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**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

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**COMMERCIAL DIVISION**

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**Between:**

**NORTHERN IRELAND HOUSING EXECUTIVE**

**Plaintiff**

**and**

**COMBINED FACILITIES MANAGEMENT LIMITED**

**Defendant**

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**Mr A M Singer QC with Mr A Fletcher (instructed by A & L Goodbody Solicitors) for the Plaintiff**
**Ms Anyadike-Danes QC with Mr R McCausland (instructed by Caldwell Solicitors) for the Defendant**

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**SIR RONALD WEATHERUP**

[1] The plaintiff's claim is by way of a Review of an adjudication decision of 3 February 2020, arising out of a contract between the plaintiff housing authority as employer and the defendant as contractor, in respect of maintenance work on an area of housing. The defendant's counterclaim is by way of a review of an earlier adjudication decision of 9 October 2019 arising in respect of maintenance work in a different area of housing involving the same type of standard form contract. It is agreed by the parties that the Reviews should be undertaken by a rehearing of the issues arising in the adjudications.

[2] The standard form contract is the NEC3 Term Service Short Contract of April 2013 with additional conditions of 2016. The plaintiff invited tenders for the maintenance work on housing in six areas and the defendant was the successful tenderer in respect of two areas, known as Lot 4 and Lot 6. The scheme of the contract was based on a pre-priced Schedule of Rates to which the contractor applied a percentage adjustment. Some of the items in the Schedule of Rates included a Prime Cost sum ("PC sum") for materials. Of about 4,000 items in the Schedule of

Rates some 90 items included a PC sum for materials. When an item with a PC sum for materials was ordered by the plaintiff the agreed invoice cost of the materials would be substituted for the PC sum. The defendant's successful tenders for Lot 4 and Lot 6 involved a negative percentage adjustment of 24.44%, with later changes for inflation. The defendant was awarded the two contracts in June 2016 and signed the contracts in August 2016.

[3] The dispute between the parties concerns the calculation of the sum payable to the defendant in respect of items in the Schedule of Rates that included a PC sum. The plaintiff says that the method of calculation would be to replace the PC sum with the actual cost of materials and then apply the percentage adjustment (which I shall call "the plaintiff's method"). The defendant says that the method of calculation would be to deduct the PC sum from the rate and then apply the percentage adjustment to the balance before adding back the actual cost of the materials (which I shall call "the defendant's method"). A simplified example of this exercise illustrates the difference. Take an item in a Schedule of Rates at £1,000 with a PC sum of £200, a negative adjustment of 25% and an agreed invoice cost of the materials of £400. On the plaintiff's method the calculation of the payment due would be £1,000, less the PC sum of £200, plus the invoice cost of £400, being a balance of £1,200, to which would be applied the negative adjustment of 25% resulting in a payment of £900. On the defendant's method the calculation of the payment due would be £1,000, less the PC sum of £200, less the 25% negative adjustment, being a balance of £600, plus the invoice cost of £400 resulting in a payment of £1,000. In effect the plaintiff applies the negative percentage adjustment to the whole of the item including the cost of materials and the defendant does not apply the negative percentage adjustment to the invoice cost but rather recovers the full cost of materials.

[4] In August 2016 the different approaches to the calculation of the payment due in respect of PC sums emerged. On 2 August 2016 David Miller of Rand Associates Consultancy Services Limited, who had been engaged by the plaintiff as a Quantity Surveyor to prepare the Schedule of Rates, conducted a training session for the maintenance contractors on the operation of the contracts. Mr Miller set out the proposed method of calculation of payments due in respect of items containing a PC sum that applied the negative percentage adjustment to the whole of the item in the Schedule of Rates. The defendant's representatives and other contractors present at the training session challenged Mr Miller's approach and contended that the calculation of payments due to the contractors should accord with what I am now calling the defendant's method that included the recovery of the whole of the invoice cost of materials. The dispute over PC sums was placed on the agenda for a meeting of the Strategic Core Group, a multi-organisation group made up of representatives from the plaintiff and the contractors on 27 October 2016. Further to discussion at the meeting of 27 October 2016, Paul Isherwood, the plaintiff's Director of Asset Management, agreed to review the issue of the calculation of payments for items containing PC sums and to give a final answer by the end of the following week.

[5] That answer was contained in an email dated 1 November 2016 from Pamela Vasey of the plaintiff, to the contractors, including the defendant, which stated that "to progress matters and close this issue, I have discussed this with Paul Isherwood, and attach proposed method for you to agree." The attached proposed method reflected the defendant's method of calculation of the payment due on an item containing a PC sum, namely that the defendant would recover the full amount of the invoice cost of the materials.

[6] By email of 1 November 2016 from Joe Keenan of the defendant to the plaintiff, the defendant agreed to the plaintiff's proposal. The defendant's stated view was that "this is the correct process as to how PC Sums are to be applied per our contract" and further that the proposal was "as per the contractual requirements." The maintenance works had already commenced under the Lot 4 and the Lot 6 contracts and the defendant's method thus became the method of calculation of payments due to the defendant in respect of items containing PC sums.

[7] From 1 November 2016 the parties proceeded on the basis that payments in respect of items in the Schedule of Rates that included a PC sum were made to the defendant without applying the negative percentage adjustment to the agreed invoice cost of the materials. However, the plaintiff later concluded that the adopted method was mistaken and in January 2019, by letter to the defendant, the plaintiff stated that the method of calculation of the payments due in respect of PC sums was incorrect and that payments should be made according to the plaintiff's method and that as a result the defendant was being overpaid. The amount of the overpayment was calculated at £50,389.35 in respect of Lot 4 and on 20 August 2019 the plaintiff gave notice of intention to refer a dispute to adjudication in respect of the payments made by the plaintiff for the Lot 4 contract.

[8] On 9 October 2019 the adjudicator, Robert Shawyer, issued his decision and found that the correct method of calculation of the payment due in respect of an item in the Schedule of Rates that included a PC sum was the plaintiff's method, that the parties had made a mutual mistake in not applying the plaintiff's method and accordingly that the defendant had received an overpayment on the Lot 4 contract amounting to £50,389.35. The defendant's proceedings in counterclaim are by way of a Review of the Shawyer decision and the defendant seeks a declaration that the defendant's method applies to the calculation of payments due under the Lot 6 contract and an order for payments underpaid under the Lot 4 contract.

[9] The defendant was dissatisfied with the Shawyer decision on the Lot 4 contract and with its impact on the Lot 6 contract and on 19 December 2019 gave notice of intention to refer a dispute to adjudication in respect of the payments due under the Lot 6 contract. The defendant's approach at the adjudication was that from 1 November 2016 the calculation of payments for items in the Schedule of Rates involving PC sums constituted a "change" to the conditions of contract under Paragraph 12.3 and that the plaintiff was estopped from altering the method that

had been adopted. By a decision dated 3 February 2020 the adjudicator, Simon McKenny, found that the method for the calculation of the payment was the defendant's method, which had become the agreed method on 1 November 2016 on the resolution of a dispute between the parties as to the correct method of calculation of the payment, that there was no mutual mistake and that any change to the contract conditions made on 1 November 2016 was in accordance with clause 12.3 of the Conditions of Contract in that it was agreed, confirmed in writing and signed by the parties. The plaintiff's present proceedings are by way of Review of the McKenny decision and the plaintiff seeks a declaration that the plaintiff's method applies to the calculation of payments due and an order for repayment of overpayments under the Lot 6 contract.

**Central Overheads and Profit**

[10] First of all, it is necessary to refer to a subsidiary issue, namely the percentage addition for central overheads and profit that applies to PC sums.

[11] In the contract documents under "Part 1: Price List Offer Details" at paragraph 1.7 against the item "Prime Cost Sums" appears the "Percentage addition for Central Overheads and Profit" stated to be 8%. The effect of this percentage addition is that in the Schedule of Rates an item which includes a PC sum also includes the stated percentage addition of that sum for central overheads and profit. This percentage addition has to be taken into account when substituting the invoice cost of the materials for the PC sum in calculating the payment due to the contractor. Accordingly, the PC sum would be deducted from the rate, together with the amount of the stated percentage addition, and then the invoice cost would be added back, together with the stated percentage addition of the invoice cost.

[12] Two ripples appeared in relation to this subsidiary issue. First of all it was not always appreciated by the parties that in the make-up of an item in the Schedule of Rates where a PC sum was included, the percentage addition was not included within the stated PC sum but was included within the remainder of the rate for the item. Thus, when making a deduction of the stated PC sum from the rate it was necessary that a further amount representing the stated percentage addition should also be deducted from the rate. When adding back the actual cost of materials the percentage addition would then be added back as well.

[13] Secondly, it was only when the SMV files were produced in the course of adjudication that the parties appreciated that the Quantity Surveyor who had made up the items in the Schedule of Rates had actually included a 10% addition rather than an 8% addition where a PC sum was included in the rate. While the SMV file was not a contract document it was evidence of the method of make-up of the item in the Schedule of Rates where a PC sum was included.

[14] Accordingly, strict entitlement in relation to the percentage addition to PC sums would have involved the deduction of the PC sum stated in the rate, together

with a further 10% of the PC sum, which had been included in the make up of the rate for the item, to be replaced by the invoice cost of the materials plus an 8% addition for central overheads and profit. The early examples of calculations of payments due in respect of PC sums did not reflect the two issues outlined above. However the plaintiff's letter of January 2019 notifying the defendant that the method adopted on 1 November 2016 was a mistake, did refer to the further deduction for central overheads and profit as being 10% and the substituted addition to the invoice cost of materials being 8%.

**Negative Percentage Adjustment**

[15] At the heart of this dispute is the issue of the method of calculation of the payments due in respect of items in the Schedule of Rates containing a PC sum for materials. I leave out of account for the moment the percentage addition for central overheads and profit. Resolution of this issue will involve, first of all, the interpretation of the written contract on which the defendant submitted the tender and secondly, the nature of the agreement of 1 November 2016.

[16] The interpretation of a contract seeks to establish the objective meaning of the language of the contract. This is usually described as a unitary exercise and involves consideration of the language used, the structure of the contract, the wider context and factual background and commercial common sense. See for example Males LJ in *Teesside Gas Transportation Ltd v Cats North Sea Ltd* [2020] EWCA Civ 503 from paragraph [55].

[17] A part of the contract dealing with "Price List Offer" at "Part 1: The Price List Offer Details", provides for tendered percentage adjustments to the M3NHF Schedule of Rates version 6.3 NIHE. A table then sets out four categories of "Workstream", the applicable Schedule of Rates and the gross base adjustment to Schedule of Rates prices, where the contractor inserts a plus or minus percentage adjustment. As noted above the defendant tendered a negative percentage adjustment of 24.44% as a gross base adjustment to Schedule of Rates prices. Paragraph 1.1 of the Price List Offer Details concludes:

> "The Rates in the Schedule of Rates as adjusted by the *Tenderer's* tendered percentages as set out in the above table include for all costs of complying with the *Contractor's* obligations (once appointed) under this Contract including all preliminaries costs, Central Overheads and Profit."

[18] In "Part 2: Price List Offer Rules" paragraph 2.1 contains the heading "Expenditure on Materials against Prime Cost Sums included in Schedule of Rates items" and includes as follows:

> "2.1.3 Where a Prime Cost Sum is used for Materials, the Contractor will be paid or must allow to the Employer the difference between the amount of the Prime Cost Sum for Materials indicated in the Schedule of Rates description and the invoiced prime cost of those Materials after deduction of all trade discounts (of any amount) and any cash discounts of more than 5% (five percent (but ignoring any cash discounts of up to 5%)) and any rebates received by the Contractor, plus the percentage Rate on each item (payable in all cases) set out in Paragraph 1.7 of the Price List Offer.
>
> 2.1.4 The percentage addition indicated in Paragraph 1.7 of the Price List Offer Details are included in the value of the Schedule of Rates item to which the Prime Cost Sum relates. This percentage Rate adjustment is to be added to the prime cost of the Materials when calculating the difference between the Prime Cost Sum and the invoice value under Paragraph 2.1.3 above."

Paragraph 1.7 of the Price List Offer Details includes the percentage addition for central overheads and profit at 8% for Prime Cost Sums, as discussed in relation to the subsidiary issue above.

[19] There is nothing in the contract documents that addresses expressly the application of the percentage adjustment to the calculation of the payments due in respect of PC sums.

[20] It is the plaintiff's case that the contract conditions provide for the application of the negative percentage adjustment, as tendered by the defendant, to each item in the Schedule of Rates, including items that apply a PC sum for materials. The methodology in respect of PC sums is therefore to substitute the actual cost of the materials for the PC sum and apply the negative percentage adjustment as tendered. According to the plaintiff there is no provision in the contract for the negative percentage adjustment to be applied to only a part of the rate. Mr Millar, who prepared the Schedule of Rates used in the contracts addressed the training day and advanced a method of calculation that applied the negative percentage adjustment to the whole of the item in the Schedule of Rates.

[21] The defendant's approach is that the contract provides for the defendant to recover the invoice cost of materials included as a PC sum as appears from paragraph 2.1.3 above. Therefore, says the defendant, the negative percentage adjustment cannot apply to the actual cost of materials. To apply the negative percentage adjustment to the actual cost of materials would be to require the contractor to supply those materials at less than actual cost. The defendant's Quantity Surveyor prepared the tender based on the defendant's method. This

method was said to be in accordance with his experience of previous contracts. The defendant also relied on the wider context of construction contracts in general that used PC sums as a means of sharing the risk of price movement by permitting the contractor to recover the actual cost of the PC sum.

[22] I interpret the contract as requiring the percentage adjustment to be applied to the whole of each item included in the Schedule of Rates. In respect of those items containing a PC sum the percentage adjustment would be applied to the invoice cost that is substituted for the PC sum included in the rate. There is nothing in the contract terms that provides that the percentage adjustment is only to be applied to a part of the rate for an item. Nor does the contract provide that any part of the make-up of the rate for an item should be excluded from the percentage adjustment. The defendant objects that it is recovering less than the cost of materials where a PC sum is included in the rate but that is the result of the defendant submitting a negative adjustment tender. Where there are materials included in an item that does not include a PC sum the negative adjustment also applies to any materials component of the rate. Paragraph 2.1.3 does not relate to the application of the negative adjustment to the actual cost of the PC sum but rather provides for the substitution of the actual cost for the PC sum without addressing the impact of the negative percentage adjustment. The design of the contract is to apply the percentage adjustment that is tendered by the contractor to the Schedule of Rates and does not provide for the contractor to divide up the rate and apply different percentage adjustments to different parts.

[23] Had the defendant been aware of the plaintiff's method being the contract method or issued a notice for clarification and been informed of the application of the plaintiff's method prior to the submission of the tenders then the defendant would have adjusted the bid by altering the negative percentage adjustment to reflect the knowledge that there would be an adjustment to the actual cost of all materials. The defendant acknowledged that they had no previous experience of this type of contract being used for maintenance contracts. Previous experience of contracts that included PC sums had involved the recovery of the actual cost of materials included in a PC sum. That of course would have happened because there was no negative adjustment but that experience would not have informed the defendant that the same outcome would be achieved in the event of a negative percentage adjustment applying.

[24] I am satisfied that the application of the negative percentage adjustment to the whole of the item in the Schedule of Rates involving a PC sum is in accordance with the wording of the contract, the structure of the contract, the context and background and the commercial common sense of the arrangements.

**Mutual Mistake**

[25] It is the plaintiff's case that when the parties adopted the defendant's methodology on 1 November 2016 it was by reason of a mutual mistake as to the

interpretation of the contract conditions in relation to the application of the negative percentage adjustment to items containing PC sums. It follows from my interpretation of the contract, as outlined above, that the method adopted on 1 November 2016 was not in accordance with the original contract. As far as the defendant is concerned I am satisfied that in agreeing to the proposal on 1 November 2016 the defendant confirmed what was understood by the defendant at that time to be the contract method of calculation of payment for the PC sum. The defendant's Quantity Surveyor, Kenneth Carson, had prepared the defendant's tenders on the basis that the defendant would recover the full cost of materials for those items that contained PC sums. Joseph Keenan, the defendant's manager, in confirming agreement on 1 November 2016 stated that the method adopted was in accordance with the contractual requirements. The defendant later presented the agreement of 1 November 2016 as a change of the contractual requirements but I am satisfied that the defendant's email of 1 November 2016 makes clear that at that time the defendant mistakenly believed the agreed method to be that provided for under the contract.

[26] The plaintiff's email of 1 November 2016 is framed as being "to progress matters and close this issue" and as putting forward a "proposed method for you to agree." It is clear that since the previous August there had been a dispute between the plaintiff and the defendant and other contractors as to the method for calculating payment in respect of PC sums. The plaintiff had engaged Mr Millar who advanced the application of the negative percentage adjustment to the whole of the item in the Schedule of Rates. The plaintiff also engaged another independent Quantity Surveyor, Ferguson Bell, to advise on the issue. Mr Bell forwarded a letter dated 14 September 2016 stating his opinion that the correct method of calculation involved applying the percentage adjustment to the actual cost of materials for an item involving a PC sum. The plaintiff sought clarification of Mr Bell's advice and he replied on 23 September 2016 setting out a more detailed opinion to the same effect which referenced the relevant clauses in the contract.

[27] Ms Vasey, the author of the email of 1 November from the plaintiff, attended a meeting with Paul Isherwood at which he told her his decision on the PC sum issue. Ms Vasey made a note of what he said and composed the email to reflect that note. Mr Isherwood had two independent quantity surveyors advising that the negative percentage adjustment should be deducted from the actual cost of materials involved in PC sums, namely Mr Miller and Mr Bell. On the other hand Mr Isherwood had the contractor pressing for full recovery of the actual cost of materials in the PC sum. How did Mr Isherwood come to make a mistake, as the plaintiff contends? Mr Isherwood did not give evidence.

[28] I conclude that Mr Isherwood was fully informed on the issues about the calculation of payments due for PC sums, knew of the approach of Mr Miller, knew of the objections from the defendant and other contractors, took advice from another independent quantity surveyor, Mr Bell, who confirmed the opinion that the negative percentage adjustment should be applied to the actual cost of materials,

obtained a clarification from Mr Bell by reference to the conditions of contract and nevertheless chose to adopt the approach advanced by the defendant. I am satisfied that on 1 November 2016 the plaintiff compromised the dispute about the calculation of payments for PC sums by accepting that the negative percentage adjustment should not apply to the actual cost of materials. The plaintiff says that there was no consideration for that agreement but I am unable to accept that contention. Consideration arose from the compromise of the dispute. Accordingly, there was no mistake made by the plaintiff and therefore no mutual mistake.

[29] The plaintiff contends that a "change" to the contracts under clause 12.3 cannot be effected in relation to the method of calculation of payments due but I reject that contention. I am satisfied that the compromise represented a change to the application of the negative percentage adjustment to items containing PC sums and that the change was effected in accordance with clause 12.3 in that the it was agreed and recorded in writing and signed by the parties by the exchange of emails of 1 November 2016.

**Estoppel**

[30] If, contrary to the finding above, the agreement of 1 November 2016 had proceeded on the basis of a mutual mistake as to the application of the negative percentage adjustment to items containing PC sums, the defendant contends that the plaintiff is estopped from changing the agreement of 1 November 2016. The defendant says that it relied on the agreement of 1 November 2016 which, if that agreement were to be revoked by the plaintiff, would be to the defendant's detriment because the defendant committed resources to updating its own IT system to match the plaintiff's system in applying the agreed method (the plaintiff operated an electronic Housing Management System), made payments to its own supply chain accordingly, organised its business in accordance with the agreed method, committed resources to implementing that method across its business and entered completed Job Requests and Task Orders (forms of employer's instructions) logged under the relevant Schedule of Rates codes to be calculated in accordance with the method. The defendant did not quantify the time or expense involved. The defendant therefore relies on estoppel by convention and estoppel by representation such that it would be unjust to permit the plaintiff to rely on mutual mistake. See for example Akenhead J in *Mears Ltd v Shoreline Housing Partnership* [2015] EWHC 1396 (TCC) from paragraph [49].

[31] On the other hand the plaintiff's skeleton argument regards the circumstances as an instance of unjust enrichment of the defendant founded on a mistake. The plaintiff does not plead the case as one of unjust enrichment but rather frames the claim in terms of contract. However in a reply to notice for particulars the plaintiff stated that monies wrongly paid and received are liable to be repaid either by way of a claim for damages for breach of contract or by way of a claim in restitution for unjust enrichment. The plaintiff says that any relevant defence to unjust enrichment that could be available to the defendant has not been pleaded but could concern the

defendant's change of position, if any change could be established, such that it would be inequitable to require the repayment of some or all of the payments made. See for example Robert Walker LJ in *Derby v Scottish Equitable Plc* [2001] EWCA Civ 369.

[32] On the premise of a mutual mistake as to the application of the negative percentage adjustment to items containing PC sums, I am satisfied that estoppel by convention would apply in that the parties to the contract acted on a common assumption as to the method of calculation of the payment for the PC sums such that it would be unjust to allow the plaintiff to go back on the common assumption. Both parties clearly relied on the common assumption for a period of time and the defendant was materially influenced by the common assumption and indeed relied on that assumption to its detriment. I am satisfied that it would be unjust and unconscionable for the plaintiff to go back on the common assumption given that both parties organised their business on the basis of the common assumption and the defendant committed time and resources to updating its IT system, making payments to its own supply chain and applying the agreed method to its business operation.

[33] Again on the premise of a mutual mistake as to the application of the negative percentage adjustment to items containing PC sums, any estoppel by representation might be said to arise on the basis of the proposal in the plaintiff's email of 1 November 2016 but this is more clearly a case of common assumption by the parties.

[34] The plaintiff's approach is based on the unjust enrichment of the defendant. Estoppel came to be regarded as an inappropriate concept to deal with some circumstances, first of all because it depended upon a representation having been made and reliance on that representation with resulting detriment and secondly, because estoppel was an all or nothing defence. Hence the 'change of position' defence developed to a claim framed as unjust enrichment and this provided the option of a remedy by way of partial restitution. The elements of representation and the all or nothing defence have suffered erosion as estoppel and change of position have developed but the two defences remain distinct.

[35] In the instant case the defence is pleaded as an estoppel that arises from a common assumption based on an agreement reached in a commercial relationship concerning the course of trading between the parties, an agreement that is treated as governing the outworking of the trading arrangements. The instant case is not in the nature of a windfall payment falling to a defendant. I disregard any pleading point. Had the issue fallen for decision, I would have upheld the defence of estoppel by convention in relation to the application of the negative percentage adjustment to items containing PC sums, to reject the plaintiff's claim up to January 2019 when the plaintiff gave notice that the common assumption no longer had effect.

[36] I return to the matter of the percentage addition for central overheads and profit, stated in the contracts to be 8% whereas the make-up of the items in the Schedule of Rates containing PC sums included a 10% addition. I find that the agreement of 1 November 2016 proceeded on the basis of a mutual mistake that an item in the Schedule of Rates with a PC sum included an 8% addition whereas it was a 10% addition. This was not a mistake based on the interpretation of the contracts but rather on the make-up of the rate. While I am satisfied, as found above, that the agreement of 1 November 2016 was a compromise of a dispute, I am further satisfied that there was within that compromise a mistake made by the plaintiff as to the percentage being applied for central overheads and profit, a mistake shared by the defendant. To this mutual mistake the defendant pleads estoppel to prevent the plaintiff's recovery of the difference. I have found above that the defendant could rely on estoppel if there had been a mutual mistake in relation to the application of the negative percentage adjustment, based on the defendant's reliance and the consequent detriment to the defendant. However, I have not been satisfied that the impact of the mistake in relation to central overheads and profit was other than of very limited effect and did not carry the significant effects I have found in relation to the negative percentage adjustment. I am satisfied that, as the only mutual mistake was that related to the addition for central overheads and profit, the matters relied on by the defendant to support the defence in relation to the application of the negative percentage adjustment are not such as would warrant the operation of an estoppel in relation to central overheads and profit.

[37] I return to the decisions in the two adjudications. Mr Shawyer's adjudication dealt with issues that might be expressed as twofold namely whether the Lot 4 contract method of calculation of payments for PC sums was the plaintiff's method and whether the agreement of 1 November 2016 was based on a mutual mistake. In his decision of 9 October 2019 Mr Shawyer found on the first issue that the contract method of calculation was the plaintiff's method. Further, Mr Shawyer found that the build-up of a rate with a PC sum included 10% profit, that the SMV that demonstrated the actual content of the rate was evidence of that 10% addition and that the percentage profit added to the actual cost of the materials would be 8%, as stated in the contract. I agree with all those findings as to the calculation of the payment due to the defendant in respect of rates including a PC sum. This accords with Mr Bell's evidence for the plaintiff and the plaintiff's letter of January 2019 in relation to the application of the negative percentage adjustment to items containing PC sums, namely that it is applied to the whole of the item contained in the Schedule of Rates and further in relation to the addition for central overheads and profit, namely that the percentage addition for an item in the Schedule of Rates containing a PC sum is 10% and the percentage addition for the invoice cost of materials is 8%.

[38] On the second issue Mr Shawyer found that there was a mutual mistake by the plaintiff and the defendant on 1 November 2016 due to a misunderstanding of the methodology for calculation of payments due to the contractor in relation to items that included a PC sum. As appears above I am unable to agree with

Mr Shawyer as to the nature of the agreement reached between the plaintiff and the defendant on 1 November 2016.

[39] Mr McKenny's adjudication also dealt with issues that might be expressed as twofold namely whether there was a change to the Lot 6 contract on 1 November 2016 so as to apply the defendant's method to the calculation of the payment due in respect of rates including a PC sum and whether the plaintiff was estopped from rejecting that change in January 2019. By his decision dated 3 February 2020 Mr McKenny found on the first issue that the method of calculation of payment due to the defendant was that agreed on 1 November 2016, this being an agreement reached between the parties by way of the resolution of a dispute as to the interpretation of the method of calculation of payment due to the defendant and that the agreement did not involve a mutual mistake. The decision also records that the contract method of calculation of the payment due to the defendant was "a moot point" but to the extent that it involved a change to the conditions of contract that change complied with clause 12.3 in that it was agreed, confirmed in writing and signed by the parties. As appears above I agree with Mr McKenny, subject to my further finding above that the interpretation of the contract method of calculation of the payment due in respect of items involving PC sums corresponds with the plaintiff's method.

[40] On the second issue, Mr McKenny, having found that there was no mutual mistake, did not consider it necessary to address the issue of estoppel as it did not arise.

[41] On this Review of the adjudication decisions I am satisfied for the reasons set out above that the contract method of calculation of payments due to the defendant in the application of the negative percentage adjustment to an item containing a PC sum is that advanced by the plaintiff, namely that the negative percentage adjustment is applied to the actual cost of the materials included in a PC sum as well as applying to the remainder of the rate. Further, I am satisfied that the agreement of 1 November 2016 was a resolution of a dispute between the parties as to the application of the negative percentage adjustment to an item containing a PC sum that involved a valid change to the conditions of contract and was not an agreement made under a mutual mistake of the parties. In addition I find that there was a mutual mistake of the parties that the percentage addition for central overheads and profit in an item in the Schedule of Rates involving a PC sum was 8% whereas 10% had been included in the rate by mistake. Declarations will be made accordingly. No figures were presented in evidence and the financial consequences of this judgment are for the parties to determine.