



Neutral Citation Number: [2019] EWHC 435 (TCC)

Claim No: HT-2017-000372

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

Date: 1 March 2019

Before:

**MR JUSTICE WAKSMAN**

**ANCHOR 2020 LIMITED**

**Claimant**

- and -

**MIDAS CONSTRUCTION LIMITED**

**Defendant**

**Duncan McCall QC and Jessica Stephens** (instructed by Clyde & Co. Solicitors) for the  
Claimant

**Rupert Choat and Christopher Reid** (instructed by Osborne Clarke LLP Solicitors) for the  
Defendant

**Hearing dates: 22, 23, 24 and 29 January 2019**

**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.

## INTRODUCTION

1. This trial has been concerned with the determination of certain preliminary issues arising in the context of a final account dispute between the Claimant Employer, Anchor 2020 Limited (“Anchor”) and the Defendant Contractor, Midas Construction Ltd (“Midas”). The works to be performed were the design and construction of a new Continuing Retirement Community at Yateley, Hampshire (“the Works”). These were commenced on or around 7 October 2013 and practical completion was obtained on 18 December 2015.
2. Both parties had intended to contract pursuant to a JCT Design and Build Contract (2011 Edition). Midas signed a copy of that contract on 21 July 2014 but Anchor never did.
3. In the present dispute, Anchor contend that a binding contract was made on 21 July. Midas denies that any binding contract was made and accordingly it should be remunerated for outstanding sums on a Quantum Meruit basis. The price which the parties had agreed for the Works was £18.2m.
4. A key document in this case has been Midas’ Risk Register (“the RR”). It quantified certain costs risks to Midas which were then fed into the calculation of the Contract Sum and amounted to some £155,000. However, it also referred to some other risk areas where the relevant work was described as “excluded” which, according to Midas, meant not within its scope of work at all.
5. Out of the 8 preliminary issues originally set for trial, 5 remain, as refined, as follows. I shall refer to them by their original numbering:
  - (1) Issue 1: Did the parties enter into a contract in respect of the Works on or about 21 July 2014?
  - (2) Issue 2: If the parties did enter into a contract in respect of the Works, did that contract include the documents set out in the Claimant’s Further Information dated 26 January 2018, or the documents set out in paragraph 1 of the Defence and Counterclaim, or some other and if so what documents?
  - (3) Issue 6: Is Midas’ entitlement to payment in respect of the Works to be valued (a) in accordance with the contract entered into (if so found) or alternatively in accordance with the Letters of Intent for the period up to 30 June 2014 and thereafter on a Quantum Meruit basis?
  - (4) Issue 7: If a contract was entered into as set out in Issues 1 and 2 above, was the 8 July 2014 RR and/or some other RR part of it? If so, what principles apply to the valuation of the Works?
  - (5) Issue 8 : If the basis of valuation of the Works carried out after 30 June 2014 is a Quantum Meruit, what valuation principles apply to the Works, in respect of any defective works and in respect of any delays for which Midas is responsible?
6. I should add that Anchor has paid Midas just under £21m to date, accepting as it has, some claims to further sums beyond the contract price (but subject to claims for deductions due to defects and liquidated damages). Midas however had contended that it was entitled to about £28.5m on a quantum meruit basis, or, if there was a contract including the RR, for just under £33m, so on any view this is a substantial final account dispute.

7. The sums at stake in the final accounts dispute amounted to at least some £10 m.

### **THE EVIDENCE**

8. For Anchor, I heard from John Webb, a quantity surveyor employed by Mace Construction Consultants Ltd (“Mace”) through whom he acted as Anchor’s Employer’s Agent. I also heard from Tony Barnes, a surveyor who worked for ECV Partnerships Ltd (“ECV”) which, among other things, provided project management and support services to Anchor both before and during the works. ECV hired Mace to perform the quantity surveying, Employer’s Agent, and contractual administration services for the project.
9. For Midas, I heard from Richard Ross who was its Commercial Director at the time and Scott Poulter who was the Commercial Director of the Midas Group.
10. The evidence of these witnesses was of some assistance but the very substantial number of contemporaneous documents in this case essentially tell the story. The utility of the oral evidence is further diminished by the fact that (a) the critical question of contract formation (or not) is an objective one, not to be determined by reference to the parties subjective perceptions and (b) as will be seen, both sides engaged in a degree of “position-taking” as they fell into dispute in late 2014.

### **THE KEY FACTS**

11. It is neither necessary nor desirable to trace the entire history of this dispute. Instead I shall concentrate on the key salient facts which are either common ground, or as I shall find them to be.

### **The Letters of Intent**

12. Following Anchor’s ITT, Midas submitted its tenders on 30 May and 30 August 2013, after which it was selected. The parties were not able to agree the intended contract before the start date and so a first Letter of Intent (“LOP”) dated 10 September 2013 was entered into (“LOI 1”). This stated, among other things:

“2. Subject to precise terms being agreed between us, it is our intention to appoint you to carry out the design, construction and completion of the Works and to enter into a contract with you (“the Contract”) for the carrying out of the design and construction of the Works. For the avoidance of doubt, this letter is not a legal acceptance of your tender.

3. Notwithstanding that all terms of the Contract are not yet agreed, we authorise and instruct you to proceed with the necessary preparation for the Works, to enable us to meet the intended start date on site for the Works of 7 October 2013 and to meet the intended date for completion being 19 December 2014, which shall be limited to the works detailed on the turnover forecast attached to this letter (“the Mobilisation Works”).

4. Any works done or services provided under this letter shall be governed by the terms of this letter, the Contract conditions (as defined in paragraph 5.) and the Documents (as defined in paragraph 5.2). In the event of inconsistencies, the terms of this letter shall prevail.

5.1 The “Contract Conditions” are JCT DESIGN AND BUILD 2011 as amended by a schedule of amendments provided to you by the Employer’s Agent on 23<sup>rd</sup> April 2013...

7. Subject to this letter, we agree to pay you for the Mobilisation Works provided by you which are in accordance with the Contract Conditions and the Documents in accordance with the following provisions:

7.1 Notwithstanding any other paragraph of this letter, our total liability under this letter ... shall not exceed £1,325,000...

7.2 The amount payable for such Mobilisation Works shall be calculated, so far as possible, in accordance with the Contract Conditions, or where not possible, we shall pay you a reasonable amount for them...

13. The authorisation contained in this letter will terminate by written notice served on you at any time....”

13. Following successive increases in the financial limit, a second LOI was issued dated 3 March 2014 (“LOI 2”). This was expressed to expire on 30 March. It capped Anchor’s total liability under LOI 1 and LOI 2 at just under £3.5m. The expiry date was later amended to 30 April 2014. It is clear that both parties saw it as vital that while negotiating for the substantive contract they had the benefit of an LOI. Thus, for example, on 31 March 2014 Midas emailed Anchor pointing out that a further LOI had not been issued and “Obviously as we discussed... The existing LOI formally instructs us to stop all works on the 30<sup>th</sup> [March] unless instructed otherwise so could we please have the formal LOI today to avoid any risk of having to explain why we are still working to our Board.” The parties then entered into a further LOI dated 28 March 2014, with an expiry date of 30 April 2014 (“LOI 3”).
14. LOI 4, dated 30 April 2014 extended the date further to 31 May 2014 with an increased cap of £6m and noting that the parties had now agreed the Contract Sum at £18,213,082. This was replaced by LOI 5, dated 3 June 2014 which extended the expiry date to 30 June 2014. There were no further LOIs after that.

### **The Structure of the Intended Contract**

15. There is no dispute as to the overall structure of the intended contract; it would consist of the following:
  - (1) The standard form of the JCT Design and Build, with its Articles, Contract Particulars and Conditions;
  - (2) Amendments made to the above either directly into its text or contained in a Schedule of Amendments; and
  - (3) A set of Contractual Documents which would include the ITT and the Employer’s Requirements which themselves consisted of sections 1-4 of the document headed Sandhurst Road Yateley Phase 1 Main Contract Works Contract documents and 41 appendices which themselves included at Appendix 32, a Schedule of (agreed) Amendments.
16. In this particular case, Anchor, together with ECV had engaged Farrow Walsh Consulting Ltd (“Farrow Walsh”) being structural engineers, and the architects, Urban Edge Consulting Ltd (“Urban Edge”), pursuant to separate written consulting agreements. However, on the making of the intended contract these agreements would be novated away from Anchor and ECV as the employers of those consultants, to Midas. As we shall see, there were considerable negotiations over the terms of those novations.

### **The RR**

17. Under the heading “Project Risk” the ITT required the tenderer to submit a summary risk register. Midas did so as part of its tender in the form of a spreadsheet headed “Risk and

Opportunities Register”. This was, among other things to identify the top 10 risks perceived on the project. According to Mr Webb, the idea was to identify potential risks where there would need to be contingency costs provided for which risks could later be designed out or reduced because of further site reports so that the likely costs could be given firm figures. The first column described the item addressed followed by columns for initial assessment, prevention, contingency and cost allowance.

18. By July 2013 the “2<sup>nd</sup> stage” review of the RR had the cost allowance column filled in. It consisted of particular sums or references to the separate Provisional Sums allowed for all the Bid but the first three items stated as follows:

<b>The Site</b>	<b>Description of Potential Problem</b>	<b>Prevention Action</b>	<b>Who</b>	<b>Cost Allowance</b>
Site Investigation	Updated SI received presence of Hydrocarbons identified and further investigation required	Further risk assessment and proposal for mitigation and/or monitoring required	ECV	Excluded
SI includes WAC test results	SI to be interpreted by the Consulting Engineers and recommendations regarding further WAC testing to firm price	Details of contamination on site received information to be issued to Ground works tendering contractors	MCL	Excluded
Gas in the ground	SI identifies elevated levels and site is graded Amber 1	Ventilation and gas membrane details to be developed	FW/ UW	Excluded

19. Midas contends that the expression “Excluded” meant that insofar as any of those risks materialise, they were for Anchor to bear and not Midas. On a fair reading, that would appear to be correct.

20. Indeed, by Tender Query 13 (“TQ13”) dated 5 August 2013, Anchor wrote of the RR:

“Please be advised that the employer’s intention is to have an all risk with the contractor. We note its contents. Should MCL [Midas] proceed to the next stage we expect these risks to be passed on to the contractor.”

And Midas replied:

“This is not a problem for Midas on the understanding that collectively we can resolve any outstanding issues during the next stage or we can agree figures representative to the issue.”

21. By an email dated 25 November 2013 following a meeting, Mr Paul Redding of Midas gave some comments on the minutes of the meeting which included saying that “Not all the risks are currently with Midas. Namely 1, 2, 3, 7, 12, 15 remain Anchors.” Mr Webb’s comments in reply later the same day stated that “as we have consistently stated and minuted in meetings this is a Design and Build contract and the risks are to lie with MCL, this includes items 1, 2, 3 and 7. ECV will only take risk on items relevant to themselves for item 12 and 15.” By an email the next day, Mr Redding stated that they acknowledged Mr Webb’s comments and made no further point on the RR then, save that the costed allowances were agreed at a total of £155,000. That figure formed part of the Contract Sum

Analysis (“CSA”) which formed Appendix 27. The whole of the CSA had been agreed by 22 May 2014.

22. Later, on 8 July 2014 Mr Redding sent an email to Mr Webb stating as follows:

“Please see attached a copy of the updated risk register. Please come back to me with any comments you may wish to add.”

23. This email appears to have been overlooked by Mr Webb who said in evidence that he could not recall it. However, it is in any event a curious email because it came out of the blue and did not state what purpose the RR was now serving. It is right to say that at this stage, items 1-3 were still being described as “excluded”.

24. Then, on 10 July, Mr Redding emailed Mr Webb again as follows:

“Your CSA documentation that has been passed between us for many months has always included the risk register and it is again referred to specifically on the CSA in the contract documentation. Having checked with the contract document administrator (Amber), for completeness, we have therefore also included the same risk register with the agreed CSA in the hardcopy contract documentation.”

25. I have to say that this email looks as if it might have been written in response to a reply from Mr Webb to the earlier one, but if so, no such email from Mr Webb has been found. But the 10 July email reads very much as a justification for referring to the RR. That justification appears to be because it is referred to in the CSA, itself a contract document. Hence the RR should be included in the hardcopies of all the Appendices together with the CSA “for completeness”. That, read objectively, does not suggest that it had any particular significance or substance and certainly not beyond showing a breakdown of the £155,000.

26. I return to later events concerning the RR, below.

### **The Schedule of Amendments**

27. As noted above, the Contract Sum and the CSA had been agreed long before 21 July. The Contract Sum itself had been agreed on 29 April and there is no dispute about that.

28. On 1 July, Mr Webb attached what he hoped would be the final set of contract amendments. On 3 July Mr Ross responded “All Ok” save to check for clarity that in respect of clause 2.17C.1 which dealt with Third Party Agreements that there were in fact no such agreements. Anchor did not come back and highlight any such agreements because there were indeed none. Mr Ross accepted in cross-examination that Midas had received confirmation of that in an email somewhere.

29. It seems that following the agreement on the Schedule of Amendments, a final version may not have been sent by Anchor to Midas and accordingly when Midas produced a set of all the Appendices in hard copies on 29 July, it used an earlier version. This was materially the same as the later version save that the name “Midas” had not been inserted in place of the generic name “Contractor”. Any points of that nature are clearly inconsequential.

30. Accordingly, the parties had reached agreement on the Schedule of Amendments also. This is supported by another email from Mr Ross on 3 July which states that the question of dealing with the wording for the NHBC issue was “the only matter preventing the issue of the novations and sign-off of the contract”. In the same email he went on to say this:

“The current LOI expired on time at the end of June and we have been continuing in “good faith” and by verbal agreement on basis the above issue would be resolved this week. However, if there is no resolution by the end of the week we will have no option but to require the issue of a further extended LOI to cover both time and value. We currently have over 100 operatives on site and as such the value of the works is increasing quickly.”

31. He went on to deal with resolution of the NHBC issue in the context of the novations to which I now turn.

### **The Novations**

32. In this case, the novation of the consultancy agreements assumed perhaps more significance than usual, in particular in relation to Urban Edge. This is because in May 2014 the NHBC stopped Midas’ work on the Village Core and Block One parts of the Works because there was an insufficient gas membrane around the base of the properties so as to insulate them properly from gas present in the ground. This led to extensive (and expensive) remedial works. Midas regarded the incident as having arisen from flaws in Urban Edge’s designs. Urban Edge, on the other hand, said that its design did not have to conform to NHBC requirements. Midas obviously wanted to have recourse against Urban Edge under any novated consultancy agreement if such problems persisted or were not resolved. That recourse would be required even if the design flaws had manifested themselves in the period before the making of the novation agreements.
33. The novation process was essentially tripartite between Anchor/ECV, Farrow Walsh or Urban Edge (as the case may be) and Midas. However, for the most part (though not always) Anchor/ECV dealt with the consultants and then dealt with Midas separately, rather than Midas dealing with the consultants direct although this sometimes happened. However, on 15 July, Mr Barnes reported to Mr Ross that both consultants had now confirmed their agreement to the revised wording in the novation agreements and “copies of the updated novation agreements will be forwarded to you for signature.”
34. The amended Urban Edge novation agreement contained the following wording:
- “Using all reasonable skill and care the Consultant shall regularly and diligently proceed with the performance of the Services having due regard to the information required schedule dated 05 June 2014 prepared for the Project and revisions thereof and shall exercise all reasonable skill and care not to cause or contribute to any delay or disruption to the progress of the Project and shall exercise... All reasonable skill and care not to impede any of the other Consultants, the Contractor, or any Sub-Contractor.”
35. It is true that Urban Edge had agreed to the substantive wording but it had also said that the reference to the “information required schedule dated 5 June 2014” was wrong because there was no schedule of that date. What Urban Edge had told Mr Barnes on 15 July was that this date needed to be amended to reflect the dates when such schedules would be agreed. Mr Ross responded to Mr Barnes email of 15 July, thanking him for the update and saying “hopefully we will be in a position to sign all the documents by the end of next

week.” On 17 July, Mr Barnes repeated that the novation agreements sent to Midas had been agreed with the consultants.

36. That said, it is the case that as between these contracting parties, Anchor and Midas, they did each agree that the form of the novation agreements to be made should be in those sent by Midas to Anchor.
37. The novation agreement for Farrow Walsh as signed by Midas and returned to Anchor for transfer to Farrow Walsh, was eventually signed by the latter on 19 August.
38. As for Urban Edge, it signed the novation agreement on or around December 2014 when it posted it back to Midas. The only change was that there was now added an agreed list of “Information Release Schedules” of which there were 12 approved by Midas on dates between 1 July and 30 September 2014.
39. I deal below with the significance or otherwise of the signing dates on the novation agreements.

#### **The Signing of the Contract by Midas**

40. I have already stated above when the Contract Sum, CSA and the Schedule of Amendments were agreed between the parties.
41. On 18 July Midas wrote thus:

“... We are arranging to sign off the contract documents and novations. As agreed at the last meeting we will arrange for the actual contract document and novations to be sent to John on Monday and will take all the backup files to site for passing on when you are there next. Thank you for all your help in getting to the position of signature.”
42. On 21 July, Midas sent to Anchor a signed set of the JCT terms and the novation agreements. They also signed the cover sheets of each of the Appendices although these documents were not sent over then. Rather, at a meeting on 29 July Midas gave to Anchor hard copies of all the signed Appendices. However (although it did not say so at the time) it had added to Appendix 27 a copy of the RR.
43. Between 30 June (when LOI 5 expired) and 21 July, Midas worked on the project as usual, as it did thereafter until completion the following year.

#### **Checking the documents sent on 29 July**

44. There is no dispute that Mr Webb checked the hardcopy documents sent over on 29 July. At trial it was suggested that this was subject to an actual agreement to check, made between the parties and that any concluded contract for the works depended on it. I do not accept that the evidence said to support this (see in particular the emails from Mr Ross to Mr Webb dated 18 and 21 July) in fact did so. Moreover, Mr Webb (whose evidence I accept on the point) said that there was no such agreement - it was simply what, as an Employer’s Agent, he would do in any event. He checked the hardcopy documents against the electronic copies which he had. That there was no such “checking agreement” also gains support from the notion that at least according to Mr Ross, he would have accepted



that there was a contract in place as soon as Anchor returned the contract signed ie even before the hard copies were sent over.

45. In a project such as this with the number of documents that were contained in the Appendices as contract documents, it would hardly be unusual if some queries, infelicities or discrepancies arose. As explained below, however, I do not think that this means that the parties could not have concluded any contract before such matters were resolved.
46. Leaving aside the question of the RR discussions (dealt with below) three particular matters arose following Mr Webb's checking of the hardcopies – the M & E Drawings for Blocks 6 and 7, the Area Schedules and the Laundry Quotation. These were raised by Mr Webb with Midas on 12 August.
47. As for the M & E Drawings Mr Webb's evidence was that the wrong version had been included in the hardcopies. But he said that this did not matter since such works were the subject of Provisional Sums only in any event and so an instruction would be needed which would define the scope of the works. It was suggested that he had in fact said that no M & E Drawings had been included at all but even if so, it would still make no difference because of the Provisional Sum. In fact, Mr Webb later agreed (on 21 September) that what could go into the contract documents was the tender version of those drawings. The fact that Mr Ross had said in some notes on 22 January 2014 that M & E was a "major concern" does not alter the fact that this was sorted out very quickly. Indeed, Mr Ross's own position was that Midas had not agreed to insert them as a contract document at the outset but then just did so later on. That hardly shows that any omission or wrong version of the drawings was a major problem nor do I accept that Mr Webb's evidence on the point (Day2/36-37) accepted otherwise.
48. As for the Area Schedules prepared by Urban Edge, it was common ground that Appendix 3 should have included them. There is no suggestion that these had not been agreed between the parties prior to 21 July and therefore their omission was a simple oversight. While Midas said that the Area Schedules had not been included in the hardcopies for them to sign, it did not matter. Mr Webb just printed off a new set and they were included, as agreed on 21 September.
49. As for the Laundry Quotation, Mr Webb had noticed that a quotation from Miele for equipment in the laundry had been omitted. Midas said that this was because it had not previously been supplied while Mr Webb said that it had been, at Stage II. None of this matters, however, since Midas agreed by 21 September to include it and the equipment was the subject of a Provisional Sum, and Change Order Number 19, from 14 March 2014, anyway.

### **Further Events after 21 July**

50. As I have already indicated, one has to treat with some care statements made by the parties (especially once a dispute had arisen) as to whether there was or was not a concluded contract. The parties were not lawyers and even if they were, their analysis of the true contractual position might not be correct. What I recount below is therefore subject to this caveat . I will deal in this part of the judgment with what arose in respect of the RR.

51. The minutes of Progress Meeting 10 between the parties held on 29 July 2014 stated that: “Contract is now in place and has been signed by Midas. Signed documents handed over by Midas on 29 July 2014.” Midas’ own Monthly Report of the same date which was provided to Anchor had itself stated that “Contract is now in place and has been signed by Midas”. Mr Barnes’ notes of that meeting referred to “receipt of Performance Bond. RR to raise bond now contract has been signed.”
52. In his witness statement, Mr Webb had said that it had been discussed and agreed at the meeting that the contract was now in place. Mr Ross had denied in his witness statement that there had been an actual discussion about the contract being in place. Mr Webb said in evidence that his reference to some discussion at the meeting was because Midas’ own Monthly [Progress] Report had itself said that the contract was now in place. And Mr Webb also said (though it seemed obvious) that the reference to the contract now being in place was going back to the signature on 21 July. I accept Mr Webb’s evidence on this point. At the time, no one objected to these minutes.
53. As to the meaning of the words “contract in place” it seems to me that they clearly and obviously mean that there was now a contract between the parties. It was, after all, what Midas (including its Board) had been pressing for, for some time. I do not accept that these words meant simply that there was now the relevant documentation available to constitute a contract not yet made. Indeed, Mr Ross in evidence said that there was a need to get the contract in place. This reflected Midas’ Project Performance Review Report dated 25/26 June 2014 which had stated, given the expiry of LOI 5 on 30 June, that “it is therefore essential that the contract is put in place.” Updates added to these notes in red from August said “contract now in place and novation signed off by engineer, architect resolved and with them for sign off”. The same expression was used in Midas’ later monthly reports for August and September. In its Board Report number 27 on 20 August 2014 it was stated that this project had been “secured” which Mr Ross accepted meant the same as being in place. Midas’ monthly report for July through to September also said that “a performance bond was now required, following confirmation of the contract.” I deal further below with the significance or otherwise of the fact that while Midas did seek to obtain a performance bond was never finalised or provided to Anchor.
54. That said, at Anchor’s strategy Team Meeting on 28 July 2014 the following is recorded at paragraph 4.1.1:
- “It was confirmed that Midas Construction has now signed the construction contract. The JCT Form of Contract including all associated documentation are being checked by Mace, prior to formal issue to Anchor for their signature.”
55. As for the RR, Mr Webb had stated to Midas that the RR should not have been included because it was not a contract document and the relevant risks had been allowed for in the CSA. Midas’ response by email on 29 August was to say that it did not take on all risks and that the RR had identified with whom the risk remained and what allowances Midas had made against the £155,000. In his response later the same day Mr Webb said as follows:
- “This is a Design and Build contract and includes for MCL All Risk. Mine and the client’s understanding is that the Fixed Price Allowance and the Risk are MCL risk. Are MCL now saying that it is not all risk? If this is so, it goes against the whole principle of Design and Build and this contract and the negotiation. MCL cannot just add documents into the contract.”

56. On 31 August Mr Webb emailed internally including as follows:

“I have held off the rest of the contract as we now appear to be revisiting old ground with the contract so I think it inappropriate to get it signed at the moment.”

57. On 19 September, Midas responded and in respect of the RR said this:

“We do not view the insertion of this document any different from outlining the risks and responsibilities which are identified in the tender queries questions and answers. The document identifies what risk we took on board and priced at the time. There are elements which remain the Client’s risk on the risk register. We were not offered the opportunity or asked to account for all the risks on the register. We do not feel that having referred to the document through the complete negotiation period and identify what risk we were prepared to accept it should be withdrawn and assumed or risk is then with Midas without proper redress.”

58. Mr Webb’s response in turn was to say:

“This is not accepted. This is a fixed-price contract and you now want to include only risks identified on your schedule and appear to want paying for any risk not included on your schedule.”

59. The subject then arose at Progress Meeting 13 on 28 October and the minutes recorded this about the RR:

“MCL had included the risk register (RR) and advised that this would need to be included and where costs have been incurred by MCL which were identified as ECV owner on the schedule Anchor should be responsible for payment. A heated discussion took place where RR stressed that the Risk Register submitted with the tender was clear and that the Anchor team had been part of the preparation of the register at a workshop. JW advised that he was not aware of any workshop as the register was dated July and he thought the first meeting with MCL was not until September. RR to advise on details of meeting. JW expressed his disbelief that under a fixed-price contract MCL now want paying for additional risk cost and this was not acceptable. JW asked if on the same principle Anchor could recover costs for risk of sums not spent, i.e. £40k for flooding. RR advised that MCL had mitigated this by installing pumps to keep the works drive. JW asked why therefore MCL had submitted for an extension of time against this item. RR [said] they had not, it was for inclement weather. JW corrected RR. TB interjected at this point and advise that on behalf of the client he was not happy and that discussion should be taken off-line and MCL to advise on what they believe they are entitled to.”

60. Anchor’s Strategy Team Meeting of 31 October noted at paragraph 4.1 that the contract had still to be signed by Anchor and “the [cause of] the delay remains the reintroduction of documentation removed from the contract set and that Midas had agreed to the reinsertion.” Nothing was said about the RR issue.

61. On 13 November Midas provided comments on the minutes of the meeting of 28 October saying that the whole of the RR had always been the basis on which the price had been submitted. There was an Interim Progress Meeting held on that day at which Mr Webb said that RR was not a contract document and that he would be issuing the existing contract to Anchor for signature without it as he had heard nothing from Midas.

62. Then, on 14 November, the following day, Anchor received a letter from Midas’ solicitors Bond Dickinson. It stated as follows:

“ As you will be aware, our clients submitted a Risk Register with its tender and the Risk Register formed part of our client’s tender submission to you identifying those risks which were to

be borne by our client and therefore included in the contract sum, and those to be retained by the Employer and the Employers Persons and so not included within the contract sum. The contract documents issued to our client for signature did not include the Risk Register included with our client's tender. Given that the Risk Register is a fundamental contract document our client inserted that document when it returned the contract documents and expressly required that the Risk Register be included as part of the contract. This reiterated the fact that our client is only prepared to enter into a contract with you which incorporates the Risk Register.

We understand that Mace, for reasons which are entirely unclear, consider that the Risk Register should not be included in the contract documents. More recently we understand that they intend to advise you to remove the Risk Register and then sign and return the contract to our client.

Mace's position is entirely incorrect as a matter of contract. Midas' tender to you incorporated the Risk Register and the tender was based on the Risk Register. Therefore, our client's offer to you to carry out the works for this project is based on the various information and statements set out in the Risk Register. It is clearly a fundamental part of any contract which is to be formed between the parties as it formed part of our client's offer to carry out the project.

Please ensure that the Risk Register is properly incorporated into the contract documents which are signed and returned to our client. This reflects the basis of our client's offer but will also avoid significant uncertainty, delay and potentially costs going forward. If you maintain the position set out by Mace to date and return the contract to our client without the Risk Register, that will constitute a further counter-offer to our client which our client will not accept. There would then be no concluded contract between the parties and the contract will remain at large leaving significant uncertainty, particularly 'or you as the employer, and our client will claim its costs date on a quantum meruit basis.

In short, the Risk Register must be included in the contract documents in order to reflect our client's offer to carry out this project and to allow a contract to be concluded and to allow the project to progress As set out above, failure to do so will only lead to significant uncertainty and additional costs to the project.”

63. It is clear that Midas was now adopting the position that there had been no concluded contract to date and accordingly, rejection of the RR as a contract document would amount to a counter-offer to what Midas characterised as its present offer (which included the RR), and thus the contract would be “at large”.
64. Anchor decided that it would review the present RR to see what the financial implications would be for it, were the RR to be included in the contract. Mr Webb also spoke to Mr Ross about this on 18 November.
65. Then, on 2 December 2014 Anchor sent two letters. The first, to Bond Dickinson, included the following:

“You say that if there is no concluded contract then your client will claim its costs on a Quantum Meruit basis; pursuant to clause 7.2 of the letter of intent dated 10<sup>th</sup> September 2013 your client's payment would be in accordance with the contract conditions and would be limited to the amount in the final letter of intent which is £6million. In the alternative it appears from the letters of intent that the only matter to be finally agreed was the contract sum; this has now been agreed and therefore it would appear that the contract comprises the letter of intent together with the contract sum as agreed.

We suggest that rather than both parties taking an inflexible stand the way forward is to deal with this issue in a cooperative practical way by considering the effects of including or excluding the Risk Register, and it appears that there are no items on the register which are not already covered by the other contract documents or by law or by the agreed contract sum or otherwise as explained below.”

66. It is fair to say that this letter did not suggest that the contract had been made specifically on 21 July to include the JCT form and Appendices. Rather, it suggested that the contract consisted of the letter of intent together with the contract sum although of course the letters of intent did apply the terms of the JCT contract as far as possible.

67. The second letter, to Mr Strachan at Midas, included this:

“We were somewhat surprised and disappointed to receive a letter from your solicitor. The issue of the addition of the Risk Register and the omission of two sets of other documents from the package of documents Midas returned in July following the signing of the Contract was raised with your site team by the Contract Administrator at the time the documents were returned. The omission of a series of M&E drawings and the floor area schedule, plus the addition of the Risk Register had not been identified in correspondence enclosing the signed Contract and associated documents and was only identified as a result of the Contract Administrator checking the contract documents package. The Contract Administrator emailed your Commercial Manager advising of the omission of key documents forming part of the Contract and clearly explaining why the risk register should not be included as a contract document. Correspondence exchanged during September resolved the inclusion of the drawings and the Contract Administrator was awaiting a response from Midas in respect of the Risk Register.

In the absence of a response the issue was raised by the Contract Administrator at a meeting on the 28<sup>th</sup> October 2014 and your team advised that this was still being considered by Midas and they would advise of the outcome, no response was received from your site team between the meeting on the 28<sup>th</sup> October and the meeting on the 13<sup>th</sup> November hence the expression of frustration by the Contract Administrator at that meeting. Given that the Contract Administrator was still awaiting a response from Midas we consider the involvement of Bond Dickinson in writing directly to ourselves somewhat heavy handed.”

68. Therefore, “on the ground” as it were, and while the works were continuing, Anchor was suggesting that it might be possible to resolve the issue of the inclusion or otherwise of the RR.

69. There was a meeting between “principals” of the parties on 9 December. In attendance were Mr Schofield, Mr Pullen, Mr Barnes and Mr Webb for Anchor and Mr Strachan, Mr Ross and Mr Poulter for Midas. In paragraph 37 of his first witness statement, Mr Poulter referred to his preparatory notes for the meeting. Those notes included the following in manuscript:

“Not in Contract  
John Webb said going to go ahead and execute contract”

and Mr Poulter said that the absence of a concluded contract was discussed, among other things. In his oral evidence when asked to explain his statement at paragraph 2.6 that the parties had agreed that no contract had yet been concluded, he said that this was a reference to the meeting of 9 December when no issue was taken with Midas’ position that there was no contract. However, none of this was put to Mr Barnes or Mr Webb and in any event, as is clear, by this stage both parties were taking positions by reference to their own commercial considerations. Accordingly, I do not regard what may or may not have been said at this meeting as of any real significance.

70. Mr Ross wrote back to Anchor by a letter dated 22 December which obviously had had some legal input, taking issue with the letter from Anchor to Bond Dickinson of 2 December. It ended, however, by saying that Midas was now revising the RR so as to cost the “excluded” item of works.

71. Subsequently, Anchor decided that it could probably live with the existing RR and took the view that it should now “accept” what Midas had characterised as its offer based on all the

relevant contractual documents plus the then RR. Accordingly by a letter dated 12 January 2015, but which arrived at Midas at 4.08 p.m. on 13 January, Anchor now said this:

“Reference our recent exchange of correspondence regarding the inclusion of the Risk Register as a Contract Document. Please find enclosed one copy of the Contract and Contract Documents previously signed by Midas which has now been signed on behalf of Anchor 2020 Ltd, we have retained the second signed copy for our records. We have included the Risk Register and added this as Appendix 42 to the list of Contract Documents as required by Midas. This has been noted as a hand amendment to the list of Contract Documents and this alteration has been signed on the relevant page on behalf of Anchor 2020 Ltd to record the alteration, we have included a second copy of this page signed on behalf of Anchor 2020 Ltd, please would you sign this on behalf of Midas and return a copy for our records.”

72. The actual package of documents was to be delivered the following day.
73. For its part, Midas had obviously been reconsidering its position and had decided that it did not now want to have what it had described as its offer (based on the last version of the RR) “out there” capable of acceptance. Accordingly it sent a letter dated 13 January which stated that the RR which it had submitted with the documents on 29 July was “now withdrawn with immediate effect and is not open for acceptance”. It then said that it would discuss the resolution of contract issues further and would be pleased to reassess the matters and quantum that should properly be included in the Risk Register to be included in the contract. However, that letter was sent by post only, on 14 January and did not arrive at Anchor until 15 January.
74. Thereafter, the position was not resolved. Anchor took the position that a binding contract had now been made, i.e. at 4.08 p.m. on 13 January when its letter of acceptance was received by email. See, for example, Mr Pullen’s letter to Mr Malins of Midas’ then solicitors. In the meantime, the Works continued as before.
75. However, when the instant proceedings were commenced on 5 December 2017, Anchor’s position had changed. It no longer alleged a contract made in January 2015 but rather one made on 21 July 2014 i.e. upon Midas’ signature on the documents. This was its position at trial. There had been various other alternative dates for the contract suggested along the way. In March 2016, Eversheds, then acting for Anchor said that the primary case was that the contract was made at the meeting on 29 July 2014. This was maintained by Anchor’s present solicitors, Clyde & Co. in August 2016 with various alternative, later dates. In May 2017, Clyde & Co. suggested that the contract had been made between 29 July and 14 November 2014.
76. I now add the following further observations. On 20 August 2014, Mr Ross had told colleagues that they were facing delays on the project because they could not get enough bricklayers and he also pointed to a “*force majeure*” clause in a different contract and how that might be employed as the basis for an extension of time on this project. Notes from an internal Midas meeting for an Action Plan dated 10 September 2014 state that on a worst-case scenario, Midas could face liquidated damages of £850,000 and further expenditure in respect of Preliminaries of £450,000 making a total of £1.3m. By 28 October, forecast losses were put at £1.36m or £1.47m.
77. In cross-examination, Mr Poulter said that he did not accept that the matters referred to above (and points on costs made in other internal documents) were based on the fact that Midas had entered into a loss-making contract and was now seeing how it could minimise those losses. Rather he said that these were things that could be done when Midas did enter

the putative contract to minimise the losses. But that makes no sense. If the putative contract was so unattractive, the obvious answer would be to walk away from it rather than conclude it. He later agreed with that proposition but said that there was an “agreement” to revalue the Risk Register made with Anchor and on that basis (if the that revaluation went Midas’ way) it would still be prepared to enter into the contract. I did not see this as much of an answer either, because it obviously assumed that Anchor would agree to increase the value of the RR. In the event, of course, as has been shown, Midas took steps to adopt the formal position that there was no contract.

78. I agree that during cross-examination of Mr Webb in particular, he did stick to what he said was his belief that the contract had been made on 21 July as if it were some kind of mantra. To that extent his evidence was not persuasive. However, ultimately, what he thought as to the existence of the contract, or not, or when it was made, is not in any way determinative. It is a matter for the court to decide objectively. For the same reason, Midas’ subjective belief (if any) that there was still no contract after it signed is of limited assistance.

### **Performance by Midas**

79. While the LOIs were operating, it is unsurprising that Midas performed as if the JCT Contract was in place. That is because the terms of the LOIs required it to do so - see above. That made sense because if the JCT Contract was later made, it would be backdated to the commencement of the Works and so its provisions would be deemed to have been in place all along.
80. After 30 June 2014, however, there was no longer any LOI. Nonetheless, Midas continued to act as if the JCT Contract governed in the sense that it continued to make payment applications, seek Change Orders, make applications for Extensions of Time etc, as if it did.
81. I do not think that much attention can be paid to the position after Bond Dickinson’s letter of 14 November however, because on any view, by then, Midas was clearly asserting that there was no current concluded contract.
82. I deal with the significance or otherwise of this, below.

### **ISSUE ONE - WAS A CONTRACT MADE ON 21 JULY?**

#### **THE LAW ON CONTRACT FORMATION**

83. The leading case is now *RTS v Molkerei* [2010] UKSC 14. Here, the parties intended to contract on the basis of standard terms which included a clause stating that the contract would not be binding unless signed by both parties. When the contract was ready for execution neither party in fact signed it but proceeded with the works. The Claimant contractor received 70% of the contract price in the form of stage payments but no more, after a dispute arose. It claimed the balance on the basis that the contract had been made, alternatively by way of a Quantum Meruit. The Defendant employer counterclaimed on the basis that there was a contract but not one which contained all the standard terms (which included a liability limitation clause) but a much simpler one.
84. Lord Clarke gave the judgment of the court and said this:

“45. The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.

46. The problems that have arisen in this case are not uncommon, and fall under two heads. Both heads arise out of the parties agreeing that the work should proceed before the formal written contract was executed in accordance with the parties' common understanding. The first concerns the effect of the parties' understanding (here reflected in clause 48 of the draft written contract) that the contract would "not become effective until each party has executed a counterpart and exchanged it with the other"—which never occurred. Is that fatal to a conclusion that the work done was covered by a contract? The second frequently arises in such circumstances and is this. Leaving aside the implications of the parties' failure to execute and exchange any agreement in written form, were the parties agreed upon all the terms which they objectively regarded or the law required as essential for the formation of legally binding relations? Here, in particular, this relates to the terms on which the work was being carried out. What, if any, price or remuneration was agreed and what were the rights and obligations of the contractor or supplier?

47. We agree... that, in a case where a contract is being negotiated subject to contract and work begins before the formal contract is executed, it cannot be said that there will always or even usually be a contract on the terms that were agreed subject to contract. That would be too simplistic and dogmatic an approach. The court should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances...

48. These principles apply to all contracts, including both sales contracts and construction contracts, and are clearly stated in *Pagnan SpA v Peed Products Ltd* [1987] 2 Lloyd's Rep 601, both by Bingham J at first instance and by the Court of Appeal. In the *Pagnan* case it was held that, although certain terms of economic significance to the parties were not agreed, neither party intended agreement of those terms to be a precondition to a concluded agreement. The parties regarded them as relatively minor details which could be sorted out without difficulty once a bargain was struck. The parties agreed to bind themselves to agreed terms, leaving certain subsidiary and legally inessential terms to be decided later.”

85. For the purpose of the issues before me, paragraph 45 is of particular importance.

86. At paragraph 49, he cited with approval the principles enunciated by Lloyd LJ in the *Pagnan* case referred to above, who said this:

“(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole . . . (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary 'subject to contract' case. (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed . . . (4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled . . . (5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty. (6) It is sometimes said that the parties must agree on the essential terms and it is only matters of detail which can be left over. This may be misleading, since the word 'essential' in that context is ambiguous... It is the parties who are... 'the masters of their contractual fate'. Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the



parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called 'heads of agreement'."

87. Lord Clarke added that such principles apply just as much to putative contracts concluded by correspondence as orally or by conduct. In *Pagnan* itself, the Court of Appeal held that there was a contract even though certain terms of economic significance were not agreed, because the party saw them as relatively minor matters which could be agreed later.
88. The decision of the Court of Appeal in *Trentham v Luxter* [1993] 1 Lloyds Rep. 25 was also considered in *RTS*. In that case, Steyn LJ referred to four matters as being of importance:

“( 1 English law generally adopts an objective theory of contract formation, ignoring the subjective expectations and the unexpressed mental reservations of the parties. Instead the governing criterion is the reasonable expectations of honest sensible businessmen. (2) Contracts may come into existence, not as a result of offer and acceptance, but during and as a result of performance. ( 3) The fact that the transaction is executed rather than executory can be very relevant. The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations and difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential. This may be so in both fully executed and partly executed transactions. (4) If a contract only comes into existence during and as a result of performance it will frequently be possible to hold that the contract impliedly and retrospectively covers pre-contractual performance.”

89. At paragraph 54, Lord Clarke said that he did not understand Steyn LJ to be saying that because work was performed the parties must have entered into a contract; “On the other hand, it is plainly a very relevant factor pointing in that direction. Whether the court will hold that the binding contract was made depends on all the circumstances of the case, of which that is but one.” And at paragraph 56, he said that whether parties have agreed to enter into a binding contract and waive reliance on the “subject to [written] contract” term or understanding will again depend on all the circumstances of the case although the cases show that the court will not lightly so hold.
90. In the case before it, the Supreme Court concluded that the presence of the clause requiring the signature of both parties was not an obstacle to contract formation because both parties had in effect waived it by their conduct.
91. I would only add that to see the conclusion of the contract as depending on offer and acceptance as if that entailed one single offer and one single acceptance is too simplistic. In substantial contracts such as the one in dispute here, the parties may engage in a linear process agreeing a whole host of component matters at different stages and in different ways. The question is always whether the parties have agreed all the relevant terms in the context of the particular putative contract.
92. Thus in this case, Mr McCall QC for Anchor put Anchor’s case thus (Day 1, p64):

“.. A lot of things happened in stages over many weeks. But the return of signed documents by Midas on 21 July was the last step in the process. It was its acceptance on our case of the offer that was put to it by Anchor in the documents that it signed and returned and those underlying those documents.”

## **ISSUE ONE - ANALYSIS**

### **Essential terms agreed?**

93. Putting to one side the question of whether, objectively, the contract had to be signed by both parties in order to be binding, in my judgment, the essential terms were clearly agreed by 21 July, as set out in paragraphs 27 - 38 above. I do not accept that the provision (or provision of the correct version) of the M & E Drawings, the Area Drawings or the Laundry Quotation were terms that had to be agreed by 21 July, not least because the first two items were subject to Provisional Sums anyway. Objectively speaking, in my view, these were all matters which the parties had agreed could be left over and were not “essential” in any required sense.

### *The Risk Register*

94. Midas submits that the addition of the RR as a (further) part of a Contract Document, namely Appendix 27, amounted to a counter-offer because it had not been included by Anchor. I do not accept this for the following reasons:

- (1) The 8 and 10 July emails were not clear as to importance and in my judgment appeared, objectively, simply to suggest that it would be included for the sake of completeness next to the CSA. But the CSA was only about figures. Objectively, that suggests that the RR was there simply to give a breakdown of the £155,000. So the fact that Anchor may not have seen either or both emails does not matter here;
- (2) If it was really being suggested that the RR was to impose unequivocally upon Anchor the risks connoted by items 1 to 3 in particular, when they could have been put into the Schedule of Amendments, that would have to be very clearly enunciated and it was not; the fact that the RR had consistently described items 1-3 as “excluded” does not matter if the context in which the RR was now being proffered was different;
- (3) It would be odd (notwithstanding Anchor’s later purported acceptance of a contract including the RR) to use an RR to allocate without more, risks which at one stage were said to carry a £5m price tag if Midas was to bear them. That is so especially where in relation to some of the matters, the contract had already provided for extensions of time in connection with them;
- (4) Furthermore, TQ13 (see paragraph 20 above) formed part of the Contract Documents so the fact that it was not in respect of Midas’ final tender does not matter. The fact that subsequently, when Mr Webb raised the question of the inclusion of the RR, it turned into a significant dispute between the parties does not mean that its inclusion by Midas within the 29 July documents should be regarded objectively as a counter-offer (or “offer” as Bond Dickinson later characterised it); nor can the letter of 10 July be characterised as such.

95. It was suggested that if there was a conflict or discrepancy between the terms of the RR and the Schedule of Amendments (or TQ13), this meant that this problem would have to be resolved by an Employer’s Instruction - see, for example, conditions 2.11-2.14 of the JCT contract. I do not accept that; I think it much more realistic to say here that there is no such conflict or discrepancy because the terms of the Schedule of Amendments and TQ13 are simply unaffected by the RR in the light of how it was, objectively, to be seen when added to the hardcopies - see paragraphs 22-25 above. Nor do I accept that if the RR was a Contract Document the “excluded” items would be dealt with by a Change Order. On

Midas' case, those items were simply not within the scope of the Works to be executed by Midas. On its case, if Anchor wanted to do anything about it, it would have to vary the contract. But in my judgment, that only serves to show that the RR would be a very odd way in which to define what the Works actually were (as opposed to an amendment to the Contract Particulars or a further item in the Schedule of Amendments).

96. I agree that Condition 4.23 in relation to loss and expense claims states that Conditions 4.20-4.22 are without prejudice to any other right or remedy, which Midas would have, but that does not objectively mean that the RR should be seen as an additional route to compensation. All it means is that the particular remedies provided for in these clauses were in addition to other remedies, for example for damages for breach of contract
97. Finally, the fact that the parties were later arguing about the inclusion or otherwise of the RR as a Contract Document (for example at the meeting on 28 October 2014) does not mean necessarily that there was still no binding contract. It is at least just as consistent with the notion that there was already a contract in existence but Midas now wished to vary it and Anchor was prepared, commercially, to see whether that might be done. The same applies to Anchor as being prepared at the end of 2014 to review the RR document.
98. Even if Midas subjectively wanted the RR in, on 29 July because it wanted to protect its costs position against items 1-3, that does not matter, especially given the limited scope of the 8 and 10 July emails, referred to above.

#### *The Novation Agreements*

99. For the reasons given above, the terms of these were agreed as between Anchor and Midas. That is all that matters for present purposes. It is true that in fact Urban Edge at least had not approved the novation agreement as sent to Midas for signing because there was an incorrect date reference for the IRS. However, there is no claim made by Midas against Anchor for misrepresentation or anything of that kind in relation to the fact that Anchor told Midas that Urban Edge had agreed it.
100. Nor does the fact of Urban Edge's then non-approval of the novation agreement mean that there was some kind of counter-offer constituted by that non-approval.
101. However, Midas also has a different point based on Article 10 of the JCT terms as amended. This provided as follows:

#### *“Article 10: Novating Consultants*

Prior to the formation of this Contract, ECV ..engaged the services of the Novating Consultants. Upon the (execution) of this Contract, ECV, the Contractor and each of the Novating Consultants shall enter into a novation agreement duly executed as a deed in the form annexed at Schedule A, in order to substitute the Contractor as employer of each of the Novating Consultants in place of ECV. The Contractor warrants to the Employer that, without limiting clause 3.3, it accepts entire responsibility for the work and designs of the Novating Consultants and for any negligence, omission or default on the part of the Novating Consultants whether prior or subsequent to the date of this Contract, as if such work, designs, negligence, omission or default were his own. The Contractor will not vary nor waive any of the obligations of the Novating Consultants under the terms and conditions upon which they are so engaged nor terminate any of their appointments without the prior written consent of the Employer.”

102. It was submitted that this provision meant that there had to be an executed novation agreement in place before the (main) contract became effective. That is clearly wrong because Article 10 does not say that. It nowhere suggests that execution of the novation by all parties is a condition precedent to the contract coming into force. (An argument that the JCT contract contained an implied term to this effect which would have been the subject of Issue 3, was abandoned by Midas).
103. Rather, what Article 10 provides is that “upon execution of this Contract” the parties and the consultants “shall” enter into the novation agreement. That could, in theory, be done contemporaneously with the JCT contract or subsequently. Since the Novated Consultants were not party to the main contract, this provision carried with it a certain degree of risk for both Anchor and Midas if the consultants did not sign at the time and later chose not to play ball; but that risk would be eliminated if they had already agreed to the novation terms in principle. But none of that is the same as some sort of condition precedent to the binding existence of the contract itself. Accordingly, there is nothing in this point.
104. It is true that Article 10 does refer to the “execution” of the Contract but (unless I were to find that by reason of this the contract was intended not to be binding at all until and unless both parties signed it, dealt with below) this does not matter. All it would mean is that if the contract was otherwise binding from 21 July, one would have to interpret the obligation to procure the completed novation agreements as being triggered by the conclusion of the main contract as opposed to its execution in the sense of having both parties sign it.

#### *The Performance Bond*

105. It is convenient to deal with this issue here. Article 11 provides as follows:

“Article 11: Security

Upon execution of this Contract, the Contractor shall immediately deliver to the Employer duly executed:

1. a bond in the amount of 10% of the Contract Sum and in the form annexed at Schedule B the surety being [Name] or such other surety as the Employer may in its absolute discretion approve; and

Notwithstanding any other provisions of this Contract no payments shall become due to the Contractor under this Contract while the Contractor remains in default of this Article 11....”

106. No performance bond was ever produced, notwithstanding the fact that by Article 11, its provision was a condition precedent to payment.
107. The evidence is that Midas thought it was obliged to procure the Performance Bond (see above) and took steps to do so. In the end however it did not provide it, no doubt because of the dispute which had arisen by 14 November. For its part, while Anchor sought the performance bond initially, it never sought to suspend payment to Midas on account of its absence.
108. In my judgment, looking at what was going on, it does not seem to me that this was an objective sign that there was not yet any binding contract in force; rather, Anchor chose not to enforce this provision in this particular respect.

*Conclusion on agreement of essential terms*

109. It follows from what I have said that I find that there was, by 21 July, agreement between the parties on all those matters which they, or the law, regarded as essential.

**Intention to create legal relations**

*Generally*

110. Midas does not contend that this is a “subject to contract” case as such. However it comes close to doing so in the sense that it does contend that both parties proceeded on the basis that there would be no contract at all unless both parties signed. In that sense it is being said that this was a case of “subject to signed contract”.
111. I agree, first, that the relevant contractual documents have spaces for execution by signature on the part of each party, and it is certainly correct that Anchor required Midas to sign it. And the Anchor Strategy Team meeting on 28 July noted that the documents would go to Anchor for signature.
112. However, as *RTS* (for example) shows, it is possible for parties to contract on the basis of a written agreement intended to be executed by both and even where it expressly states that it is ineffective without it. The question is what happened here.
113. A powerful reason why, objectively, Midas would have accepted that it was entering into a binding contract once it had signed is because the history of this matter shows that it always insisted on a contract being in place. At the time, albeit that it was seeking Anchor’s signature, it clearly thought it had entered such a contract. If it thought that it (and Anchor) were still not bound after 21 July I cannot see that it would have continued to perform the works, at least not after giving a few days grace. Midas did of course continue to perform the contract. In a case like this, with works of considerable substance requiring detailed documents, I consider that the fact of performance is of considerable weight.
114. I accept that from time to time, Midas was seeking a signature from Anchor and likewise, internally, Anchor was proceeding on that basis until things started to go wrong at the end of August. At that point, Anchor certainly did not want to sign the contract. Had it done so, it would have been incontrovertibly bound. But by this stage, the RR issue had arisen and from that point onwards, Anchor was effectively hedging its bets. Later on, of course, it took the position that it could and would sign and accept Midas’ “offer”. But that does not mean that the parties had objectively only intended to create legal relations if they had both signed, back in July. Even if both parties originally contemplated that each would sign (as I think they did) that does not of itself mean that when Anchor had not done so, there was no binding contract.
115. That, in my judgment, is the way to approach the email from Mr Webb to Mr Schofield of 31 August cited at paragraph 56 above.
116. I agree that there was something of a contractual hiatus between 30 June when LOI 5 expired, and 21 July when Midas signed the contract during which Midas kept on working. But there is a difference between continuing to perform for a short period pending (at least

Midas') signature on the contract and doing so on a much longer term basis. I refer back to Midas' letter to Anchor of 3 July in this regard (see paragraph 30 above).

117. While Mr Ross said in evidence that there was a "need" to have the contract concluded he said that this was not an "urgent" need. That distinction is in my view belied by the terms of the letter of 3 July. There is no rational basis for supposing that Midas' position as set out in that letter was then radically changed so that it was now content to be without the security of a contract. So for Mr Ross to say, as he did in evidence, that "we were all working on the basis that we were going to get ourselves into a contract in the near future" simply does not tally with its previous commercial approach. Indeed it does not tally with Midas' various statements that the contract was now in place or had been secured - see paragraphs 51 - 54 above.
118. The emergence of the RR issue clearly had the effect of causing both parties to take different positions on the question of the contract formation and one can see why it was in their respective commercial interests to do so. See, for example, Anchor's purported acceptance of Midas' "offer" in January 2015. But that is a very poor guide as to what objectively was the position as at July 2014.
119. Further, and as already noted in paragraphs 79-80 above, Midas continued to perform the Works in accordance with the JCT terms right through until completion in December 2015. Certainly for the period between 21 July and 14 November 2014 (see paragraph 81 above) that is here strong support for the prior existence of the contract, as *RTS* contemplated it might be.
120. The matter can be tested in this way: suppose that there was no RR issue raised in August 2014 but only much later in 2015, and yet Anchor never signed. I think it would be very hard if not impossible to argue that nonetheless, the parties had not (yet) intended to enter into legal relations.
121. Insofar as the matters raised in relation to Article 10 and Article 11 (see paragraphs 96-103 above) are invoked on this separate question of the intention to create legal relations, they do not support the proposition that both parties objectively required the contract signed by both before it was binding.
122. Midas also relies on the non-performance of certain other obligations within JCT Contract as evidencing that it was not yet in place. First, there is clause 2.7.2 which obliges Anchor as Employer to send a certified schedule of Contract Documents back to Midas. This was not done. However, it does not mean that because of this omission and by reason of clause 2.7.2, no contract could have yet arisen. Rather, and if one reads the word "execution" here as meaning the "conclusion" of the contract (as I suggested should be done in relation to Article 10) at most it would mean that Anchor was in breach of a contractual obligation. That is very different from saying that there is no contract at all.
123. Clause 7.4 was also relied upon. This provides that:

"Where this Contract is executed as a deed, any collateral warranty to be entered into or procured pursuant to this section 7 shall be executed as a deed. Where this Contract is executed under hand, any such warranty may be executed under hand."

124. I do not see how this assists, since it only requires collateral warranties to be in the same form as the JCT contract. I agree that this clause at least contemplates that the contract will be executed by signature but for the reasons already given, this does not mean that it is not possible to have a binding contract without both parties signing.
125. It is right that Midas suggested at one point that there should be a “page turning exercise” between the parties to agree every single page of every document in or appended to the contract, prior to signature. But the matter did not proceed in this way and Midas was content to sign in any event. If it had real doubts about whether the parties were in agreement or the documents were in order, it surely would not have signed. Further, in cross-examination, Mr Ross accepted that if Anchor had come back and countersigned immediately, he would have accepted there and then that there was a contract i.e. any question arising out of any checking would be sorted out later.

*Mr Webb’s authority*

126. A further point taken by Midas is that in the ITT (Section 1, page 8) it stated that “Any contract award will be conditional on the Contract being approved in accordance with Anchor 2020 Limited internal procedures and Anchor 2020 Ltd being generally able to proceed”. If that was suggesting that Anchor’s internal procedures would require the contract to be signed by it, then obviously that did not happen. But again, the fact that this was contemplated does not exclude the conclusion of a contract in the anticipated form but not being signed by both parties.
127. When being asked about his email of 31 August 2014 (see paragraph 56 above) Mr Webb said that he did not believe that his role was to tell Anchor when to execute the contract as a deed. But he accepted that he could advise Anchor when it might or should decide to sign, and he had advised in the email. I have already said that the reluctance of Anchor to sign at that particular stage does not necessarily mean that the contract had not already been concluded as a matter of law. See paragraphs 114-115 above.
128. However a further aspect of this, according to Midas, was that it showed that Mr Webb did not have the authority to make any offer to Midas capable of acceptance by it on 21 July. Paragraph 103 of Midas’ Defence and Counterclaim did not admit that Mr Webb or Mace had actual or apparent, ostensible, or any authority to enter into a contract with Midas at any material time. This was responding to in paragraph 53 of Anchor’s Reply and Defence to Counterclaim which stated that “insofar as was necessary the Contract was approved pursuant to its internal procedures and that Mr Webb of Mace was duly authorised by Anchor.” It does not follow from the fact that, according to Mr Webb he could advise or not advise Anchor to sign the Contract, he had no relevant authority and Anchor’s statement of case (signed by Mr Pullen) stated that he did. If Midas really wished to challenge the whole question of the authority of Mr Webb in proffering the various documents for signature by Midas those matters should have been put to him directly in cross-examination (and indeed to Mr Barnes of ECV) and they were not. Midas also relies upon an answer given by Mr Webb in cross-examination on an entirely different matter which was the question of the existence or otherwise of third-party agreements. When asked whether he would have amended the document to refer to third-party agreements he said that he did not make this amendment and would not have had “ownership of this particular document.” But I fail to see how this bears upon the general question of his authority.

129. Moreover, had the question of authority been properly ventilated it seems to me to be plain (quite apart from the Reply and Defence to Counterclaim) that Mr Webb must have had authority to do what he did in terms of all the agreements he made with Midas along the way until 21 July, when it was then for Midas to sign. If he had no such authority it means that, for example and assuming no issue over the RR arose, and Anchor never signed, it could have turned around to Midas 3 or 6 months later and said that there was no contract because Mr Webb never had authority to agree it with Midas. I have no doubt that this would have been met (rightly) with incredulity by Midas. Alternatively, but with the same result, the parties' performance of the Contract after 21 July, in my judgment, would not necessarily have entailed that Anchor had ratified it. In the event, that is academic because in my view the point was not properly raised by Midas in this trial anyway.

#### *Conclusion on Intention to Create Legal Relations*

130. For all the reasons given above, I reject the contention that the parties intended to be legally bound only when both signed the contract. I find that they intended to be so bound as at 21 July 2014 when Midas signed.

#### **Conclusion on Issue 1 as a whole**

131. It follows (and I find) that the parties did enter into a contract on 21 July 2014.

#### **ISSUE 2**

132. As refined, this deals with the following questions:

- (1) Did the contract include the RR?
- (2) Are there (still) discrepancies as to the identity of the documents comprising the Appendices which are material in some way?

#### **The RR**

133. For all the reasons set out in paragraphs 17-26, 55-73 and 94-98 above, the contract did not include the RR. Midas made some other points about the RR in the context of Issue 7 and I deal with those below.

#### **Discrepancies in documents**

134. Any points in relation to the M & E Drawings, the Area Schedules and Laundry Quotation have been dealt with above. If there was a contract, the initial issues over these documents do not give rise to any point under Issue 2 because the parties have agreed the position on the relevant documents.
135. However, Midas has made a general point that there are discrepancies between:
- (1) The documents said to form the Appendices as contained in Files G (G1 G2 etc) as prepared for this trial ("the G Files"); and
  - (2) The documents attached to Anchor's purported acceptance of Midas' purported offer in January 2015 ("the 2015 Documents"); and
  - (3) The documents identified by Anchor in its Further Information dated 26 January 2018 said to constitute the hardcopy documents handed over by Midas to Anchor on 29 July 2019 ("the RFI Documents").



136. This point was raised principally very late, namely in a letter from Midas' solicitors dated 10 January 2019 i.e. shortly before the trial. This led to Mr Webb's second witness statement.
137. Any point about a discrepancy between the G Files and the 2015 Documents can be disposed of immediately. The latter documents are irrelevant because the only contract in issue is that made on 21 July 2014. In any event, Mr Webb provided a sufficient explanation of the alleged discrepancies in his second witness statement dated 14<sup>th</sup> January 2019 and in exhibit "JRW 2".
138. As for the G files, Midas contends that they cannot be an accurate representation of what was handed over on 29 July 2014. I list its points below with my comments:
- (1) The G files omit the Section 4 tender form which everyone agrees was sent on 29 July; that is a non-point because if that is what everyone agrees then there is no dispute that it was included in the contract;
  - (2) The G files omit the RR; that is correct because it did not form part of the contract although it is not in dispute that Midas attached a copy to Appendix 32;
  - (3) The G files include the mid-April M & E drawings; this is irrelevant because there was no real issue on those drawings-see above;
  - (4) Urban Edge did not agree the whole wording of the novation agreement which Anchor sent to Midas and which Midas sent back signed; I agree, but this is a non-point for the reasons given above;
  - (5) The G files omit the fly sheets signed by Midas which accompanied the hardcopy documents; but even if this is correct this point goes nowhere since it is common ground that they did sign such fly sheets;

Accordingly, these points are immaterial for present purposes.

139. There was a further point made by Midas which is really to the effect that the G Files seem to have added documents not referred to in the RFI. Mr Webb in his second witness statement set out in Exhibit "JRW1" a list of the relevant documents. To the extent that the list in the RFI was incomplete (and there is a very large number of documents in the Appendices) I do not accept that this means there was general confusion or that there is any real doubt as to what documents the parties had agreed as at 21 July. Save for the RR the parties are in fact in agreement as to what documents the Appendices consists of or (in a very few cases) what they should have consisted of because already agreed. The proof of the pudding is in the eating - it is not suggested that as the Works progressed to completion, there was any difficulty caused by some confusion as to what documents Midas was meant to have been working to, leaving aside the M & E Drawings etc. In reality therefore, there is no uncertainty as to what the parties agreed.

## **ISSUE 6**

140. It follows from my findings in respect of Issue 1, that Midas' entitlement to payment in respect of the Works is to be valued in accordance with the contract which I have found to exist under Issues 1 and 2 above.

## **ISSUE 7**

141. I have already found that the RR was not part of the contract made on 21 July. On that basis, Issue 7 does not arise unless it can be said that the RR somehow became part of it subsequently.

142. There are hints of this in paragraphs 152-163 of Midas' Opening and in paragraphs 48-55 of its Closing Submissions. However, the fact that the parties later discussed the RR once the issue had arisen and that Anchor was prepared to review it (whether the subject of an agreement - which I did not find - or not) has no contractual significance. Nor does the fact that the RR refers to "excluded" items since it was not incorporated into the contract anyway.
143. It is true that within Payment Certification Number 18 dated 2 March 2015, Mr Webb allowed Midas' claim for £57,334.05 in respect of gas membrane/N HBC-related works. Mr Webb agreed that he did so, but said that this was an interim account made on this basis, as the document confirms:
- "Not Instructed, however 'You are instructed to carry out the following without prejudice to either parties' position to any question there might be as to whether this Instruction constitutes a change to Employers Requirements.' "
144. So although this work was part of an "excluded item", payment for it in that way did not mean that the RR was incorporated in the contract or that Anchor had accepted in some way that it was binding upon it. And in any event, by then, Midas had withdrawn the RR. There is nothing in this point.
145. In so far as Midas submits that the fact that there was an issue and discussion over RR shows that there never was a contract, I reject that for all the reasons given under Issue 1.

## **ISSUE 8**

### **Introduction**

146. This issue does not arise since I have found that there was the alleged contract. Nevertheless, in deference to the arguments made under it, I make some observations about it below. However, not only are these observations strictly unnecessary, there is a degree of artificiality to them because any assessment of the relevant Quantum Meruit principles of assessment would have to be made in the context of the basis on which it was found that the parties had not made the putative contract. In this case Midas has put forward a variety of reasons about why there was no contract. One concerned the alleged lack of agreement over essential terms and another concerned an alleged lack of intention to create legal relations. And there is likely to have been factual findings on this hypothesis which I would not have made.
147. However, subject to those important caveats, my observations are set out below.
148. Anchor contends that if there was no binding contract then nevertheless the work undertaken since 30 June 2014 should be valued by reference to its putative terms. As against that, Midas contends that the work should be valued by reference not to the contract terms (including price) at all but by reference to its value. However, that yardstick should be applied not by some assessment of the value to Anchor but rather the cost to Midas of performing it with a profit margin on top i.e. as if there had been a "costs plus" contract.
149. Neither side really argues that Midas should not receive a "reasonable remuneration" for the work done. The only question is the basis on which it is calculated.

### **The Law**

150. Keating (10<sup>th</sup> Edition) summarises the position thus at 4-037:

*"Assessment of a reasonable sum.* The courts have laid down no rules limiting the way in which a reasonable sum is to be assessed. Different considerations can

arise depending on whether the claim is for a quantum meruit in the absence of a contract or a reasonable price payable within a contractual framework. Where a quantum meruit is recoverable for work done outside an existing contract, the work cannot generally be regarded as though it had been performed to any extent under the contract. A restitutionary award made on the basis of unjust enrichment should be calculated as the value of the benefit received by the defendant at the expense of the claimant. The enrichment should be valued at the time it was received and, where the benefit was in the form of services, the starting point was normally the objective market value of the services, tested by the price which a reasonable person in the defendant's position would have had to pay for them and taking into account conditions which increased or decreased their objective value to any reasonable person in that position. The principle of subjective revaluation whereby the amount paid to the claimant might be increased on the basis that the specific defendant had valued the services at a higher than market price was not to be recognised, save perhaps in exceptional circumstances.”

151. In *ERDC v Brunel University* [2006] EWHC 687, the parties intended to contract on the basis of the (then) JCT Standard Form of Contract with Contractors Design. ERDC, the contractor was appointed by Brunel University, the Employer, to undertake works at its Uxbridge Campus.
152. The parties agreed to defer signature of the contract until after the grant of planning permission; however, the price and CSA were agreed. Between February and September 2002 ERDC was paid under three successive letters of appointment. Like the LOIs in our case they required payment applications in accordance with the putative contract and CSA which ERDC had already agreed in December 2001. The CSA formed the basis for 8 successive payment applications made prior to December 2002. At that stage, ERDC refused to sign the contract on the basis that there had by then been significant changes on site with a financial impact. It would only agree to continue the works if it was now going to be paid on a Quantum Meruit basis. Brunel University did not agree and ERDC later left the site and made a claim. Most of the relevant work had been completed.
153. So (as with this case) while the intended putative contract was not made (on this hypothesis) there was a contract originally in place namely the letters of appointment which expired in September 2002.
154. In dealing with the question of a Quantum Meruit for the period after the expiry of the last letter of appointment, HHJ Humphrey Lloyd QC held that this should be assessed on the same basis as that done before the expiry. He said it would not be right to switch from an assessment based on ERDC's rates to one based entirely on its costs. He accepted that a price that was reasonable before expiry did not become unreasonable afterwards just because of the expiry. While noting that there were no hard and fast rules for the assessment of a Quantum Meruit he said that it could not be said in his case that there had been no contract. Rather there was a move from a contractual to a non-contractual basis.
155. That case has clear parallels with ours in that:
  - (1) The parties did not in the end execute the contract they had agreed (or almost agreed) but;
  - (2) They had been proceeding under a contract namely the letters of appointment. That is why there was “a move from a contractual to a non-contractual” basis;
  - (3) The CSA had been agreed;
  - (4) The works were performed and payments sought in the same way, after as well as before the letters had expired and in accordance with the JCT terms. In our case (and as noted in more detail in paragraph 48 of Anchor's Closing Submissions on which there is no dispute) this included the making of numerous payment

applications after applications for Extensions of Time and claims for delay, by Midas. While it is fair to say that the delay claims were made after the issue of the RR and whether a contract had arisen, the fact remains that Midas was content to deal with Anchor on the same basis as before.

156. It is true that in *ERDC*, it was the contractor, ERDC, that refused to sign whereas on this hypothesis it was Anchor that did not sign but I do not think this affects the analysis.
157. For all those reasons it seems to me that in principle the proper basis for a Quantum Meruit assessment for the Works in this case, had it arisen for consideration, should be the JCT payment terms as set out in the putative contract. It also seems to me that any financial valuation should take into account defects in the works but on the other hand should allow for any claim made by Midas based on prolongation of the works for which it was not responsible, just as Judge Lloyd did in *ERDC*.
158. Midas argued that this should not be so because there were in place “wide-ranging” agreements made on 28 October and 15/16 November to review the RR. But in my view there were no such agreements and in any event I do not see why this makes a difference. It also argued that there were differences in the versions of the Schedule of Amendments actually sent with the documents on 29 July 2014 and the correct version. However, as discussed above, any differences were immaterial.
159. I also consider that this is the just approach to take here because in truth, Midas had discovered that it was making losses on the contract indeed it may have regretted the price it agreed at the start (see, for example, the email from Mr Redding, Midas’ quantity surveyor to Mr Webb seeking to analyse “how much money Richard [Ross] gave away!” following agreement of the CSA). I do not see why it should now be for Anchor to pay for that commercial decision which would be the result if Midas was to be paid on a “costs-plus” basis.

## **CONCLUSION**

160. Following the handing-down of this judgment, I will invite Counsel to agree a draft order refusing the findings on the issues I have made above. I am most grateful to them for their extremely helpful oral and written submissions.