of the parties' actions - but in summary what is said to have happened is this. E.ON instructed CDL to investigate a concrete heading to identify its contents and/or a route around it. CDL formed the view that the proposed excavation was dangerous and stopped work. E.ON adopted the position that the sub-surface conditions were at CDL's risk and a matter for CDL. E.ON then gave a Notice of Specified Default on 9 May 2017 and in June 2017 removed from CDL's scope of works the remainder of sections 8D and 9-11.
5. In this way, a dispute arose between the parties about the extent of CDL's obligations; what scope of works fell within the definition of the Sub-Contract Works or were works in respect of which CDL were, to put it somewhat colloquially, entitled to a variation; and the allocation of risk in respect of ground conditions.
6. In July 2017, CDL referred this dispute to adjudication and sought relevant declarations. The adjudicator gave his decision on 11 August 2017. He did not make any of the declarations sought and essentially decided the dispute in E.ON's favour.

### ***These proceedings: declaration and rectification***

7. These proceedings were then commenced on 4 October 2017. CDL again sought various declarations and, in the alternative, rectification of the Sub-Contract. The declarations sought were lengthy but I set them out almost in full because they provide the context for

the issues which are the subject matter of this judgment. In the result, not all of them were pursued.

(i) Declaration no. 1 is pleaded as follows:

*“Upon a proper construction [of the Sub-Contract] CDL is entitled to a Variation instruction, and in principle to an adjustment to the Sub-Contract Sum under clause 5, where CDL encounters any one or more of the following whilst carrying out the Sub-Contract Works:*

- (a) Ground conditions which do not permit CDL to use mechanical plant and which instead require hand-digging (save where hand-digging has been provided for in the Bill of Quantities);*
- (b) Mains and services which obstruct E.ON’s as-designed pipe route and given the presence of which CDL cannot carry out the Sub-Contract Works in accordance with E.ON’s design, and which mains or services E.ON do not have diverted by the relevant statutory undertaker;*
- (c) Obstructions in the trench (including rock) which need to be broken out/ removed to permit CDL to carry out the Sub-Contract Works, other than the breaking out of the existing road surfaces (ie concrete and tarmac only);*
- (d) Soft spots;*
- (e) Unavailability of a clear and unrestricted corridor in which to carry out the Sub-Contract Works (including for the avoidance of doubt, the lack of a clear and unrestricted corridor for those works when CDL is working below ground level).*

These five matters (a) to (e) were referred to as the five matters or the five circumstances.

(ii) Declaration no. 2 related to the rectification of the contract to give effect to what CDI said was the common intention of the parties, by the insertion of words into clause 2.1.7 (which appears below). The two suggested insertions, before the start of clause 2.1.7, were:

- (a) words to the effect of “In relation to the scope of works agreed by the parties in the Numbered Documents (including the exclusions set out therein) the parties hereby further agree as follows”;* or
- (b) words to the effect of “Subject to the exclusions agreed by the parties in the Numbered Documents the parties hereby further agree as follows”.*

(iii) Declaration no. 3 was framed as follows:

*“Each such Variation instruction as CDL is entitled to as above on either the proper construction of the Sub-Contract or upon its rectification is, in principle and subject to all other terms of the Sub-Contract save for clauses 2.1.7 – 2.1.9:*

- (a) A Relevant Sub-Contract Event within the meaning of clause 2.19; and*
- (b) A Relevant Sub-Contract Matter within the meaning of clause 4.20.”*

(iv) Declaration no. 4 was in the following terms:

*“Clauses 2.1.7 – 2.1.9 of the Sub-Contract do not debar CDL’s entitlement to claim such adjustment of the contractual date for completion and/or such adjustment of the Sub-Contract Sum as CDL may otherwise be entitled to for such Variations.”*

(v) Declaration no. 5 was, in summary, in terms that, where mains or services obstructed the as-designed route or had to be diverted, CDL were entitled to directions from E.ON; an adjustment of the date for completion and the Sub-Contract Sum; and a Variation under clause 5. Declaration no. 6 was to the effect that clauses 2.1.7 to 2.1.9 did not debar CDL’s entitlement to an adjustment of the contractual date for completion or the Sub-Contract Sum as a result of an instruction to stop works during diversion of mains or services by a statutory undertaker.

8. An agreed list of issues was prepared for this trial which reflected the declarations sought. There was also some discussion in the course of the hearing before me as to the precise nature and scope of the declarations sought. It is most convenient to explain the nature of the dispute and the parties’ arguments before turning to the detail of those submissions.
9. The Particulars of Claim set out a case for rectification to give effect to the common intention of the parties which was, in short, that the Sub-Contract should be construed as CDL argued it should be. That was reflected in the declaration sought in respect of rectification. That case was expanded upon in subsequent pleadings. CDL relied upon the sequence of tender submissions and post tender clarifications (which I will refer to below) together with the post-contract conduct of the parties. CDL’s pleaded case was that those matters established that the parties reached and applied a common intention during their negotiations that the scope of the Sub-Contract Works that CDL were to undertake was defined by and set out in the Numbered Documents; that that common intention was manifest as at the conclusion of the negotiations; and that at that point E.ON accepted that CDL would only contract on the basis that their offer was qualified in the manner set out in the responses to the tender enquiries, the Bill of Quantities and CDL’s tender submissions.
10. This matter was heard over 4 days. Because of the case on rectification, oral evidence was heard from the following:
  - (i) Louis Walshe, at the relevant time a member of CDL’s bid team
  - (ii) Richard Venison, at the time CDL’s Bid Manager
  - (iii) Brendan Anderson, and Associate Director of CDL and the head of the Civils Business Unit.
  - (iv) James Harris, E.ON’s Senior Project Delivery Manager

- (v) Thomas Price, E.ON's Senior Quantity Surveyor
- (vi) Brett Smith, E.ON's Senior Category Manager in its Procurements Team.

11. As Mr Walker QC, on behalf of E.ON, observed, CDL's case on rectification had opened the door to rather more evidence both as to contractual negotiations and post-contractual conduct than one might have anticipated in a claim that essentially related to the construction of a contract. With no disrespect to the witnesses who came to court to give evidence, there was little in it that assisted me on the issues of construction. I set some of it out below in the story of what happened as part of that story but, as will be apparent, my decisions on the meaning of the Sub-Contract are based on the contractual documents and not on either extraneous documents or the subjective evidence of the parties' intentions.

*The feasibility study*

12. Before the Sub-Contract was put out for tender, E.ON had invited bids for a "feasibility study". CDL, McNicholas and PJ Carey were invited to bid, the job going to PJ Carey. CDL have made the point that no feasibility study has ever been produced and that they do not know exactly what PJ Carey did, other than some preliminary trial pit work. CDL submit that, as a result, (i) E.ON could not produce a design for pipework runs that took account of all existing underground services and obstructions and (ii) the design against which CDL were asked to tender, and which forms part of the Sub-Contract, was underdeveloped and showed only a proposed layout or general route without depths and other essential details ("the layout drawings").

*The tender process*

13. A Tender Enquiry Pack was first sent out in June 2015. The Tender Enquiry Pack included, amongst other things, a Sub-Contract Enquiry Document; a draft Bill of Quantities for completion; 2 layout drawings; drawings prepared by Buro Happold that showed (some) utilities and gave a confidence rating for the information in the drawing; and, on E.ON's case perhaps most importantly, a document headed Scope of Works.

14. The Sub-Contract Enquiry Document (in the names of Mr Smith and Mr Price) identified the Project as "District Heating Scheme – Barts Square, London" and the Sub-Contract Works as "District Heat Network – UDHN Including Civil Works". It continued:

*"We have been successful in securing the above contract; you are invited to tender for the supply, delivery/transport, offloading, storage, site logistics, positioning, installation, protection, testing and commissioning and all civil related aspects of the above mentioned Sub-Contract Works in accordance with documents and information listed and/or referenced herein.*

1. *Your offer must be strictly in accordance with the documents enclosed or referred to herein. You should allow for everything necessary, except where specifically detailed as being by others, to carry out and complete the Sub-Contract works as detailed within this enquiry. Any deviations must be brought to our attention. Unless such deviations are specifically identified in your Form of Tender for Sub-Contract Works, your offer will be deemed to be in strict compliance with this enquiry.*

....

7. *You will be given reasonable opportunity to visit the site and ascertain the nature of the site, access thereto, and all local conditions and restrictions likely*

*to affect the execution of the works. You will be deemed to have made allowance for such conditions whether or not you have visited the site.*

....

9. *No claims arising from lack of knowledge or understanding of any of the above or of any kind will be considered following receipt of your quotation.*

....”

15. The attached document, which was to be completed by tenderers, included the following statement:

*“We confirm that we have complied in all respects to the conditions and requirements of your enquiry including all contract specification requirements, terms, conditions and preliminaries; except as specifically identified below ...”.*

Below was a box headed “Declared Deviations from Enquiry Requirements” and below that a Note that *“if the above space is left blank, it will be deemed that there are no deviations & the bid is fully compliant.”*

16. The Scope of Works contained the following:

(i) Tenderers were invited to:

*“... prepare a tender for the following, using the price breakdown schedule within these documents:*

*All civil works associated with the installation of network pipes and ducts, including break out, excavations, sand beds, reinstatement, traffic management, licences, authorisations etc.”*

(ii) Tenderers were instructed that they:

*“.... should clearly indicate the inclusions/ exclusions for each type of work and the risk element associated and included within the build up” of the price.*

In due course, the Tender Enquiry, including the Scope of Works, became Numbered Document 3 in the Sub-Contract, and the Scope of Works also formed Numbered Document 6.

17. There were three initial bids submitted by PJ Carey, McNicholas and CDL. CDL’s First Tender Submission was made on 9 July 2015 under cover of an e-mail from Mr Walshe to Mr Venison. The e-mail stated that CDL’s tender was “offered on the following basis”:

(a) *“... the understanding that [EON] have initiated a feasibility study, which has been undertaken by others and that [EON] have confirmed that there is a clear and un-restricted corridor to lay the proposed DHN system as per the route identified on the drawings.”*

(b) *“For clarity purposes we have included within our submission a bill of quantities identifying what we have allowed for within our bid ....”*

(c) *“We have based all the works using mechanical plant and have made no provision for hand digging other than those areas where we specifically mention hand digging within our prepared Bill of Quantities.”*

- (d) *“We have made no allowance for diversion of mains and services, nor have we made any allowance for dealing with contaminated material (all excavated assumed to be of a dry, stable and inert nature, no allowance has been made for rock within our bid) and any delays that may occur as a result other than those specifically measured as contaminated in our Bills of Quantities.”*

18. That e-mail did not become a contractual document. The tender included a re-drafted Bill of Quantities (and the final version of the Bill did become a Numbered Document). There was evidence from Mr Walshe as to why CDL re-drafted the Bill of Quantities template which highlighted, as CDL saw it, the inadequacy of the tender information but, as I have indicated, this background information does not assist in the construction of the contract.
19. Mr Harris of E.ON produced a tender analysis which compared the bids of PJ Carey (£2.835m), McNicholas (£2.364m) and CDL (£1.242m). This included a spreadsheet with columns for each contractor and sub-columns headed “Priced”, “Excluded” and “Unclear” and coloured in. So far as CDL was concerned:
- (i) Against the line “Moving of existing services”, this was coloured in as “Unclear” followed by the query: “confirm that you have allowed for the adjustment/ re-alignment of services to facilitate the installation”.
  - (ii) Against the line “Underground obstructions/breakout”, this was also coloured in as “Unclear” and followed by the query: “confirm that you have allowed for the removal/breakout of obstructions in the trench”.
  - (iii) Against the line “Removal of soft spots”, the “Unclear” column was coloured in and followed by the query: “confirm that you have allowed for removal of soft spots”.
- So far as Carey and McNicholas were concerned, the same lines were coloured in as “Excluded”.
20. Mr Harris circulated the analysis and spreadsheet internally, under cover of an e-mail dated 31 July 2015, together with a proposed list of questions for tenderers.
21. Under cover of an e-mail dated 3 August 2015, from Mr Smith to Mr Walshe and Mr Venison, with the subject line “Bart’s Square – Post Tender Clarification 1”, E.ON then said that there were “a number of technical and commercial clarifications that we require understanding of”. The attached document, amongst other things, asked CDL to confirm that they had allowed for the removal of soft spots and for adjustment/ diversion of third party services to facilitate the UDHN installation. CDL were also sent the trial pit information from the PJ Carey works. This document later became part of Numbered Document 8.
22. That was followed by a telephone meeting on 4 August 2015. What happened in the course of that meeting is disputed. I had the evidence of Mr Walshe and Mr Harris about this and about Mr Walshe’s insertions of comments against E.ON’s queries. It is not



necessary for me to set that out here. What matters is the documents that became part of the Sub-Contract.

23. At about the same time, on 6 August 2015, E.ON circulated its draft terms and conditions for the Sub-Contract which were a JCT Standard Building Sub-Contract with sub-contractor's design, 2011 edition with bespoke amendments including additional clauses 2.1.7 to 2.1.10. Despite the chosen form of contract, this was not, in fact, a design and build contract.
24. Following the telephone meeting on 4 August 2015, CDL (by an e-mail from Mr Venison) then sent a revised tender submission. The e-mail stated that a review of the proposed terms and conditions had been carried out and that the JCT standard form was familiar and CDL had no objections to it. The e-mail, however, repeated that the revised tender was based on the same matters as set out in paragraph 14 above.
25. The attachments to the e-mail included CDL's Post Tender Clarifications in which CDL had inserted an answer to each of E.ON's questions as follows:
  - (i) "Confirm that you have allowed for the removal of soft spots  
This item is quite onerous and as discussed we would recommend that a m<sup>3</sup> rate be agreed between all parties."
  - (ii) "Confirm that you have allowed for the adjustment/diversion of 3<sup>rd</sup> party services to facilitate the UDHN installation.  
  
As discussed and clarified we have allowed a provisional sum for modifications to gully runs, gully pots and channels only – refer to CDL clarifications 17 August 2015."

The e-mail and its attachments became part of Numbered Document 7.

26. Following this response, Mr Harris produced a revised spreadsheet in which he now, for CDL, coloured in the soft spot and moving existing services lines as "excluded" and only dealing with underground obstructions/ breaking out remained "unclear".
27. E.ON then produced Post Tender Clarifications No. 2 on 19 August 2015 and asked CDL to confirm that it was offering a fixed price lump sum for the works. A telephone meeting on 4 September 2015 followed, itself followed by an e-mail from CDL (Mr Walshe) to E.ON (Mr Smith and Mr Harris) with CDL's revised submission. The e-mail included the same statements as to the basis of the tender as in the previous submissions. There was attached a revised Bill of Quantities (which became Numbered Document 5).
28. Mr Harris produced a further spreadsheet on 11 September 2015. Against each of the removal of soft spots, moving existing services and underground obstructions/ breakout lines the column had been coloured in for "excluded". I note at this point that Mr Harris' explanation for this in his witness statement and in cross-examination was that "excluded" meant not that an item was excluded from the scope of works but that it had not been priced for by the contractor (and was therefore at the contractor's risk). Further, the spreadsheet was circulated internally under cover of an e-mail which said: "I do still

have concerns about the Clancy price but they seem adamant that they have allowed for everything.”

29. That was not the end of the story. On 14 September 2015, E.ON (Mr Smith) e-mailed CDL (Mr Walshe and Mr Venison) with what he described as a few outstanding clarifications to which he needed a response. One of those matters and CDL’s response was this:

“[E.ON] confirm that you have allowed for the removal/ breakout of obstructions in the trench.

[CDL] *This item is quite onerous. The route responsibility lies with you as you have undertaken a feasibility study and then determined the route, so we have based our submittal on a clear corridor .... we have allowed for breaking out the existing road surface ie. concrete and tarmac layers only.*”

This e-mail also became part of Numbered Document 8.

30. In their written submissions, CDL referred to the documentary evidence as to what then happened internally at E.ON in terms of seeking approval, from the Sourcing Board in Germany, to let the Sub-Contract. That is plainly not relevant to any issue of construction. Sourcing Board approval was given on 30 September 2015.

31. The documentary evidence showed that in advance of Sourcing Board approval, E.ON (Mr Harris) had started to draw up Post-Tender Minutes. Dated 22 September 2015, these were ultimately also incorporated into the Sub-Contract and became Numbered Document 9:

- (i) The Post-Tender Minutes included a “Brief Description and Scope of Sub-Contract Works”:

*“All civil related works ....*

*The Sub-Contract Works shall be as detailed within The Company enquiry document dated [26th July 2015] reference [SBC/DHN/TP] Revised Submission 4<sup>th</sup> September 2015. The Sub-Contract Works shall be further defined on the Sub-Contract Documentation scheduled in Appendix 2 and other relevant information.”*

- (ii) Appendix 2 was left blank.

- (iii) The Post Tender Minutes concluded with “AOB”. Under this heading, there was a section which stated “Clancy have specifically excluded:

- *Sections 2 & 3 of the works package*

...

- *Disposal of contaminated/ hazardous materials*
- *Removal of soft spots*
- *Breaking out of rock*

.....

- *Any provision for entering private land or premises*
- *Any provision for 3<sup>rd</sup> party compensation*
- *Any form of design other than temporary works*
- *Costs associated with diversion of other services*

...”

32. An Award letter was sent out on 1 October 2015. CDL commenced work on site on about 26 October 2015. Negotiations about the contract documentation continued until 19 November 2015. There is no dispute as to the final form of the Sub-Contract.

*The Sub-Contract*

33. The Sub-Contract was called the Sub-Contractor’s Agreement (based on JCT Standard Building Sub-Contract). The relevant JCT contract was the Standard Building Sub-Contract with sub-contractor’s design, 2011 ed.

- (i) The Articles of Agreement described the Sub-Contract as being between E.ON, as the Contractor, and CDL, as the Sub-Contractor:

*“FOR (Underground District Heat Network enabling Works (the “Sub-Contract Works”, more particularly described in the Numbered Documents), supply of the district heating and cooling energy pipe infrastructure to serve the Barts Square development, London .....”*

- (ii) Recital 4 provided:

*“the Contractor has provided documents (included in the Numbered Documents) showing and describing or otherwise stating the requirements of the Contractor (the “Contractor’s Requirements”).”*

- (iii) Recital 6 provided:

*“the Sub-Contractor has examined the Contractor’s Requirement and the Sub-Contractor’s Proposals and is satisfied that the Sub-Contractor’s Proposals meet the Contractor’s Requirements.”*

- (iv) Article 1 provided as follows:

**“Sub-Contract**

*This Sub-Contract consists of:*

*1.1 this Agreement and the Sub-Contract Particulars;*

*1.2 the documents referred to in the Schedule of Information;*

*1.3 the JCT Standard Building Sub-Contract with sub-contractor’s design Conditions (SBCSub/D/C) 2011 Edition incorporating the standard JCT Amendments referred to in the Sub-Contract Particulars, and modified in accordance with the Schedule of Amendments contained in Schedule 2 of the Agreement (together the “**Sub-Contract Conditions**”);*

*1.4 the Sub-Contract Payment Schedule ...;*

*1.5 to the extent not set out above, the Numbered Documents.”*

- (v) Article 2 provided:

**“Sub-Contractor’s Obligations**

*The Sub-contractor shall carry out and complete the Sub-Contract works in accordance with this Sub-Contract .....*”

34. The Sub-Contract Particulars (at item 18) identified the Numbered Documents (so far as relevant to this dispute) as follows:

*“The Numbered Documents, for the purposes of this Sub-Contract, are those listed below, a copy of each of which has for identification been numbered sequentially, signed or initialled by or on behalf of each party and annexed to this Agreement:*

1. *Schedule of Amendments – to the Standard Building Sub-Contract with sub-contractor’s design Conditions 2011 Edition (SBCSub/D/C 2011)*
- .....
5. *Bill of Quantities*
6. *Contractor’s Requirements*
7. *Sub-Contractor’s Proposals dated 9<sup>th</sup> July 2015 as amplified by revised submission dated 17<sup>th</sup> August 2015 and 4<sup>th</sup> September 2015.*
8. *E.ON post tender clarifications numbered 1-3 as dated 3<sup>rd</sup> August 2015, 19<sup>th</sup> August 2015 and the 14<sup>th</sup> September 2015 and Clancy Docwra respective responses.*
9. *Sub-Contract Post Tender Interview Minutes as dated 22<sup>nd</sup> September and signed 26<sup>th</sup> October.”*

The Schedule of Amendments (Numbered Document 1) deleted the standard definition of the Numbered Documents and inserted *“the documents annexed to this Sub-Contract Agreement and/or listed in the Sub-Contract Particulars (item 18)”*.

35. Clause 1.1 of the Conditions provided a list of definitions (including that of the Numbered Documents):
  - (i) the Sub-Contract Documents were defined as “the documents referred to in Article 1”.
  - (ii) The Sub-Contract Works were defined as “the works referred to in the Sub-Contract Agreement and described in the Numbered Documents to be executed as part of the Main Contract Works, including any changes made to such works in accordance with this Sub-Contract.” I have underlined the key words which have particular relevance in this case.
  
36. Clause 1.3 (headed “Sub-Contract to be read as a whole”) as amended provided as follows:

*“1.3 This Sub-Contract is to be read as a whole, provided that:*

  - 1.3.1 *the Sub-Contract Agreement shall prevail over any other provisions of the Sub-Contract;*
  - ...
  - 1.3.3 *if the Numbered Documents include any standard terms and conditions of the Sub-Contractor such standard terms and conditions shall be of no contractual effect whatsoever.*
  - 1.3.4 *if there is any inconsistency between the Sub-Contract Agreement and these Conditions, the Sub-Contract Agreement shall prevail;*
  - 1.3.5 *if there is any inconsistency between the Sub-Contract Documents (other than the Numbered Documents) and the Numbered Documents (excluding the Schedule of Modifications (if any)), those Sub-Contract Documents shall prevail;*
  - .....
  - 1.3.9 *In the event of any such inconsistency referred to in this clause 1.3 being discovered the Contractor shall be entitled, in its absolute discretion, to determine and direct the Sub-Contractor as to which of the provisions or documents (or parts of documents) are to prevail. The Sub-Contractor shall*

*comply with whatever documents (or parts of documents) he is directed are to prevail and shall be excused compliance with the documents (or parts of documents) which he is directed are to be disregarded. ....”*

37. Section 2 set out the Sub-Contractor’s Obligations and, as amended, included the following:

*“2.1.1 The Sub-Contractor shall carry out and complete the Sub-Contract Works in a proper and workmanlike manner, in compliance with the Sub-Contract Documents, the Construction Phase Plan and Statutory Requirements and in conformity with directions given in accordance with clause 3.4 and all other reasonable requirements of the Contractor.....*

*.....*

*2.1.7 The Sub-Contractor shall be deemed to have inspected and examined the site and its surroundings and to have satisfied himself before the date of the Sub-Contract as to the nature of the ground, the sub-surface and sub-soil; the form and nature of the site; the extent, nature and difficulty of the Sub-Contract Works; .... and in general to have obtained for himself all necessary information as to risks, contingencies and all other circumstances influencing of (sic) affecting the Sub-Contract Works.*

*2.1.8 Notwithstanding any other provision of this Sub-Contract, the Sub-Contractor shall not be entitled to any extension of time or to any additional payment, damages, or direct loss and/or expense on the grounds of any misunderstanding or misinterpretation of any matter set out in clause 2.1.7, or his failure to discover or foresee any risk, contingency or other circumstance (including, without limitation, the existence of any adverse physical conditions or artificial obstructions) influencing or affecting the Sub-Contract Works.*

*2.1.9 The Sub-Contractor shall not be released from any of the risks accepted or obligations undertaken by him under the Sub-Contract on the ground that he did not or could not have foreseen any matter which might affect or have affected the execution of the Sub-Contract Works.*

*2.1.10 Any information, survey, report or other document which may have been provided by or on behalf of the Employer or Contractor in connection with the site is provided by way of information only without warranty or representation as to its accuracy, reliability or completeness.”*

38. For the purposes of time for completion and loss and expense respectively, Clauses 2.19.1 and 4.20.1 defined Relevant Events as including “Variations” and “any other matters or directions which under these Conditions are to be treated as, or as requiring, a Variation.”
39. Clause 3.4 (as amended) permitted the Contractor to give directions to the Sub-Contractor in regard to the Sub-Contractor’s obligations under the Sub-Contract and/or the Sub-Contract Works, including the ordering of any Variation. Variation as defined in clause 5.1.1 included “the alteration or modification of the design, the quality or ... the quantity of the Sub-Contract Works include the addition, omission or substitution of any work.”

40. As I have indicated above, a number of the documents that had been produced during the tender process formed (or were contained within) Numbered Documents in the Sub-Contract:
- (i) Numbered Document 3: the original Sub-Contract Tender Enquiry including the Scope of Works
  - (ii) Numbered Document 5: the (re-drafted) Bill of Quantities
  - (iii) Numbered Document 6: also the Scope of Works document
  - (iv) Numbered Document 7: CDL's original tender and the revised submissions dated 17 August 2015 and 4 September 2015
  - (v) Numbered Document 8: E.ON's requests for post-tender clarifications and CDL's responses.
  - (vi) Numbered Document 9: the Post-Tender Minutes (amended and signed)

### *The dispute*

41. The primary dispute between the parties can be shortly stated. E.ON's position is that CDL undertook to carry out the Sub-Contract Works which, as defined, included "all civil works". CDL's position is that, on the true construction of the Sub-Contract, the five circumstances (or the work that might arise if they were encountered) were excluded from the scope of the Sub-Contract Works which were defined by reference to the Numbered Documents. On that basis, the broad allocation of risk in the amended clauses 2.1.7 to 2.1.9 was simply irrelevant because these works were not included in the Sub-Contract Works.

### *The law: construction of contracts*

42. The parties referred me to the most recent Supreme Court authorities in relation to the construction of contracts. I do not cite from these at length but the following passages encapsulate the principles I apply:

- (i) ***Arnold v Britton*** [2015] UKSC 36, per Lord Neuberger:  
"15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean" .... And it does so by focussing on the meaning of the relevant words ... in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. ....  
17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances ....should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. ...  
18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural

*meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. ...”*

- (ii) **Wood v Capita Insurance Services** [2017] UKSC 24, per Lord Hodge:  
*“11. .... Interpretation is, as Lord Clarke said in Rainy Sky (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival construction by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause ....; and it must also be alive to the possibility that one side might have agreed to something which with hindsight did not serve his interest .... Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that their negotiators were not able to agree more precise terms.”*

43. It is perhaps trite to state that on that approach, the factual evidence before me was of limited relevance to the issues of construction of the contract and principally relevant to the alternative case on rectification.

***The parties' cases on construction***

44. CDL's case was that “the Sub-Contract Works” which they were obliged to carry out were defined by the Numbered Documents. That was summarised by CDL as meaning that CDL were obliged to execute the route in accordance with the specification and the drawings (ND 3) and the other Numbered Documents (in particular NDs 7-9) and the general obligations in Section 2.
45. In practice, and in so far as relevant to the declarations sought, CDL's case was that that meant that they were obliged, and thus entitled, to carry out the works in a “clear and unrestricted corridor” (which was the basis of the tenders); using mechanical plant (except where hand digging was expressly allowed for in the Bills of Quantities); without the need for mains and services to be diverted; not having to remove or break out obstructions; and not having to remove any soft spots. Put another way, none of those matters formed part of the Sub-Contract Works. If E.ON required CDL to carry out works that did not form part of the Sub-Contract Works, CDL was entitled to the instruction of a Variation which would be a Relevant Event with consequences in time and money.
46. E.ON's case had two main limbs. Firstly, that the definition of the Sub-Contract Works was to be found in the Scope of Works document. Secondly, and consistently with their case as to the scope of the Sub-Contract Works, save in circumstances where the works could not be built as designed (that is, the circumstances raised an issue of design inadequacy), the proper reading of the Sub-Contract terms was such that the risk of unforeseen ground conditions was clearly placed on CDL. On E.ON's construction of the Sub-Contract, the Numbered Documents did not remove any works or matters from what might otherwise have been the scope of the Sub-Contract Works. The Sub-Contract clearly allocated risk in respect of ground conditions and that allocation of risk was not modified by the Numbered Documents. The relevant allocation of risk was that in clauses 2.1.7 to 2.1.9 which were bespoke amendments to the contract and should be given effect.

47. I trust I do no injustice to Mr Walker QC's detailed arguments, which I will come to in greater detail below, if I summarise the other aspects of E.ON's case on construction as follows:
- (i) E.ON argued that the declarations sought were too vague or hypothetical. That was either a reason why, in the exercise of my discretion, I should not grant the declarations sought or an element of the argument on construction. The more difficult it was to define or understand what it was CDL said was not within their scope of works, particularly having regard to what might be anticipated on a job such as this, the more difficult it was to accept their construction of the Sub-Contract.
  - (ii) E.ON described the Numbered Documents as "a diffuse collection of documents relating to a wide range of matters" and including drawings, e-mails, procedures, meeting notes and so on. E.ON argued that the Numbered Documents would not be the place where a reasonable recipient of the Sub-Contract would expect to find CDL's rights to extra time and money. The key elements of the Numbered Document were the Scope of Works in Numbered Document 3 and Numbered Document 6 (itself the Contractor's Proposals) and not the collection of documents in Numbered Documents 7, 8 and 9.
  - (iii) The order of precedence of contractual documents in clause 1.3 as amended also supported E.ON's case.

### ***Discussion***

#### *The Sub-Contract Works and the Numbered Documents*

48. It is a statement of the obvious that the starting point – and in one sense the end point – must be to ascertain as a matter of construction what it was that CDL contracted to do. What they contracted to undertake was the Sub-Contract Works (under clause 2.1.1) so necessarily the key issue is what the Sub-Contract Works were.
49. Clause 1.1 of the Conditions defined the Sub-Contract Works as "the works referred to in the Sub-Contract Agreement and described in the Numbered Documents". The Sub-Contract Agreement itself gave a broad description of the Sub-Contract Works as the UDHN enabling works but, consistently with the definition in clause 1.1, "more particularly described in the Numbered Documents". It seems to me clear, therefore, and it was not really in issue, that one turns to the Numbered Documents to see what the Sub-Contract Works were. That is not looking to the Numbered Documents for CDL's entitlement to extra time and money but looking to the Numbered Documents for particularisation of CDL's obligations in accordance with the contract.
50. As I have indicated, E.ON's case places particular emphasis on the Scope of Works document. E.ON also placed some emphasis on the absence of the identification of any "deviations" in CDL's tender submissions and on the following documents included in the Tender Enquiry documents which indicated the likely scope of work:
- (i) The series of Buro Happold drawings that have sections at 10m intervals for part of the route with "confidence ratings".



- (ii) PJ Carey’s drawings showing services superimposed on the pipe route.
  - (iii) The UK Power Networks drawing which bore the notes:
    - “1. The position of the apparatus shown on this drawing is believed to be correct but the original landmarks may have been altered since the apparatus was installed.
    - 2. The exact position of the apparatus should be verified - use approved cable avoidance tools prior to excavation by using suitable hand tools.
    - 3. It is essential that trial holes are carefully made avoiding the use of mechanical tools or picks until the exact location of all cables have been determined.”
51. There seem to me to be a number of prongs to E.ON’s argument for the status of the Scope of Works document as the document that defined the scope of the Sub-Contract Works. E.ON accept that the Numbered Documents should be read as a whole but say that the Scope of Works should be the primary source of the definition of the Sub-Contract Works because it was what CDL were invited to, and did, tender for and because it set out the Contractor’s Proposals with which CDL purported to comply.
52. It is, of course, right that the Scope of Works was included in the tender enquiry which in due course became Numbered Document 3. Numbered Document 3 meets the description of a diffuse collection of documents and, to my mind, itself poses difficulties in identifying the scope of the Sub-Contract works. The various drawings are all informative but hardly define the scope of works. Having said that, I accept that the Scope of Works document broadly defines the Sub-Contract Works as all civil works associated with the network pipes and ducts, including break out, excavations etc. and carried out in accordance with the drawings included. However, what is evident is that the invitation to tender and the Scope of Works itself recognised that the tender might involve exclusions of types of work and risk and/or might deviate from the enquiry. Tenderers were expressly asked to identify exclusions and to bring all deviations to E.ON’s attention. What is evident from the sequence of documents set out above, is that CDL did, in its initial tender and its revised submissions, identify such exclusions and, arguably, a “deviation” in that the tender was expressly based on the assumption of the clear and unrestricted corridor. Leaving aside the internal E.ON documents that recognised such exclusions, with the exception of hand digging and the breaking out of obstructions generally, they were listed in the Post Tender Minutes, themselves made Numbered Document 9.
53. It is the case that CDL did not identify such matters as “deviations” in the box provided in the form of tender but E.ON did not, in my view rightly, place great reliance on that. The purpose of the box was to draw to E.ON’s attention matters that might affect the bid and cause them to regard it as non-compliant with the enquiry. If some departure from the Scope of Works indicated was expressly identified by a tenderer elsewhere, and agreed to by E.ON in accepting the bid, I cannot see how the failure to include the matter in the box can override that agreement. There was evidence from CDL that they understood what was to be included in the box in terms of deviations from contractual terms – I place no reliance on that but it serves at least to illustrate that the term “deviations” is less than clear.
54. Mr Walker QC submitted further that, if there was a tension between the Scope of Works and what CDL said in the e-mails and documents forming Numbered Documents 7 and

8, the recitals pointed to Numbered Document 6 as the primary document. That is because it was identified in Recital 4 as the Contractor's Requirements and Numbered Document 7 (the Sub-Contractor's Proposals) was how CDL proposed to comply with the Contractor's Requirements. That does not seem to me to resolve the position in E.ON's favour both because the Sub-Contractor may offer to do something that is in some respect different from the Contractor's Requirements and because, as E.ON accept, the Numbered Documents should be read as a whole. If the intention of the contract was to define the Sub-Contract Works by reference to Numbered Document 6 or by the Contractor's Requirements, it could easily have said so but that is not what it says. Further, E.ON's construction would render largely pointless the inclusion of Numbered Documents 8 and 9.

55. Numbered Documents 7 and 8 included the requests for tender clarifications and responses referred to above and the revised tender submissions. I emphasise again that I have set these out as part of the chronology above not because I place reliance on any factual background evidence (including internal documentation) as to CDL's or E.ON's subjective intentions but for the rather more prosaic reason that it places the documents in the right order. It seemed to me to be part of E.ON's case that because the documents appear in something of a jumble in the Numbered Documents, they should be given less weight as contractual documents. I can see the nature of the argument that the presentation of the documents might be taken to suggest that they do not have great significance or that they may be sorts of documents that the Supreme Court had in mind as poorly drafted - but they must have some role to play and they are included in the Numbered Documents for a reason.
56. Putting the documents in order makes it very clear that in responding to the invitation to tender, CDL was seeking to set out what it would and would not do and what it would and would not take responsibility for or the risk of.
57. In its written submissions, E.ON contended – and for this contention relied on the documents themselves rather than evidence of fact – that the post-tender clarifications and CDL's responses were concerned with pricing and not with risk. As it was put in E.ON's full written opening submissions:

*“If, as CDL stated, it had not allowed for the risk of breaking out, this was a pricing decision it had chosen to take. CDL's response did not say that removal of obstructions in the trench was excluded from CDL's scope of work such that E.ON would have to issue a Variation if CDL encountered obstructions (or engage a third party to remove the obstruction).”*

58. That argument does not, in my view, make sense. Firstly, the wording of the post-tender clarifications is naturally read as asking what is included in CDL's offer to carry out the Sub-Contract Works – that is, what work is included. That is what is being asked because CDL's tender sought to set out what was not included. CDL's answers have to be read in the same context. Secondly, although in one sense E.ON might indeed have been asking about pricing, it is difficult to see why E.ON would have been asking about pricing divorced from risk. If a tenderer has not priced for an element of work, it would be unusual to say the least that it would have done so whilst still offering to or intending to carry out the work. A question about whether something is included in the price is thus most naturally to be taken to be a question about whether something is included in the

scope of works offered. E.ON's position seems to me to turn on characterising what CDL was saying as being about risk and not about scope of work. Again in one sense it was – a tenderer who says that he has not included a particular element of work is in effect saying that he is not taking the risk of having to carry out that element of work – but the questions and answers are framed in terms of work not risk. Lastly, I cannot see why CDL would, in any event, have been expected to say in terms that if they did have to do something they had excluded, they would seek a Variation. That is a function of the operation of the contract and not something anyone experienced in the industry would expect to see spelled out.

59. In my view, that construction of Numbered Documents 7 and 8 is entirely consistent with Numbered Document 9. E.ON's argument to the contrary relies on the following in the Post Tender Minutes:

(i) *“The Sub-Contractor is deemed to have visited the site and ascertained the nature of the site, access thereto, and all local conditions and restrictions likely to affect the execution of the works.”*

That repeats what is found in the invitation to tender. It is, of course, a provision that seeks to place on the Sub-Contractor the risk of adverse site conditions “likely to affect the execution of the works.” But it seems to me that it must be read in the context of what the works are. If, for example, the Sub-Contract Works expressly exclude dealing with soft spots, to say that a provision such as this places the risk of soft spots on the Sub-Contractor has the effect of expanding the scope of the agreed Sub-Contract Works. That is not risk allocation: it is ignoring the definition of the Sub-Contract Works.

(ii) *“The Sub-Contract Works shall be as detailed within The Company enquiry document dated 26<sup>th</sup> July 2015 ... The Sub-Contract Works shall be further defined in the Sub-Contract Documentation scheduled in Appendix 2 and other relevant information.”*

That seems to me to add little or nothing to the definition of the Sub-Contract Works.

(iii) Numbered Document 9 reflects, it is said, the lump sum nature of the Sub-Contract where it states that *“the rates contained within the Bill of Quantities ... are deemed to include for all works necessary in carrying out the Sub-Contract scope of works. ....”* But that again adds nothing to the identification or definition of the Sub-Contract Works.

(iv) *“The Sub-Contractor confirms that the Tender is Fully Compliant with the Project Requirements.”* As E.ON say, “Project Requirements” is not a defined term but I agree that it is most likely to refer to the Contractor's Requirements. To construe this statement as meaning that the Sub-Contract Works included all possible works despite the express exclusions would, however, firstly render them pointless and, in any event, ignore the fact that the Tender Enquiry itself anticipated departures from the requirements.

(v) The specific exclusions on which CDL relies are, E.ON points out, a small number in a lengthy list and many of the other items, it is argued, are expressly concerned with pricing, such as, “any provision for 3<sup>rd</sup> party compensation” or “any provision

for entering private land or premises”. The fact that the items CDL relies on are a small number in a long list (and it not a particularly long list) would merely seem to reflect the matters that have become contentious on this project. It is not at all clear that other matters are expressly concerned with pricing as it is put but, even if they are, that does not change the meaning of other items.

60. More broadly, Mr Walker QC put the matter as one of business common sense. When the parties entered into this Sub-Contract, they were likely to have been aware that the excavation of the trenches was likely to uncover mains and services which might, for example, require hand digging. Thus it was likely that the parties would intend both that CDL should carry out such works and that CDL should bear the risk of having to do so. That argument, however, cuts both ways and is, as a matter of business common sense, exactly why CDL would seek to exclude works from their scope.
61. It will be apparent from what I have said above that, in my view CDL are right to say that their works did not include the matters that were specifically excluded by them from their scope of works as set out in their tender submissions and the Post Tender Minutes, namely the removal of soft spots, hand digging, the breaking out of obstructions (including rock) in the trench and the diversion of mains and services.
62. All of these items were either expressly listed in the Post Tender Minutes as ones specifically excluded by CDL (and that means what it says) or were specifically not included in the tender submissions. The exception is the more general breaking out of obstructions which had been dealt with in the e-mail dated 14 September 2015. Although that e-mail did not, in answer to the request for confirmation that CDL had allowed for the breakout of obstructions in the trench, say “no we have not” or “no, this item is excluded”, that was plainly what the answer meant, particularly because it identified what breaking out had been allowed for and said that that was what had been allowed for only.
63. What I might call the “clear and unobstructed corridor” point is, to an extent, less clear. CDL readily accept that E.ON had never, in fact, told them that CDL would have a clear and unobstructed corridor in which to carry out the Sub-Contract Works and that the statement in CDL’s tender submissions that purported to state that E.ON had done so should be construed as CDL setting out the assumption on which the tender was based. CDL’s case involves reading this assumption as meaning that they were offering (and in due course contracting) only to carry out works in a clear and unobstructed corridor and not to carry out any works that were necessitated by there not being a clear and unobstructed corridor.
64. It was part of E.ON’s argument that the meaning of a clear and unobstructed corridor was itself both difficult and ambiguous. It referred, it was argued, more naturally to the route of the pipe than to the trench. If it referred to the trench, then, E.ON asked rhetorically, what did it mean? If it was intended to refer (and to seek to exclude) the breaking out of rock or the diversion of mains and services, then it added nothing to the other matters CDL had excluded. CDL’s position was simply that since their works involved digging a trench in which to lay the pipeline, the clear and unrestricted corridor must refer to the trench and not simply to the route of the trench. Although it does not assist on the issue of construction as such, Mr Anderson clearly thought that divorcing the trench and the route of the pipeline was nonsensical and I regarded his incredulity at Mr Walker’s suggestions as genuine.

65. Although the amendments to the JCT contract were not circulated until 6 August 2015, they were available to CDL when they submitted the revised bids in August and September. At that point there was, potentially, a direct conflict between CDL's assumption, the allocation of risk in clause 2.1.7 and the terms of clause 2.1.10. But CDL accepted the terms offered and, if the tender submissions had done no more than set out an assumption, I would have preferred E.ON's argument on this issue.
66. However, in my view, both parties adopted positions that were too polarised. The point was resolved by the clarification in the e-mail of 14 September 2015 which explained what the "clear corridor" meant, and what CDL had included in their offer, and that did not include the breaking out of obstructions. That clarification having been given, it does not seem to me that the scope of the exclusion from what might otherwise be the Sub-Contract Works should be construed any more broadly.
67. It follows, at the least, in my judgment, that if E.ON instructed CDL to carry out the work that had been expressly excluded (which includes the breaking of obstructions), E.ON was instructing a Variation within the meaning of clause 5 because they were instructing an addition to the Sub-Contract Works.

*The Agreement, the Conditions and the Numbered Documents*

68. E.ON, in its written submission, characterises CDL's case in the Particulars of Claim as starting with Numbered Documents 7 to 9, CDL submitting that the Conditions have to be read in the light of the Numbered Documents. E.ON submits (i) that that is the wrong starting point and that the correct starting point is the Agreement and the Conditions which set out the parties' rights and obligations and (ii) that the Conditions allocate risk and allocate risk of subsurface conditions to CDL. In my view, that misstates CDL's position in order to cast doubt on it.
69. Inherent in E.ON's argument is its case as to the meaning and effect of clauses 2.1.7 to 2.1.9. As I have indicated, E.ON's position shortly stated is that those clauses allocated all risk of ground conditions (and other adverse site conditions) to CDL.
70. I do not set out clause 2.1.7 in its entirety again. In this paragraph, I use the term "sub-clause" in a grammatical sense and not as referring to a clause of the contract. Under the first sub-clause, the Sub-Contractor is deemed to have inspected and examined the site and satisfied himself as to "the nature of the ground, the sub-surface and sub-soil". Under the second sub-clause, the Sub-Contractor is deemed to have inspected and examined the site and satisfied himself as to the form and nature of the site. In neither of those sub-clauses is there expressly reference to the Sub-Contract Works. However, in each of the remaining sub-clauses there is such express reference to the Sub-Contract Works.
71. E.ON submits that the words (presumably of the first two sub-clauses) are not qualified by any description of the Works. The effect of E.ON's argument, it seems to me, therefore, is to seek to construe the clause as meaning that CDL has taken on some broad open-ended risk as to the condition of the site by dint of having inspected and examined and satisfied itself as to that condition. In reality, to consider the first two sub-clauses in isolation makes no sense. The purpose of the inspection, examination and satisfaction is for the purposes of carrying out the Sub-Contract Works and that that is the intent of the

clause is made plain by the reference to the Sub-Contract Works in each of the following sub-clauses. That view is reinforced by the provisions of clause 2.1.9 which expressly state that the Sub-Contractor shall not be released from any of the risks accepted by or obligations undertaken by him “on the ground that he did not or could not have foreseen any matter which might affect or have affected the execution of the Sub-Contract Works.” E.ON’s position assumes that the Sub-Contract Works are “all civil works” and, if one makes that assumption, one might easily conclude that the risk of all adverse conditions affecting all civil works lay with CDL. But that is why it is necessary, in my view, to start with the definition of the Sub-Contract Works and that leads to the Numbered Documents. That is the real thrust of CDL’s argument and I agree with it.

72. Alternatively, E.ON’s argument might be put this way. The Sub-Contract Works do not include, for example, dealing with soft spots. If CDL have satisfied themselves as to the ground conditions (relying on clause 2.1.7), CDL have satisfied themselves that there are no soft spots and/or taken the risk as to whether there are. At first blush that is a persuasive construction but it fails on analysis. It would have the effect that clause 2.1.7 allocated to CDL the risk of carrying out work which CDL had expressly excluded from the Sub-Contract Works: it would have the effect of meaning that CDL had satisfied themselves in respect of the site for the purposes of carrying out works that were not part of the Sub-Contract Works. And that would not make sense.
73. Clause 2.1.8 follows the same pattern. It provides that the Sub-Contractor shall not be entitled to additional time or money “on the grounds of any misunderstanding or misinterpretation of any matter set out in clause 2.1.7 or his failure to discover or foresee any risk, contingency or other circumstance” influencing or affecting the Sub-Contract Works. Both limbs of the exclusion in that clause, therefore, bring into play the Sub-Contract Works and their definition or scope.
74. That view leads me to the following conclusions:
  - (i) there is no inconsistency in CDL’s construction. If, for example, the Sub-Contract Works do not include the breaking out of obstructions, the effect of clause 2.1.7 is not then to allocate to CDL the risk that there are obstructions because any inspection or examination cannot be for the purposes of satisfying oneself as to the conditions for carrying out works that CDL have not contracted to carry out. There would similarly be no question of CDL being released from any risk or obligation undertaken because CDL had not contracted on the basis that they would break out obstructions.
  - (ii) To construe clauses 2.1.7 to 2.1.9 or the Numbered Documents otherwise would not give effect to what the parties had agreed was the scope of the Sub-Contract Works.
  - (iii) E.ON placed little reliance on the order of precedence in clause 1.3.5 (also referring to clauses 1.3.3 and 1.3.9) but submitted that all these clauses show the intention of the parties to be that the Numbered Documents should be read subject to the Agreement and the Conditions. I agree but, for the reasons I have explained, I do not consider that CDL’s construction involves giving precedence to the Numbered Documents over the Agreement or the Conditions.

*The five matters*

75. There were two further limbs to E.ON's argument which I should address.
76. Firstly, it was submitted that the effect of CDL's construction of the Sub-Contract was to render almost pointless clauses 2.1.7 to 2.1.9. That, it seems to me, is a question of fact and fact that arises post-contract. I can well see that, in trench excavation in central London, obstructions of all sorts are likely to be encountered. If breaking out obstructions is excluded from the sub-contract works, it does mean that a substantial risk is not imposed on the sub-contractor but that is the consequence of the express exclusion from the sub-contract works. A clause that imposes risk in respect of ground conditions may still have relevance where, for example, it is the nature of the ground that inhibits the sub-contractor's works. Mr McCall QC gave the examples of hard clay, voids and the water table. Further, clause 2.1.7 is not limited to ground conditions and refers also to the form and nature of the site and more generally to the extent, nature and difficulty of the Sub-Contract Works.
77. Secondly, E.ON took a series of specific issues with the terms of the declarations sought, starting with the general proposition that in no case is CDL "entitled" to a variation instruction (as pleaded and as set out in the agreed issues). Although it seemed to me that E.ON was right about that and that the term "entitled" was being used as shorthand, Mr McCall QC sought to persuade me that CDL had such an entitlement under clause 2.19. I do not accept that proposition. Clause 2.19 does not say that where a situation arises where the Contractor ought sensibly to issue an instruction for a variation, he is obliged to do so and the Sub-Contractor is entitled to the instruction. The wording of the clause that refers to "treated as or requiring a variation" in the context of the Conditions of Contract refers to circumstances where the Conditions so provide. If CDL are instructed to carry out work that is not within the scope of the Sub-Contract Works, that is a Variation. It is a matter for the Contractor whether to instruct such work or not. If, without that instruction, the Sub-Contractor cannot proceed with its works, that may give rise to another entitlement under the contract or even to damages. In a colloquial but not a contractual sense, the Sub-Contractor might then be said to be entitled to the instruction of a Variation.
78. It follows that the declarations that CDL will be entitled to will be framed in terms of their entitlement to have treated as a Variation work that they are or were instructed to do that was additional to the work within the scope of the Sub-Contract Works. I return to this below.
79. Beyond that general point, E.ON takes a series of issues on the precise terms of the declarations sought. These are not solely points of detail but are matters that E.ON argues demonstrate the fallacy of CDL's arguments. As I set out above, the first set of declarations are framed in terms of entitlement to a variation instruction where CDL encounter one or more of the five circumstances or matters that I have been concerned with.
80. The first matter is, in summary, ground conditions that do not permit hand digging:
  - (i) E.ON places emphasis on the addition of the words "ground conditions" which do not appear in the relevant bullet point in the tender submissions in Numbered Document 7. I cannot see the relevance in this emphasis. Hand digging by

definition occurs in ground. CDL's case is that hand digging is not within the scope of the Sub-Contract Works (save where specifically mentioned in the Bill of Quantities) and that if it is instructed to carry out hand digging, that is a variation. Such an instruction is likely only to be given where ground conditions are encountered that do not permit the use of mechanical plant.

- (ii) E.ON established both by reference to the Bill of Quantities and the factual evidence that there is, in fact, no express reference to hand digging in the Bill of Quantities but that takes things no further.
  - (iii) E.ON further submit:
    - (a) that the declaration is vague: it is not clear what ground conditions are referred to; whether that would include mains and services (where hand digging is required); and whether vacuum excavation is included within mechanical plant; and
    - (b) that if hand digging around mains and services were excluded that would be a surprising thing for the parties to have agreed given that the works involved the excavation of trenches in central London and the consequences would be far reaching.
  - (iv) Each of those arguments is a reason for submitting that what the parties agreed may be surprising or to some extent lacking in clarity but I come back to the point that CDL was at pains to set out what was not included in the Sub-Contract Works and that, on the face of the contractual documents, that was agreed as part of the definition of the scope of those Works.
  - (v) As an operational matter, it would be for CDL in the first instance to decide whether they could and should use mechanical plant. There may be a dispute between the parties as to whether hand digging was necessary. But these are operational issues and do not mean that the clear exclusions should be ignored.
81. The second matter is mains and services that obstruct E.ON's as designed pipe route and where the mains or services have not been diverted. E.ON accept that CDL had no responsibility for the permanent design and that where there was a clash with mains and services, E.ON would either have to arrange for diversion or would have to revise the design and instruct a Variation. In its written opening submissions, E.ON then said "the implication to be taken from this declaration sought by CDL is that CDL regard the mere occurrence of the clash as a Variation, rather than the instruction to divert the pipeline route that may or may not follow from the clash". Given E.ON's acceptance of this position and what I have said about "entitlement" to a variation, this seems to me to be a minor storm in a teacup. If such an instruction is given, it is common ground that it is a variation and no declaration beyond that is necessary.
82. The third matter is obstructions in the trench (including rock) which need to be broken out/ removed to permit CDL to carry out the Sub-Contract Works.
- (i) Although I have addressed this above, for completeness, I repeat E.ON's submission in this context that they were asking CDL to confirm that they had allowed for breaking out obstructions in the trench; that that request evidenced a



belief on E.ON's part that CDL had made such allowance; and that CDL's response did not challenge that belief. The request for "confirmation" is equally capable, and in this case probably was, an attempt to get CDL to confirm something that E.ON did not think was the case. CDL's response, on its natural reading, was the opposite of the confirmation E.ON sought. As a subjective matter that appears to have been interpreted by E.ON and then included in Numbered Document 9 as the specific exclusion of breaking out of rock.

- (ii) E.ON further submits that the declaration lacks clarity because it is unclear how "obstructions" are to be distinguished from other material that needed to be removed in the digging of a trench and how "rock" is to be defined. Any lack of clarity is a function of the exclusion (which it has to be observed E.ON did not seek to clarify further). It is not a matter which persuades me that I should not grant any declaration.
83. The fourth matter is "soft spots". E.ON advances similar arguments to those in respect of "obstructions" but E.ON also says that no soft spots occurred on the project and no claims were made in respect of soft spots so that there is no reason to seek a declaration in relation to soft spots. I agree that the Court should not make pointless declarations but I would assume that the declaration has been sought because it is consistent with the balance of CDL's case and, in that sense, is not pointless.
84. The fifth matter is unavailability of a clear and unrestricted corridor in which to carry out the Sub-Contract Works and the issues as to the meaning of that expression. In the light of my decision above, I do not address these issues further.

### ***Rectification***

85. As set out above, CDL's case as to rectification was pleaded in the alternative. It was based on common mistake. In the course of the hearing, Mr McCall QC indicated that he would consider a further alternative case on the basis of unilateral mistake but he did not, in the event, pursue such a case. The nature of the rectification of the contract sought would have been to insert words that would have qualified clauses 2.1.7 to 2.1.9 such that they did not have the effect of imposing on CDL the risk of the five matters and such that CDL would still be entitled to the declarations that it sought.
86. The agreed list of issues summarised the issues that arose as being in particular:
- (i) Was it the common intention of the parties that the Sub-Contract Conditions be qualified in one of the ways set out in the Particulars of Claim (and set out at paragraph 7 above) that is by the addition of words to clauses 2.1.7.
  - (ii) Was there an outward expression of accord in respect of either of the qualifications set out in the Particulars of Claim.
  - (iii) Did any such intention continue up to and including the time when the Sub-contract was entered into.
  - (iv) By mistake, do the terms of the Sub-Contract fail to reflect the common intention.
  - (v) Do CDL's proposed qualifications give effect to the common intention. If not, what wording is required to express the common intention.

87. Since I prefer CDL's construction of the Sub-Contract, it is not necessary for me to deal with the case on rectification. I will, however, say shortly that I would not have found in CDL's favour on this basis. I can well see why CDL advanced this alternative case in particular because the spreadsheets produced by Mr Harris following the post-tender clarifications and, indeed, the Post Tender Minutes, appeared to demonstrate that E.ON fully understood what was not included in CDL's scope of works and intended that the Sub-Contract should reflect this.
88. However, having heard the evidence given at trial, I was not at all satisfied that that was, in fact, E.ON's understanding. Mr Harris' evidence on these issues was, in many respects unsatisfactory and difficult to accept. He sought to argue (and that is the appropriate verb) that the invitation to tender did not allow for exclusions from the scope of work: the contractor could exclude an activity they considered unnecessary but would do so at their own risk. Whilst recognising that the exclusion of hand-digging, for example, was strange in the context of the site, it was, he appeared to say, a matter for CDL. On other occasions in his evidence, however, he accepted that CDL had clearly stated that something was outside the scope of their works. However, he then said that when he used the term "excluded" in his spreadsheets, he meant only that the item was not priced. The wording in the Post Tender Minutes that "Clancy have specifically excluded" was explained away as a mistake. Mr McCall QC invited me to find this evidence incredible and to regard it as Mr Harris' attempt to explain away what he clearly understood CDL to mean.
89. Tellingly, however, Mr Harris also said that his understanding was that this was "an all risk contract" and that CDL "bought the ground". He said that he made clear to the procurement team (who would deal with placing the Sub-Contract) that the sub-contractor should take on all risk. Mr McCall QC, therefore, put to him that, given that CDL were seeking to exclude specific works, he, Mr Harris, must have thought that CDL were labouring under a serious mistake about the scope of works. His answers were these:
- (i) "No. I think we were clear to them. ...they need to carry out all the works, we try to prompt them to look to the scope and specifications. If they had erred in not understanding their works, there was little I could do about it."
  - (ii) And later: "I thought they were confused in terms of their returns. They didn't fill out the tender returns in the format we asked them to. The responses that we got were sometimes not always in alignment. Fundamentally, though this was not a matter for myself to deal with in great regard (sic) because the procurement team were under instructions to place an all risks contract."
90. I was left with the overall impression that Mr Harris well understood that CDL were tendering and seeking to contract on the basis that specific works were excluded from their scope of works. However, my impression was also that he genuinely believed that the Sub-Contract was to impose all risk on CDL and that he hoped or believed that the terms of the contract would achieve this. I recognise that, on that basis, it could be said that there was a common understanding as to the scope of the Sub-Contract Works, although not a common understanding as to the allocation of risk, but that seems to me to attribute too sophisticated a contractual analysis to Mr Harris. My overall impression, which was not dispelled by the evidence of Mr Smith or Mr Price for E.ON, was that

E.ON hoped that they had allocated as much risk as possible to CDL, even if contractually they had not. That is not the same as a common understanding as to the scope of works or contractual risk.

*The declarations*

91. It follows from what I have concluded above that I will grant declaration no. 1 in an amended form. The declaration should be to the effect that CDL are entitled to a Variation instruction if instructed to carry out work where it encounters one of the matters at (a) to (d) or that if CDL are instructed to do such work it should be treated as a Variation. For the reasons I have given, I am not persuaded that it is right or necessary to make the broader declaration relating to the clear and unobstructed corridor.
92. I do not grant the declaration rectifying the Sub-Contract which is unnecessary.
93. Declaration no. 3 was, Mr McCall QC, accepted unnecessary, if declaration no. 4 were granted, and I say no more about it.
94. Declaration no. 4 will be granted. The effect of granting this declaration is that it makes patent that any claims that CDL may have in respect of Relevant Events are not debarred but I do not make any declarations as to whether CDL in fact have such claims.
95. The further declarations sought were also agreed in the course of the hearing to be unnecessary.
96. As also discussed in the course of the hearing, the parties will agree the precise form of the declarations in the light of this judgment.
97. I should add that, as the parties were directed to do they agreed a list of issues for trial. The issues largely reflected the declarations sought in the Particulars of Claim. I have had regard to the list of issues but, unless corrected by the parties, it seems to me that they are all addressed by my decisions in relation to the declarations.