Neutral Citation Number: [2025] EWHC 120 (Comm)

Case No: LM-2023-000117

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 23rd January 2025

Before :

Ms Lesley Anderson KC sitting as a Deputy Judge of the High Court

- -

Between:

WINCH DESIGN LIMITED

Claimant

and

CARL LE SOUEF

Defendant

and

SOMNIO SUPERYACHTS PTY LIMITED

Part 20 Defendant

- -

Adam Board (instructed by **HFW**, Friary Court, 8 Bishopgate, City of London, London EC2N 4BQ) for the **Claimant**

Karl Anderson (instructed by **Wedlake Bell LLP**, 71 Victoria Street, London EC4V 4AY) for the **Defendant**

Hearing dates: 28 and 29 October 2024

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Approved Judgment

This judgment was handed down remotely at 3pm on January 23rd 2025 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Ms Lesley Anderson KC :

Introduction

1. This is a dispute about an ambitious project (**the Project**) to build a luxury yacht, comprising several, single, luxurious, residential apartments, which is intended to be one of the largest and most luxurious yachts ever to be built (**the Yacht**).
2. The Claimant, Winch Design Limited (**Winch**), is an English company that provides design services in relation to the manufacture of, amongst other things, luxury yachts. Although he has since retired, Winch's non-executive chairman at the relevant time was Russell Clive Beharell (**Mr Beharrell**). Aino-Leena Grapin (**Ms Grapin**) has been its Chief Executive Officer since September 2016 when she took over that role from the company's co-founder Andrew Winch (**Mr Winch**).
3. The Defendant, Mr Le Souef (**Mr Le Souef**), is an entrepreneur and businessman and an Australian national. There is some disagreement over his true net worth or at least how that was projected to Winch.
4. The Part 20 Defendant, Somnio Superyachts Pty Ltd (**Somnio**), was incorporated in Australia on 17 April 2019. It was co-founded by Mr Le Souef and Capt. Erik Bredhe (**Capt. Bredhe**), a Finnish national, now living in Spain. Mr Le Souef is Somnio's sole director.
5. Mr Le Souef and Capt. Bredhe met in 2007 when Capt. Bredhe was captaining MS The World, another private residential cruise ship on which Mr Le Souef had an apartment. They discussed the possibility of them combining to engage in a project for the construction of a new highly exclusive, ultra-luxury residential yacht (destined to become the Yacht). An early promotional brochure describes this as a lifestyle project which was to be funded by a consortium of investors (invited by Mr Le Souef and who would each contribute via non-refundable deposits of $125,000 for apartments on the Yacht). Each investor would become part of a steering committee (**the Steering Committee**) in order to drive the Project forward and to influence aspects of the Yacht's design and development. According to Mr Le Souef, the total estimated cost of the project is $500 million and Somnio was incorporated to act as a special purpose vehicle (**SPV**) for the development of the Yacht. According to its accounts for the year ended 30 June 2021, Somnio had raised $760,000 for the Project's initial research and feasibility costs, which Mr Le Souef says was intended to be used mainly for the creation of marketing materials and initial design work. Somnio is the owner of the relevant intellectual property in relation to the Yacht.
6. By an email dated 1 May 2019, Mr Le Souef and Capt. Bredhe were introduced to Mr Beharrell of Winch by Mr Jon Stewart, one of Mr Le Souef's business partners, and discussions then took place, including at various meetings, and including Ms Grapin, about Winch's potential involvement in the Project. Unsurprisingly, given the nature and extent of the Project, Winch was very excited about its potential involvement, and it is common ground that it represented a significant commercial and financial opportunity for Winch.
7. It is not in dispute that Winch did some initial work on the Project in 2019 and 2020 before the formal contract was executed, including some exterior design work for the Monaco Yacht Show in 2019, and some design development work in 2020. During this period, the work appears to have been the subject of separate contractual negotiations. Some design work was undertaken by Winch in June 2019 and invoiced to Somnio on or about 20 June 2019. Some specific tasks were undertaken which were the subject of

separate "Fee Overview" letters sent to Capt. Bredhe. In addition, Winch also produced fee proposals for the main Project on 5 June 2019, 5 July 2019 and 16 October 2019 which led, during the negotiations, to an agreed reduction in the price of c.£1m on 22 July 2020.

8. Negotiations for a formal contract took place in October and early November 2020. It is common ground that the relevant contractual framework is as follows:
   8.1. A written contract was entered into dated 3 November 2020 (**the Initial Contract**) by which Winch was engaged to provide certain interior and exterior design services in relation to the construction of the Yacht;
   8.2. The Initial Contract was amended by an Addendum dated 9 April 2021 (**the Addendum**); (and save where otherwise specified together I refer to this as (**the Contract**)).
9. The claim is by Winch for unpaid invoices in relation to its work done on the Project pursuant to the Contract. It is common ground that Winch issued invoices under the Contract as follows:
   9.1. Invoice No 9422 in the amount of £200,000 on 12 April 2021 which was paid on 15 April 2021;
   9.2. Invoice No 9455 in the amount of £197,500 on 27 April 2021 which has not been paid;
   9.3. Invoice No 9485 in the amount of £197,500 on 10 May 2021 which has not been paid;
   9.4. Invoice No 9502 in the amount of £338,750 on 19 May 2021 which has not been paid;
   (the unpaid invoices (**Disputed Invoices**) together amount to £733,750).

10. However, Mr Le Souef and Somnio challenge Winch's entitlement to be paid the Disputed Invoices on various grounds, namely: (i) an issue as to the true identity of Winch's counterparty to the Contract on its proper construction and/or through rectification and/or estoppel (**the Contracting Party Issue**); (ii) the proper meaning and construction of the payment terms in the Contract and/or whether Mr Le Souef is estopped from denying that the payments are due in full (**the Payment Terms Issue**); (iii) whether Winch agreed with Mr Le Souef to forbear from demanding or suing for payment of the Disputed Invoices pending Somnio being placed in funds by third party investors (**the Forbearance Issue**); (iv) whether Winch breached the terms of the Contract by failing to provide the services covered by the Disputed Invoices and was entitled to suspend providing further performance of the Contract in light of their continuing non-payment (**the Winch Performance Issue**) and (v) if Winch had broken the terms of the Contract whether Mr Le Souef/Somnio have suffered a recoverable loss for which he/it is entitled to counterclaim for damages (**the Counterclaim Issue**).
11. Mr Le Souef and Somnio were represented at the trial before me by Karl Anderson and Winch was represented by Adam Board. I have been assisted by an Agreed List of Common Grounds and Issues and by detailed written skeleton arguments and helpful oral submissions from Counsel for both parties. I am grateful to them for the way in which they assisted me during the trial and for the assistance provided by their respective solicitors in compiling the trial bundles, including providing me with a retrospective core bundle of documents referred to during the trial.

The Contract

12. The Initial Contract comprises: (i) a document described as a Proposal (which is described in the footer as being a 21 page document) and is dated 3 November (**the**

Proposal); (ii) a signature page on page 18 of 21 (**the Signature Page**); (iii) at Annex 1 Winch's Terms of Engagement which runs to nine pages (**Terms of Engagement**) and (iv) a document headed "Scope of Supply (Owners Area) Interface Matrix at Annex II. Although the Initial Contract purported to have a further Annex V (described as a "Demarcation Plan") the actual page is blank and I am satisfied this can be disregarded. The Initial Contract was signed by Ms Grapin on behalf of Winch on 4 November 2020 and is expressed to be "*Signed by Erik Bredhe on behalf of Carl Le Souef"*.

13. So far as material to the present dispute the Initial Contract provides as follows.

13.1. Mr Le Souef is described and defined as "the Client" on the first page of the Proposal.

13.2. The "Client's Representative" is described and defined to be Erik Bredhe on the first page of the Proposal.

13.3. The Period of the Contract is described and defined on the first page of the Proposal to mean "*October 2020 to March 2024 (approximately 42 months, subject to any extension)*".

13.4. The first page of the Proposal states: "*This Proposal, together with the annexed Terms of Engagement, sets out the terms on which [Winch] are to be engaged by the Client to provide interior and exterior, decorative design and other associated services for the luxury areas of a turnkey motor yacht project to be constructed at the Vard shipyard, in Aalesund, Norway (the "Shipyard" or "Contractor")*".

13.5. Page 2 of 21 to page 12 of 21 of the Proposal set out a detailed scope of works for the Project to be carried out in six stages: Stage One – Concept Design (which is then sub-divided into Stage One Part One - Interior & Exterior Preliminary Concept Design and Stage One Part Two – Interior & Exterior Final Concept Design); Stage Two – Exterior Detail Design; Stage Three - Interior Detail Design; Stage Four – Interior Decorative Design; Stage Five – Design Management and Stage Six – Procurement.

13.6. At page 13 of 21 of the Proposal under the sub-heading "The Winch Charges" and at page 15 of 21 there is a payment schedule based on the start date of October 2020. The total contract price is £5,285,000 (**Total Winch Charges**) divided to reflect the stages of work as follows: Stage One Part One - £595,000; Stage One Part Two - £265,000; Stage Two - £1,650,000; Stage Three and Four - £1,495,000 and Stage Five – Estimated Interior Design Management £704,000 and Estimated Exterior Design Management £576,000. The cost of the work in Stage 6 – Procurement is "£TBC".

13.7. At page 14 of 21 of the Proposal under the sub-heading "Timetable" there is a timetable for the work based on a start date of October 2020.

13.8. "The Client" is described and defined in the Terms of Engagement at clause 1.1 to mean "*the person named as Client in the Proposal*".

13.9. "Client Representative" is described and defined in the Terms of Engagement at clause 1.1 to mean "*the natural person named as Client Representative in the Proposal or otherwise notified in writing to Winch from time to time during the Period and who binds Client"*.

13.10. "Contract" is described and defined in the Terms of Engagement at clause 1.1 to mean "*the Proposal, these Terms and any other Annex to the Proposal*".

13.11. Clause 5.1 of the Terms of Engagement provides that: "*Winch will have no obligation to provide any of the Services until it has received payment of the first instalment of the Total Winch Charges in accordance with the Proposal"*.

13.12. Clause 5.2 of the Terms of Engagement provides that: "*Winch will issue invoices for subsequent instalments of the Total Winch Charges as such instalments fall due in accordance with the Timetable"*.

13.13. Clause 5.6 of the Terms of Engagement provides that: "*In respect of Fees, payment is due within thirty (30) days of the date of Winch's invoice".*

13.14. Clause 11.1 of the Terms of Engagement provides that: "*The Contract may be terminated forthwith by either Party by written notice to the other Party if …. (viii) the other Party commits a material breach of the Contract which, if remediable, is not remedied within thirty (30) days of such Party receiving written notification of such breach, requiring its remedy"*.

13.15. Clause 12.1 of the Terms of Engagement provides that: "*If Client fails to make punctual payment to Winch of any payments referred to in the Contract and such failure is not remedied within fifteen (15) days of written notice by Winch to Client, Winch may (i) suspend the provision of the Services until such time as payment has been made and (ii) adjust the Timetable accordingly"*.

13.16. Clause 12.2 of the Terms of Engagement provides that: "*Subject to payment in full of all Fees then due and all Expenses then incurred, Client will have the right from time to time to suspend the Project (any suspension under Term 12.1 or this Term 12.2, a "Suspension") by giving notice in writing to Winch, whereupon Winch will suspend provision of the Services. In the event that the total periods of Suspension exceed six (6) months in aggregate, Winch may terminate the Contract forthwith upon written notice to Client, whereupon the provisions of Term 11.4 will apply"*.

13.17. Under the sub-heading "*Terms of Engagement"* on the Signature Page, it is provided that: "*The Terms of Engagement of Winch (a copy of which is at Annex I to this Proposal shall apply to all Services to be performed by Winch for the Client"*.

13.18. Above the block for signing on the Signature Page, it is provided that: "*The Client accepts the terms of the Proposal set out above and acknowledges a copy of the Terms of Engagement of Winch"*.

13.19. As I have indicated on the Signature Page the Contract is expressed to be "*Signed by Erik Bredhe on behalf of Carl Le Souef*".

14. So far as the Addendum is concerned, the principal purpose of this was to vary the payment schedule at pages 15 to 17 of 21 in the Original Contract. The Original Contract had provided for the first invoice (for £300,000 in relation to the work in Stage One Part One) to be issued one month after acceptance of the Proposal; for the second invoice (for £295,000 in relation to further work in Stage One Part One) to be issued two months after acceptance and for the third invoice (for £265,000 in relation to the work in Stage One Part Two) to be issued three months after acceptance. The effect of the Addendum was to vary this payment schedule such that Winch was to issue its invoices on the following dates: the first invoice (for the varied sum of £200,000) was to be issued by 15 April 2021; the second invoice (for the varied sum of £197,500) was to be issued by 30 April 2021; the third invoice (for the varied sum of £197,500) was to be issued by 15 May 2021 and the fourth invoice (for the varied sum of £338,750) was to be issued by 15 June 2021.

15. So far as the material provisions of the Addendum is concerned:

15.1. It is described as being: "*This Addendum to the Contract originally dated 3rd November 2020 (Project Period from October 2020 to March 2024) between Carl Le Souef and Winch Design Limited in respect of Project 1399 Somnio is made on …. April 2021"*.

15.2. At clause 1 it provides that: "*Expressions used in this Addendum with initial capitals will have the meaning given to them in the Contract"*.

15.3. At clause 2 it provides that the Period is amended from October 2020 to March 2024 (approx. 42 months) to 1 October 2020 to 24 May 2024 (approx. 44 months).

15.4. At clause 3 it provides that: "*The Timetable set out in the Proposal (for the completion of each Stage) and the Payment Schedule set out in the Proposal (for the payment of the Total Winch Charges) will be deleted and replaced with the updated Timetable and Payment Schedule which is annexed to this Addendum"*.

15.5. At clause 4 it provides that: "*Save as amended by this Addendum, the Contract remains in full force and effect in accordance with its terms".*

15.6. At clause 5 it provides that: "*Winch and the Client have caused this Addendum to be executed as of the date set out above by their authorised representatives"*.

16. The Addendum was signed by Ms Grapin on behalf of Winch. Although there is no version signed on behalf of Mr Le Souef/Somnio it is not disputed by them that the Addendum is binding on them and had the effect of varying the Original Contract.

Performance of the Contract

17. It seems to me that the matters I deal with in this section are largely not seriously disputed, especially since they derive mainly from the contemporaneous documents. However, if I am wrong about that, then to the extent they are disputed, these form part of my findings of fact.

18. On 9 November 2020, Ms Grapin for Winch sent Capt. Bredhe two invoices - invoice 9231 (for £300,000 for work done in respect of Stage One Part One) and invoice 8928 (which was for some early basic design work). By his email dated 17 November 2020 Capt. Bredhe said that from their standpoint (which I infer to include Somnio and Mr Le Souef), until the shipbuilding contract was signed, Winch should only charge for work it had done rather being paid in advance. It is Winch's case that this did not represent the true contractual position, but I will return to that point when I consider that issue.

19. However, by 16 December 2020, it seems that position had changed because in an internal email from Ms Grapin to Mr Winch, she shares what she regarded as the good news that Capt. Bredhe had promised her that funds for both invoices were being paid the following day and would be paid to Winch well ahead of a presentation scheduled for the following Monday. She notes that Capt. Bredhe had apologised for the delay stating that the payment "*got stuck with Carl's approval"*. In fact, no payment was made.

20. By December 2020, as evidenced by Capt. Bredhe's email dated 21 December 2020 and Ms Grapin's email to Capt. Bredhe the following day, a dispute had arisen about the payment of the two invoices. Even then it appears that Winch had done nothing to enforce payment of them and Ms Grapin was expressing broadly sympathy for his need to reassure the members of the Steering Committee.

21. On 10 February 2021, Mr Le Souef sent a detailed email to Mr Beharrell in which he noted, amongst other things, that they expected to execute the shipbuilding contract within the next two weeks. After setting out that: "*The issues to date have revolved around what is being charged, which is per the agreement, against what has been delivered and this is either seemingly somewhat vague or not agreed on by each operating side"* he goes on to say "*I suggested we reconsider the structure [of] the agreement and what is payable when and on what basis"*.

22. On 22 February 2021 there was a discussion between Mr Beharrell and Mr Le Souef which led to an acknowledgment (in Mr Beharrell's email sent later that day) that the

Contract had not taken sufficient account of possible delays in appointing the shipyard and the knock-on effect on Winch's deliverables and payment. In my view, Mr Board is correct to say that this was despite considerable misgivings within Winch.

23. However, the parties sensibly agreed to compromise their respective positions, and it was in this context that the Addendum, after some further negotiations in March and April 2021, was finally agreed and sent to Mr Le Souef on 10 April 2021.
24. One matter is explicitly in issue between the parties as to the reason for execution of the Addendum. In Le Souef One at paragraphs 2.10 to 2.11 and in Capt. Bredhe's evidence at paragraph 4.23 both suggest that the reason for the Addendum was Winch's poor performance. It seems to me that is not a fair reading of the position. Rather it seems clear to me that the real reason was delays on the part of Somnio in relation to the contract with the shipyard. I note for example that in his email dated 21 December 2020, Capt. Bredhe explicitly referred to the fact that the Steering Committee's requirement for tight management of cash was linked to certain milestones, the prime one being finalisation of the builder.
25. On 12 April 2021 Winch issued invoice number 9422 for £200,000 in accordance with the revised payment schedule in the Addendum. As with the earlier invoices which had been raised in relation to the early design work, this invoice was addressed to Somnio not Mr Le Souef. As already noted, this invoice was paid on 15 April 2021.
26. On 27 April 2021, 10 May 2021 and 19 May 2021 Winch issued three further invoices in accordance with the revised payment schedule in the Addendum. Again, as previously set out, these Disputed Invoices have not been paid.
27. In an email sent to Mr Beharrell on 15 June 2021, Mr Le Souef wrote about the efforts he was making to manage payments and reassured him that it was not an ongoing problem and one that was being managed for him by his team owing to his continued absence on ill health grounds.
28. Although Winch had continued to work on the Project, despite the Disputed Invoices not having been paid, by 30 June 2021 Winch acting by Mr Jim Dixon (**Mr Dixon**) was writing to Capt. Bredhe to the effect that Winch was no longer able to commit the relevant resources to the Project because the Disputed Invoices had not been paid.
29. On 16 August 2021, Mr Beharrell wrote to Mr Le Souef stating, among other things, that although Winch wanted to keep the dialogue open between them "*in the spirit of partnership"* but that "*we also have terms agreed in our contract and …. I must ask you please to treat this as notice under our contract for non-payment of our invoices"*.
30. It is not in issue that no steps were taken to remedy the default within the 15 days provided for by clause 12.1 of the Terms of Engagement (or for that matter within the 30 days provided for by clause 11.1 of the Terms of Engagement).
31. On 22 October 2021, there was a meeting over dinner between Mr Beharrell and Mr Le Souef at Lucio's restaurant in London at which Mr Le Souef alleges that Mr Beharrell, on behalf of Winch, promised that it would not demand payment of its invoices or institute legal proceedings to recover any sums owed under the Contract before Somnio obtained funding for the Project. Mr Beharrell denies that any promise or representation was made. I will return to make specific findings about this highly contentious part of the Defence and Counterclaim after I have set out my overall assessment of the witnesses.
32. In an email sent on 24 October 2021, Mr Beharrell reported the outcome of his meeting with Mr Le Souef back internally to Ms Grapin. On 25 October 2021, he emailed Mr Le Souef to thank him for the dinner and Mr Le Souef responded the same day. As Mr Board notes in his Skeleton Argument, there is no mention in any of those documents of the alleged promise or representation now relied on by Mr Le Souef.

33. On 14 December 2021, Mr Le Souef emailed Mr Beharrell with an update on the Project noting that "*... we are very appreciative of the support we have received to date from Winch Design and we do understand the issues caused with delays in payment. As you know only too well, this was ostensibly caused due to the loss of over $100 million in early sales revenue as a result of shipyard related issues on due diligence"*.
34. On 24 December 2021, Mr Le Souef sent a further email to Ms Grapin, Mr Beharrell and Mr Dixon thanking them for their continued support for Somnio and stating that as a business owner himself, he understood the issues surrounding non-payment of invoices.
35. On 3 February 2022, there was exchange of emails between Mr Le Souef and Mr Beharrell concerning Winch's unpaid invoices in which the former acknowledged Winch's disappointment and that it was not because he was unable to make the payments, but the funding had not arrived yet to facilitate it. Capt. Bredhe passed on similar sentiments on Mr Le Souef's behalf in his email sent on 18 July 2022.
36. Finally, in his email to Ms Grapin on 8 May 2023, Mr Le Souef again provided her with an update including that "*we now have indicative offers of finance and are working to finalise these in order to complete contract execution before August"* and "*the moment we are in the right position you can rest assured that Winch is number one cab off the rank"*.

The Witnesses

37. I heard evidence on behalf of Winch from Mr Beharrell (who had made two witness statements dated 19 September 2024 (**Beharrell One**) and 2 October 2024 (**Beharrell Two**)) and Ms Grapin (whose witness statements were dated 20 September 2024 (**Grapin One**), 3 October 2024 ((**Grapin Two**) and 25 October 2024 (**Grapin Three**)). Mr Le Souef and Somnio relied on 2 witness statements from Mr Le Souef dated 20 September 2024 (**Le Souef One**) and 2 October 2024 (**Le Souef Two**) and a witness statement from Capt. Bredhe dated 20 September 2024.
38. This is a commercial case involving commercial parties who were dealing at commercial arm's length. When assessing their evidence, I have reminded myself of the proper approach to evidence based on recollection in this type of case in the well-known decision of Mr Justice Leggatt (as he then was) in *Gestmin SGPS S.A v (1) Credit Suisse (UK) Limited and (2) Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (**Gestmin**) especially his observations at [15] to [22] as to the fallibility of human memory and reconstruction and as to the effect which civil litigation has on memory. At [22] he cautioned, and I bear firmly in mind:
"*In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth"*.
39. Gestmin was revisited by Mr Justice Leggatt in *Jeffrey Ross Blue v Michael James Wallace Ashley* [2017] EWHC 1928 (Comm) 1928 at [65] to [69], in particular, at [69]

and the footnote where the Judge added: "*In addition to the points that I noted in the Gestmin case, two other findings of psychological research seem to me of assistance in the present case. First, numerous experiments have shown that, when new information is encoded which is related to the self, subsequent memory for that information is improved compared with the encoding of other information. Second, there is a powerful tendency for people to remember past events concerning themselves in a self-enhancing light"*.

40. I deal first with the witnesses for Winch. Save in relation to the Forbearance Issue, much of Mr Beharrell's evidence was not seriously challenged by Mr Anderson for the Defendants who accepted that after the initial introductions, Mr Beharrell did not have much involvement in the management of the Project. I will deal separately with my assessment of Mr Beharrell's evidence on the Forbearance Issue and confine my present remarks to his evidence on the other issues. My assessment of him was that he was generally trying to assist the Court albeit with a keen eye on the implications his answers might have for Winch's case. He accepted (fairly in my view) that the Project represented an excellent business opportunity for Winch. I accept his evidence that he was not heavily involved in negotiating the revised payment plan which was ultimately reflected in the Addendum because that is borne out by the documents including his email to Mr Le Souef dated 1 April 2021 which refers to him having had discussions with Ms Grapin and Mr Dixon. He was initially slightly reluctant to acknowledge that funding the Project was dependent on initial sales of apartments on the Yacht, but did not seek to maintain that in the face of the documents he was shown. I also accept his evidence that when he did get involved in dealings with Winch, including in relation to the Disputed Invoices, his role was to try to keep the Project and the relationship alive for everybody's benefit. This is consistent with his role as non-executive chairman and what I have already described as being a pattern of Winch holding back from taking enforcement action. Unless stated to the contrary, I am generally able to accept Mr Beharrell's evidence as being truthful.

41. Ms Grapin, as Winch's CEO, understandably had a more active role in relation to the Project especially as regards negotiating the Addendum and in relation to the Disputed Invoices. There were some unsatisfactory features of Ms Grapin's oral evidence. First, I found her explanation of her understanding of Winch's disclosure obligations to be unduly cautious and unconvincing. In particular, she sought to avoid answering simple questions about the obligation to disclose adverse documents by making an improbable distinction between documents known to Winch and those known to the Defendants and then to avoid answering altogether by suggesting she was not aware of the intricacies of the process. I am unable to accept that she was not closely involved in the response sent on behalf of Winch dated 11 October 2024 to the request being made for disclosure of ledgers and other accounting documents which might show how internally Winch had identified its client. These documents were disclosed for the first time in Ms Grapin's third witness statement on 25 October 2024, shortly before the trial and only in response to the application for their specific disclosure which had been made on behalf of the Defendants on 22 October 2024. Her suggestion in cross-examination that there was no reason for those documents to have been provided to the Defendants earlier was disingenuous and plainly wrong. I approach her evidence as to the way in which the ledgers have been repopulated following a serious cyber-attack in which Winch's accounting records were lost, with extreme caution. As CEO I would have expected Ms Grapin to need to know this in much more detail than she presented to me in evidence. Likewise, I found her evidence as to when and how she would look at Winch's accounting documents (including dealings with Winch's auditors) when she

suggested that she did not pore over them in detail to be unconvincing and untrue bearing in mind her background as having the equivalent to an MBA and a former strategic management consultant. When asked about her knowledge about the involvement of Somnio in the Project, I consider Ms Grapin to have been unnecessarily reticent and some of her answers seemed contrived to be supportive of Winch's case (for example, pointing out that Capt. Bredhe had referred in one email to it being "based on the owner's feedback"). However, despite these reservations, save insofar as her evidence is contradicted by specific documents, I am able to accept Ms Grapin's evidence as being true on the issues concerning the identity of the parties and the actual working through of the Contract.

42. So far as concerns Mr Le Souef, his evidence was surprisingly defensive as to matters which I would have thought to be uncontroversial. Despite being an experienced businessman, he initially claimed not to have come across contracts although he shortly qualified that by saying he meant contracts relating to the general operations of the business which did not involve intellectual law (I take this to be a reference to intellectual property). Until he was taken to the initial presentation in connection with the Yacht, his evidence as to what, if any, margin was to be taken by the promoters was confusing and unconvincing as was his rebuttal that he was a man of significant wealth. Throughout Mr Le Souef's cross-examination, when he was presented with documents that contradicted his case, he was simply unable to provide an explanation. For example, despite saying that he believed Somnio to be the contracting party "from Day 1" his only explanation for not raising it even after he had sight of the Addendum was that it was "an oversight". At another point, he strayed into advocacy, in effect repeatedly submitting that, as Winch's invoices were issued to Somnio, that was the correct party. The later invoices cannot, as a matter of his evidence, assist me to determine the Contracting Party Issue.

43. So far as Capt. Bredhe is concerned, I regret that he too was unwilling at times to accept what was written in black and white and, at times, strayed into advocacy to support Mr Le Souef/Somnio's case. Despite Capt. Bredhe fairly accepting that whether or not Mr Le Souef had actually seen the Initial Contract, he (Bredhe) had discussed the contents of it with him, and when asked to confirm that the reference to "our comments" in his email to Ms Grapin on 20 October 2020 included those from Mr Le Souef, he initially evaded the thrust of the question by describing them as "only comments", then tried to say that it evidenced that he was signing on behalf of the company (which made no sense), then denied that they were the comments of Mr Le Souef, before finally conceding they were "our collective comments". Even then he sought to qualify that by speculating whether there were any emails to show whether Mr Le Souef provided any comments. When asked about the circumstances in which he came to sign the Initial Contract on behalf of Mr Le Souef, Capt. Bredhe said "I would not concur that I would never sign a document like this without any sort of approval from the rest of the team". This was an unsatisfactory and evasive answer although when further pressed he accepted that he and Mr Le Souef had satisfied themselves that they understood it sufficiently for him to sign it. So far as the Disputed Invoices are concerned, despite having implied in his witness statement that there was some confusion around whether they were due, when cross-examined by reference to the documents, he finally accepted that the reason the invoices had not been paid was because of delay by the shipyard and nothing to do with Winch not performing.

44. In line with Gestmin, I approach the testimony of the witnesses with some caution, except where it is corroborated by the documents, or where it aligns with my assessment of the known facts and commercial probabilities.

45. It is convenient here to deal with a specific issue which arose in the course of the run up to the trial and the way in which some of the evidence emerged and in respect of which Mr Anderson invited me to draw certain adverse inferences against Winch. The law as to the drawing of adverse inferences is fairly settled and I was referred to one of the principal textbooks – Hollander on Documentary Evidence (at paragraphs [12-20] to [12.26] and to the discussion there of three of the leading cases: *Indian Oil Corp Ltd v Greenstone Shipping Co SA (Panama) (The Ypatianna)* [1988] Q.B. 345 per Staughton LJ; *British Railways Board v Herrington* [1972] A.C. 877 per Lord Diplock and to the four principles set out by Brooke LJ in *Wiszniewski v Central Manchester HA* [1988] P.I.Q.R P324. The underlying mischief is that if a wrongdoer prevents the innocent party from proving part of his case, then the Court is entitled to treat the wrongdoer as being liable to the greatest extent. In relation to the absence of evidence, it is clear that: (i) a court might draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action; (ii) if a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably be expected to call the witness; (iii) there must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue and (iv) if the reason for the witness's absence or silence satisfied the court then no such adverse inference may be drawn; if, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified. I also remind myself that even if the four principles are engaged I am not obliged to draw an adverse inference and that there are matters within my discretion.

46. Mr Anderson invited me to draw adverse inferences against Winch in relation to the evidence given by Ms Grapin in Grapin Three on two bases: first he submitted that it became clear during his cross-examination of Ms Grapin that she was not the correct person to provide evidence as to the deletion of relevant journal entries in Winch's records because said that the first time that she seen those journal entries was when that witness statement was being prepared. Rather, he submitted, the Court should conclude that Sarah Pratt, Winch's head of finance, was the more appropriate person to give this evidence (including as to the underlying treatment of who was regarded as the true Client in its accounting records) and that Winch had deliberately elected not to call Ms Pratt. Secondly, he invited me to draw adverse inferences as to the actual content of Winch's accounting records so far as the identify of their client was concerned.

47. I am entirely satisfied that I should not draw formal adverse inferences in the way that I was urged to do for the following reasons. First, so far as Ms Pratt's evidence is concerned there is nothing to suggest that the Defendants contemplated her giving evidence at all until shortly before the trial. On the contrary, everyone seems to have proceeded on the basis that Ms Grapin was the right person to do so. Secondly, Ms Grapin says that she spoke to Ms Pratt about the issues raised in the specific disclosure application and so I am not satisfied that the Defendants are right to invite me to infer that Ms Pratt would have said something different. On the accounting records issue, the relevant journal entries which exist have now been provided and it is not necessary for the Defendants to rely on wider inferences. Finally, as I have already indicated, I have been able to take a view as to the circumstances in which this evidence came about, in my assessment of Ms Grapin's evidence and so it is not necessary for me to go further and draw formal adverse inferences against Winch.

The Relevant Law

48. Unsurprisingly, given that this is a claim in contract, Counsel for the parties were broadly agreed as to the correct legal position.

49. The applicable legal principles to the proper construction of the Contract are well-established. It falls to be construed by me in the manner set out in recent authorities at the highest level on the principles governing the interpretation of commercial contracts, the most recent of which are the decisions of the Supreme Court in *Investors Compensation Scheme Limited v West Bromwich Building Society* [1998] 1 WLR 896; *Re Sigma Finance Corporation* [2010] 1 All ER 571; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, [2017] AC 1173.

50. First, in construing a contractual provision, regard is to be had to the purpose of the provision and the circumstances in which it was agreed. The principle was stated by Lord Nicholls in *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 (HL) as follows at [26]:
"*The meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made*".

51. Second, it has often been said that in cases of ambiguity (such as where there are two possible meanings of the words to be construed), the court is entitled to prefer the construction which is most consistent with business common sense. In *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 Lord Clarke stated the principle as follows at [21]:
"*… the exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so, the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other*".

52. These principles were considered and endorsed in *Arnold v Britton* [2015] UKSC 36. Lord Neuberger (with whom Lords Sumption and Hughes agreed) considered the proper approach to contractual interpretation at [14]-[23].

53. At paragraph [15] he said:
"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to 'what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean', to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] UKHL 38, [2009] 1 AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [contract], (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions…".

54. Lord Neuberger went on to emphasise seven factors (although the seventh was concerned with service charge clauses and so is not set out below):

> 17. *"First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in Chartbrook, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focusing on the issue covered by the provision when agreeing the wording of that provision.*
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> 18. *Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.*
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> 19. *The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in Wickman Machine Tools Sales Ltd v L Schuler AG [1974] AC 235, 251 and Lord Diplock in Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios) [1985] AC 191, 201, quoted by Lord Carnwath at para 110, have to be read and applied bearing that important point in mind.*
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> 20. *Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.*
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> 21. *The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances*

which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties.

22. *Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such a case, if it is clear what the parties would have intended, the court will give effect to that intention. An example of such a case is Aberdeen City Council v Stewart Milne Group Ltd [2011] UKSC 56, 2012 SCLR 114, where the court concluded that "any ... approach" other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract (see paras 17 and 22)".*

55. In *Wood v Capita Insurance* [2017] UKSC 24 at [11], Lord Hodge, citing Lord Clarke in *Rainy Sky*, stressed that the Court is engaged in a "*unitary exercise; where there are rival meanings, the Court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense"* which is an iterative process.

56. In *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The Ocean Neptune)* [2018] 1 Lloyds Rep. 654 (Comm) at [8] Popplewell J. analysed these authorities as follows: "*The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each".*

57. Finally, on the specific issue of the identity of the correct contracting parties, I was reminded by both Counsel that the correct approach to the issues of fact is as set out by Lord Millett in *Hombourg Houtimport BV and others v Agrosin Private Ltd and another* [2004] 1 A.C. 715 at [175] to [176] (known as *(The Starsin)*): "*Where a contract is contained in a signed and written document, the process of ascertaining the identity of the parties and the capacity in which they entered the*

contract must begin with the signatures and any accompanying statement which describes the capacity in which the persons who appended their signatures did so".

58. Turning to the legal principles which govern rectification of contracts on the grounds of an alleged common mistake, the parties agree that the relevant legal test is as set out by Leggatt LJ (as he then was) giving the judgment of the Court in *FSHC Group Holdings Ltd v GLAS Trust Corpn Ltd* [2020] Ch 365 at [176]:
"*We consider that we are bound by authority, which also accords with sound legal principle and policy, to hold that, before a written contract may be rectified on the basis of a common mistake, it is necessary to show either (1) that the document fails to give effect to a prior concluded contract or (2) that, when they executed the document, the parties had a common intention in respect of a particular matter which, by mistake, the document did not accurately record. In the latter case it is necessary to show not only that each party to the contract had the same actual intention with regard to the relevant matter, but also that there was an "outward expression of accord" – meaning that as a result of communication between them, the parties understood each other to share that intention"*.

59. It is common ground that, in contradistinction to the position when I am construing the Contract, I am entitled to have regard to a wide range of materials when considering whether to rectify the Contract. I accept that these matters include: (i) parol evidence; (ii) prior negotiations between the parties; (iii) subsequent conduct of the parties and (iv) the subjective intentions of the parties. In *Dunlop Haywards (DHL) Limited and others v Barbon Insurance Group Ltd and others* [2009] EWHC 2900 (Comm) at [176] Hamblen J. (as he then was) said that in determining whether there has been a common mistake in the expression of the terms in the final contract between the parties, the Court must necessarily consider all the circumstances and that "*[T]here is no conceptual limit to the sort of material which may be relevant, and it can include evidence of subjective state of mind or intention. It is a matter for the Court to weigh the evidence in reaching its conclusions. Particularly relevant factors are likely to be the nature of the final contract, and the circumstances in which he wording now alleged to be there in error, came to be included in it, and agreed by the parties"*.

60. For completeness, I note that after I had reserved my judgment on this matter, the parties drew my attention to decisions which were handed down in two other cases dealing with the law on construction of contracts but more significantly rectification. The first decision was by Paul Stanley KC (sitting as a Judge of the High Court) in *SATA Internacional - Azores Airline SA v HY FLY and another* [2024] EWHC 2762 (Comm) and the relevant analysis is at [107] to [108] and [126] to [148]. The second decision was that of the Supreme Court in *National Union of Rail, Maritime and Transport Workers and another v Tyne and Wear Passenger Transport Executive T/A Nexus* [2024] UKSC at [26] to [35], a case concerning rectification of collective agreements. I am grateful to the parties for drawing my attention to these cases and am assisted generally by them in my approach but agree with them that no further submissions in this case are needed because those cases broadly rely on the same legal principles and authorities (in particular the *FSHC* case) by reference to which I have already directed myself.

61. Likewise, the parties were agreed as to the relevant legal principles governing estoppel by convention. Both referred me to the decision of Akenhead J. in *Mears Ltd v Shoreline Housing Partnership Ltd.* [2015] EWHC 1396 (TCC) at [49]:
"*(a) An estoppel by convention can arise where parties to a contract act on an assumed state of facts or law. A concluded agreement is not required but a concluded agreement can be a "convention.*

(b) The assumption must be shared by them or at least it must be an assumption made by one party and acquiesced in by the other. The assumption must be communicated between the parties in question.
(c) At least the party claiming the benefit of the convention must have relied upon the common assumption, albeit it will almost invariably [be] the case that both parties will have relied upon it. There is nothing prescriptive in the use of "reliance" in this context: acting upon or being influenced by would do equally well.
(d) A key element of an effective estoppel by convention will be unconscionability or unjustness on the part of the person said to be estopped to assert the true legal or factual position. I am not convinced that "detrimental reliance" represents an exhaustive or limiting requirement of estoppel by convention although it will almost invariably be the case that where there is detrimental reliance by the party claiming the benefit of the convention it will be unconscionable and unjust on the other party to seek to go behind the convention. In my view, it is enough that the party claiming the benefit of the convention has been materially influenced by the convention; in that context, Goff J at first instance in the ***Texas Bank*** *case described that this is what is needed and Lord Denning talks in these terms.*
(e) Whilst estoppel cannot be used as a sword as opposed to a shield, analysis is required to ascertain whether it is being used as a sword. In this context, the position of the party claiming the benefit of the estoppel as claimant or indeed as defendant is not determinative or does not raise some sort of presumption one way or the other. While a party cannot in terms found a cause of action on an estoppel, it may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on the estoppel, it would necessarily have failed.
(f) The estoppel by convention can come to an end and will not apply to future dealings once the common assumption is revealed to be erroneous".

62. Finally on the relevant law, one of Mr Le Souef/Somnio's defences relies on a defence of promissory estoppel or forbearance. As to that, Mr Board drew my attention to Chitty on Contracts at [7-031] an earlier version of which passage has been approved in the recent decision of Ms Clare Ambrose, sitting as a Deputy Judge of the High Court in *JBR Capital Limited v (1) JM Investments/Trading Ltd and (2) Mr Karan Abbott* [2023] EWHC 174 (Comm) at [28]:
"*For promissory estoppel to operate there must be a legal relationship giving rise to rights and duties between the parties; a promise or a representation by one party that they will not enforce against the other their strict legal rights arising out of that relationship; an intention on the part of the former party that the latter will rely on the representation; and such reliance by the latter party. Even if these requirements are satisfied, the operation of the doctrine may be excluded if it is, nevertheless, not "inequitable" for the first party to go back on their promise. The doctrine most commonly applies to promises not to enforce contractual rights, but it also extends to certain other relationships".*

The Contracting Parties Issue

63. The first issue is whether Winch's counterparty to the Contract was Mr Le Souef (as Winch contends) or Somnio (as the Defendants contends). This firstly raises an issue of the proper construction of the Contract (which requires separate consideration of the Initial Contract and the Addendum), then an issue as to whether the written Contract ought to be rectified and if so, how, and finally, an issue as to whether Winch is estopped from denying that Somnio was the correct contractual counterparty.

64. Dealing first with the proper construction of the Contract and bearing firmly in mind the legal principles which I have set out in detail above, I remind myself that this is an objective task and an iterative one. The question is: what would the Contract convey to a reasonable person, having all the background knowledge which was reasonably available to the parties in the situation which they were in at the time of the Contract.
65. It is convenient to start with a close examination of the actual express terms of the Initial Contract and the Addendum. As I have already set out, the Initial Contract states on the first page that the "Client" is "*Carl Le Souef"* and the term is expressly defined in clause 1.1 of the Terms of Engagement to mean "*the person named as Client in the Proposal"* (itself a defined term). Clause 1.1 also describes and defines "Parties" to mean "*Winch and Client"*. Capt. Bredhe is both described and defined as "*the Client Representative"* and signed the Initial Contract in the signature block "*on behalf of Carl Le Souef"*. Turning to the Addendum, this explicitly refers back to the Contract as being "*between Carl Le Souef and Winch Design Limited"*.
66. On behalf of Mr Le Souef and Somnio, Mr Anderson relies on a number of factors in support of his submission that, on any objective view, Winch's true counterparty was Somnio. First, he submits that the Contract should be construed in the context of the following facts which were reasonably available and within the knowledge of parties standing in the position of the parties: (i) the recent incorporation of Somnio as the relevant SPV for the Project and that it owned the relevant IP; (ii) Winch had not previously contracted with Mr Le Souef and earlier contracts had not referred to him; (iii) that the earlier invoices had been raised to Somnio and (iv) Winch had been introduced by an email dated 20 June 2019 to Somnio's CFO on the basis that he would manage the financial elements of the Project. Secondly, to treat Mr Le Souef personally as the relevant party to the Contract because Somnio had been incorporated specifically as an SPV to enter into these types of contract, and it would flout business common sense for the parties then to have deprived Mr Le Souef of the benefit of separate legal personality otherwise implied by the use of a corporate vehicle.
67. Despite those forceful submissions, I am in no doubt that, any reasonable person, having all the background knowledge which was available to the parties at the time of the Contract, would conclude that Mr Le Souef was the intended contracting party. Indeed, I accept Mr Board's submission that the position could scarcely be clearer and in circumstances where I have found that the Contract is clear and unequivocal as to the identity of the parties, in my judgement there is no room to admit the sort of factual matrix on which Mr Anderson sought to rely. Mr Board referred me to the appellate decision in *Gregor Fisken Ltd v Carl* [2021] EWCA Civ 792, [2021] 4 WLR 91 at [64] which makes clear that parole evidence is admissible to clarify the meaning of a contract but not to contradict it, even on issues of identity. Even if I was wrong on this point, in my judgment, even armed with that relevant factual matrix, any objective bystander would still conclude that Mr Le Souef was the intended contracting party because Capt. Bredhe signed the Initial Contract on behalf of Mr Le Souef. In those circumstances, to conclude that Mr Bredhe was in fact acting as agent for Somnio, or that Mr Le Souef was acting as agent for Somnio, as Mr Anderson submitted, would contradict the express terms of the Contract.
68. So far as rectification is concerned, as I have already noted, a wider range of evidence is available when determining whether the parties (a) shared a common intention that Somnio should be the contractual counterparty and (b) outwardly expressed an accord in that respect.
69. In addition to those matters which Mr Anderson relied upon in connection with the proper construction of the Contract he relied on a number of further factors. First, he

referred to the fact that all of the later invoices were also raised on Somnio and that Ms Grapin's explanation of that was unsatisfactory. In his closing submissions, Mr Anderson was able to take this point further because the outcome of the late disclosure application made on his clients' behalf supported, for reasons that again Ms Grapin was not able fully to explain in cross-examination, that both the partial records (relating to the period 1 June 2020 to 31 May 2022) from the so-called Temporary System (which was put in place following the cyber-attack on Winch and which was populated by its employees by reference to current year invoices and reports) and the Current System (which was in use from July 2022 and which was populated from information on the Temporary System) refer to the customer name as "Somnio Superyachts P/L". Secondly, he submitted that all the pre-contract work was done in contracts made between Somnio and Winch. Both he suggested were indicators of Winch's subjective intention to contract with Somnio. Thirdly, he submitted that Winch was aware that the entire Project was contingent on Somnio obtaining funding from commercial lenders and that if, as Mr Beharrell suggested, he paid little or no attention to the identity of the contracting parties, that was because he must have assumed it was Somnio and this was also why Ms Grapin did nothing to query Mr Le Souef's reference to Somnio being a "two-dollar" company. So far as the Defendants' subjective intention is concerned, he relies on Mr Le Souef's evidence that he assumed that Somnio was the contracting party (repeated on several points during his written and oral evidence) and submits that, where Capt. Bredhe confirmed in cross-examination that he was agreeing to the terms of the Contract, this was only on the basis that he subjectively understood this to be a reference to Somnio. Finally, he pointed to the fact that all of the other contracts relating to the construction of the Yacht have been made by Somnio including: (a) a later Sales Representation Agreement made between Somnio and Winch itself dated 15 September 2021; (b) the binding letter of intent dated 6 October 2020 for the shipbuilding contract with VARD Group AS and (c) an Interior & Exterior Design Services Agreement made between Somnio and Tillberg Design AB. So far as Mr Le Souef's evidence is concerned he is not aware of any other contract in which he has been named personally as the client.

70. For Winch, Mr Board submitted that: (a) the parties' objective common intention is reflected by the Initial Contract and the Addendum themselves and they show that Mr Le Souef was the intended contracting party; (b) that the subjective intentions of Winch were the same; (c) there was in any event no outward expression by Winch of that objective accord that Somnio was intended to be the relevant counterparty and (d) whatever might have been their internal intentions, the written documents (including those which arose in the pre-contract negotiations and the Contract itself) indicate that neither Mr Le Souef nor Capt. Bredhe communicated to Winch that Somnio was intended to be the Client. Although in his Skeleton Argument, Mr Board had appeared to challenge the relevance of the parties' subjective intentions at the first stage of the inquiry, in his closing submissions he withdrew from that position.

71. In my judgment, it is the second requirement that is especially fatal to the Defendants' claim to rectify the Contract because viewed objectively, there is no "outward expression of accord". Put simply, the evidence simply does not support that Mr Le Souef or Capt. Bredhe communicated to Winch that Somnio was intended to be the counterparty in the Contract and, indeed, all of the indications go the other way. Winch had sent a draft of the fee proposal and terms of engagement to Capt. Bredhe as long ago as 13 October 2020 which identified Mr Le Souef as the Client. A discussion then took place about the draft between Ms Grapin and Capt. Bredhe which led to a revised document being sent. Capt. Bredhe then commented by marking up a version of the fee

proposal. No changes had been requested or made to the contracting parties at any point. On 4 November 2020, Capt. Bredhe signed the signature page and sent it to Winch. Again, no changes were suggested or made to the contracting parties. As I have already set out, when the Addendum was negotiated and agreed upon in April 2021, it expressly referred to the Contract as having been made between Winch and Mr Le Souef.

72. In any event, in my judgment, for the same evidential reasons, this is not a true case of mistake and it does not offend commercial sensibilities that Mr Le Souef was the true intended party. So far as the invoicing of Somnio is concerned, this does appear on the evidence simply to have been a continuation of the practice which had arisen prior to the Contract when the invoices were raised on Somnio and paid by it. I agree with Mr Board that the reference to a two-dollar company takes matters no further as the relevant email was sent on 18 July 2022, a considerable time after the Contract, and in circumstances where Mr Le Souef was already finding excuses for the delay in paying the Disputed Invoices. Whilst Mr Anderson is rightly critical of the way in which the evidence of Winch's internal treatment of its client emerged, it does appear plausible that this is the reason why the ledgers continued to show Somnio as client. I am satisfied on the evidence I have heard (especially in light of his cagey approach to his cross-examination on the point) that Mr Le Souef was presented as being a man of some wealth and that at the relevant time the Project was a lifestyle project for him and his supporters. Mr Le Souef and Capt. Bredhe had access to legal advice.
73. For estoppel by convention to arise, there must be a common assumption that Somnio was the contracting party and that that assumption was communicated between the parties. For the same reasons that I have set out in relation to the Defendants' case on rectification, I am not satisfied that there was any common assumption or that any such assumption crossed the line between them.
74. I would add that if I was wrong on that point, I accept Mr Board's submission that the evidence of Capt. Bredhe was that he signed the Initial Contract after having gone through it with Mr Le Souef and Mr Le Souef confirmed in cross-examination that he understood the Addendum to amend a contract to which he was a party and that by that stage he had seen the Initial Contract and the Addendum. In those circumstances, any suggestion that Mr Le Souef was relying on a common assumption that Somnio was the true counterparty was unreasonable. I also accept Mr Board's further submissions that Mr Le Souef has failed to establish that he has acted to his detriment (the only pleaded case in this regard being that Somnio paid invoices to Winch under the Contract) and that in all the circumstances of this case, it is not unjust or unconscionable for Mr Le Souef to be held to the terms of the bargain which he reached with Winch.

The Payment Terms Issue

75. The next issue for my determination is whether the sums invoiced by Winch are due for payment. Two legal issues arise: (i) on the proper construction of the Contract are the Disputed Invoices accrued debts (as Winch contends) or does the obligation to pay arise only after Winch has performed or substantially performed its obligations to provide services in respect of the relevant stage of work (as Mr Le Souef/Somnio contend) and (ii) whether the Defendants are in any event estopped from denying that the sums due under the Disputed Invoices are due by virtue of having acknowledged them? There is a related factual issue as to whether, if Winch's construction of the Contract is rejected, Winch has in fact performed the work to justify payment of the relevant invoices but that is more conveniently dealt with as part of my analysis and decision on the Winch Performance Issue and/or the Counterclaim Issue.

76. On the question of the proper meaning of the Contract, in his closing submissions, Mr Anderson submitted that the over-arching principle was that it cannot be right as a matter of law or common sense that Winch should be entitled to payment for work which it has not performed.
77. He submitted that there are two routes to get there: firstly, that as a matter of common law, a claim in debt does not arise unless the relevant contractual performance has been rendered and that there is nothing here in the terms of the Contract to vary that principle. In this regard he relied on the well-known decision in *Sumpter v Hedges* [1898] 1 Q.B. 673 and an extract from Chitty on Contracts (35th ed) at [31-003]: "*The sum claimed must be due under the contract. This requires the claimant to satisfy any condition precedent to payment, whether that be performance of the entire obligation (subject to the substantial performance qualification), performance of a divisible part of the contract, or the occurrence of some other specific event or condition"*. Here, it is common ground that we are concerned about the performance (or substantial performance) of divisible obligations in the various stages. It is simply absurd, he argued, for Winch here to be claiming a debt in relation to parts of the work where it has performed zero because it would mean that Winch would be entitled to charge for work and decide (say the day immediately after an invoice had fallen due), with impunity, simply not to perform. In his oral closing, he drew a distinction between a contract, say for rent, which expressly provides for payment in arrears.
78. Secondly, and alternatively, he submits that even if a debt claim arises, it cannot be the case that the counterparty is shut out from claiming damages for the breach by the other party for having not rendered its performance under the contract.
79. For his part, Mr Board did not challenge that the extract in Chitty represents the correct starting point, as a matter of common law. I also did not understand him to deny that as a matter of principle, Winch could have been met by a counterclaim for damages for breach. His principal point on the counterclaim is that there is here no breach and even if there is a breach that there is no evidence upon which the Court can properly assess the losses claimed. Winch's case is that the Disputed Invoices are accrued debts because that is what the Contract expressly provides. First, he reminded me of the words in the preamble to the original timetable for payment in the Original Contract (which expressly provides on page 17 under the heading "Payment Schedule" that: "*On confirmation of our appointment we require the payment due on acceptance of this Proposal and thereafter in accordance with the payment schedule below. The Payment Schedule is geared to progression of the Project in accordance with the timetable above"*). This, he submits, provides for payments by the specific dates and this was not varied in any way by the Addendum which simply changed the amounts and dates. He then points to Clauses 2.3, 5.2 and 5.6 of the Terms of Engagement which I have already set out in full above. Clause 5.6 sets out a 30 day payment provision from the date of the invoice. There is no absurdity, because Winch was obliged to perform in any event (see clause 2.3 which subjects it to a reasonable endeavours obligation), subject only to Clause 12.2, which provides expressly for Mr Le Souef to suspend performance at will subject only to paying accrued expenses and invoices. The commercial rationale, he submits, is that the Contract was entered into at a time before the shipbuilding contract between Somnio and VARD had been agreed so the dates were necessarily uncertain depending on what was agreed with the other parties and other designers, so various extensions and changes are permitted, subject to the overall obligation on Winch to take reasonable endeavours to perform and points to the fact that these clauses are designed to ensure that Winch, which had to put together and resource a team of designers to undertake the ongoing design work under the Contract,

such that it needed a commitment so as not to incur lots of overheads for a period of time without being paid.

80. It seems to me that taking the iterative approach to the interpretation of the words of the Contract alone, Winch's construction is to be preferred and, aside from relying on the common law position, Mr Le Souef and Somnio have no real answer to these points made by Winch as to the true underlying commercial rationale for the payment terms of the Contract being drafted in the way they have. I am satisfied that the Disputed Invoices are accrued debts under the terms of the Contract.

81. In light of my conclusion on the proper meaning of the payment terms in the Contract it is not strictly necessary for me to go on to consider estoppel and it is right to say that Mr Board did not separately address me on the issue in closing submissions. In case the matter should go further, I would have accepted Mr Board's submission that the Defendants had repeatedly acknowledged the debts (in particular by reference to the emails which I have referred to in my factual analysis above) but also Mr Anderson's submission that, even if the basis of an estoppel was established by Winch there is no, or no sufficient evidence that Winch had acted to its detriment. In particular, in light of the evidence of the significant forbearance which Winch had shown in pursuing its invoices, I would have rejected Ms Grapin's evidence to the effect that Winch might have started proceedings earlier. For the reasons I have already identified, it seems to me that Winch was hanging in there for its own commercial reasons in being associated with what it clearly regarded as a prestigious and commercially valuable Project. I also agree with Mr Anderson that in circumstances where Winch is pursuing a claim for interest, it cannot be detrimental for it to have relied on the acknowledgment of its debts.

The Forbearance Issue

82. The next issue is whether at the meeting which took place between Mr Beharrell and Mr Le Souef over dinner on 22 October 2021 at Lucio's restaurant Mr Beharrell agreed that Winch would forbear from demanding or suing for payment of the Disputed Invoices pending Somnio being place in funds by third party investors.

83. It is common ground that the effect of clause 15.3.4 of the Terms of Engagement (which provides that the Contract may be amended only in writing) is that the oral agreement could not amount to a variation of the Contract. Instead, the pleaded case on behalf of the Defendants is that any agreement takes effect as a matter of law as a separate collateral contract. A legal issue also arises as to whether, in the alternative, Winch is estopped from demanding payment of the sums alleged to be due pending the result of Somnio's efforts to obtain third party funding for the Yacht. This is a different species of estoppel – promissory estoppel.

84. So far as the evidence is concerned, Mr Le Souef deals with this meeting in paragraphs 4.1 to 4.6 of Le Souef One at paragraphs 4.1 to 4.5 of Le Souef Two. His evidence is that Mr Beharrell unequivocally stated that Winch would not demand payment, or institute legal proceedings, in respect of the Disputed Invoices until Somnio had secured sufficient third-party funding in respect of the construction of the Yacht.

85. Mr Beharrell deals with this meeting and the following events in his first witness statement at paragraphs 8 to 15. His evidence is that the focus of the discussion was Mr Le Souef's explanations about the five financing options which he had on the table and that one of them would be confirmed in the next 3-4 days and that the Project was now proceeding as a profit-making enterprise rather than a non-profit members club for him and his friends. He categorically denies having made the promises or representations

alleged to have been made and says there would have been no reason for Winch to agree to this.

86. Put simply, there is a straightforward conflict of evidence between the two men as to their respective recollections of the October meeting. In these circumstances, I bear firmly in mind the guidance in *Gestmin,* and in particular, the importance of the task of checking what each of them says (especially when being cross-examined) against the contemporaneous documents and events and against the inherent probabilities or otherwise of their respective accounts.

87. Dealing first with the cross-examination of Mr Beharrell (whose evidence came first in time), he accepted that by summer 2021 Winch was pressing for payment of its invoices but rejected the suggestion that Winch knew that the Defendants' ability to discharge them was dependent on Somnio raising finance from buyers of the apartments. He then reiterated that his sole purpose was to ensure that the Project stayed on track and that the company of which he was Chairman was paid. Mr Beharrell was then asked some questions about the purpose of the dinner and confirmed that one of the topics discussed was Somnio's need for external finance. He then rejected the suggestion made by Mr Anderson that he had told Mr Le Souef that Winch was under particular pressure at that stage of its life because it had recently become an employee-owned company although he accepts that there was something said about employee ownership. His evidence is that Winch still had a strong balance sheet and was in very, very good health so he had no reason to say that. He accepted that he told Mr Le Souef that Winch understood the bigger picture in respect of the Somnio Project and was keen to see the Yacht come to fruition. The core issue in dispute was then put to him as follows:

"*Q. And it was in that context that you promised Mr Le Souef Winch would not demand payment of the allegedly outstanding fees until Somnio had secured that third party funding to construct the Yacht; correct?*

A. I have absolutely no recollection, of (a) a discussion on that basis, let alone an agreement, and my witness statement clearly shows that, and also I minuted in detail the context, the contents of that dinner, literally 36 hours after the dinner, and there was absolutely no mention of that. And also I thanked Mr Le Souef on the Monday following our dinner on the Friday, for buying dinner, and there was no mention whatsoever of any discussion about matching payments to funding. And Mr Le Souef responded to me the same day and there is no mention in his email at all about this particular aspect of the conversation, because in my opinion certainly, as far as I am concerned, it did not take place. There was no conversation along those lines".

88. The point was then put to Mr Beharrell that agreeing not to sue for the invoices was giving the Project the best chance of succeeding to which he replied: "*I did not agree with Mr Le Souef anything to do payment terms being related to him receiving external funding"*.

89. Mr Le Souef was also cross-examined at some length about the 22 October 2021 meeting. His evidence in chief had focused on three aspects of the event: first, he says he expressed disappointment about Winch's performance of the Contract; secondly, he referred to the fact that Somnio was in the process of raising capital and that it was difficult to make any payment to Winch and thirdly, he said that Mr Beharrell explained that Winch was struggling financially owing to the fact that it had become an employee-owned company. Although it had not been something he had mentioned in his witness statements, his evidence in cross-examination was that he came to the meeting intending to try to negotiate with Winch. When challenged that there had been

no discussion about Winch struggling financially, Mr Le Souef maintained that had been said but did not know why but accepted that, if true, it would not be a reason for Winch not to pursue its invoices (to the contrary, it seems to me that it would be a reason for doing so).

90. I have no hesitation in rejecting Mr Le Souef's account of the 22 October 2021 meeting and preferring Mr Beharrell's account. First, it is notable that although Mr Le Souef claimed to have gone into the meeting intending to negotiate, he did not elaborate at all on what he intended to achieve or whether he had discussed it with anyone else, for example Capt. Bredhe, or the other members of the Steering Committee. If, as he says, that had been an important purpose of the meeting, I would have expected him to have cleared the way to reach some form of settlement at the meeting. Secondly, I accept Mr Beharrell's evidence that, whilst the employee-owned structure was mentioned at the meeting, there was no mention of Winch struggling financially. Aside from the fact that he says it was not correct, which I accept, Mr Beharrell did not strike me as the sort of person who would have discussed his company's financial position (whatever it was) with Mr Le Souef and, if it had been true, it would have been a reason for Winch to press for payment of the invoices, not agree to forebear from doing so. Thirdly, as was pointed out to Mr Le Souef, this part of his witness statement had a curious reference – "I do not admit that any of the sums are properly due and owing" – which he fairly accepted was no part of what was said at the meeting and which appears to me to have the hand or pen of his lawyers on it. Fourthly, it seems to me that Mr Beharrell's overall recollection of the event was clearer and more compelling. Although a small point, I note when Mr Le Soeuf was asked what he ate at the dinner, he initially shrugged but then qualified by saying "*I have got a feeling that I ate fish"* but this was based on reconstruction from the fact that the restaurant was Lucio's. More tellingly, it was put to Mr Le Souef that his evidence in chief as to what Mr Beharrell had actually said, apparently "unequivocally" namely: "*Winch would not demand payment or instigate legal proceedings in respect of the disputed invoices until Somnio had secured third party funding"* was highly improbable bearing in mind the context was an informal dinner. I agree with this point and regret to say that this passage of Mr Le Souef's evidence also had all the hallmarks of having been crafted by him with his lawyers. It is highly improbable in my view that this type of language had been used and I accept Mr Beharrell's evidence that it was not. At this time Winch had been pressing for payment of the outstanding invoices for some considerable time and Mr Le Souef has been unable to explain, beyond saying that Winch was supportive of the Project, why Winch or Mr Beharrell would change their minds. That Winch was supportive of the Project is plain but nothing had changed in that regard. I also note that although Mr Le Souef claimed to have gone into the meeting to negotiate, it does not appear that was necessary because, on his account, no persuasion by him was necessary. I find this to be extremely improbable against the backdrop of the correspondence in which Winch had been pressing for payment. Mr Le Souef also does not suggest that he communicated that he had negotiated this important concession to anyone else (for example, Capt. Bredhe or the members of the Steering Committee).

91. More generally, Mr Beharrell was a more convincing and straightforward witness overall. I also have regard to the events which took place shortly after the meeting. Contrary to Mr Le Souef's suggestion that it confirmed the alleged "oral agreement" the email exchanges on 25 October 2021 do no such thing. Again, if Mr Le Souef had negotiated an important concession from Winch, he would have been careful to record it in writing. Unlike Mr Le Souef, Mr Beharrell reported back on the outcome of the dinner to Ms Grapin and other colleagues in Winch in an email dated 24 October 2021.

I accept Mr Beharrell's evidence that as non-executive Chairman, he would not have entered into an agreement to forbear from seeking payment of Winch's invoices without the agreement of Ms Grapin, the CEO and so, at the very least, it would have been important and necessary for him accurately to report back the outcome of his meeting with Mr Le Souef. I accept Mr Beharrell's email dated 24 October 2021 is an accurate account of what was discussed at the meeting.

92. In circumstances where I have found that there was no promise or assurance on the part of Winch to forebear seeking payment of the Disputed Invoices, there is no scope for the operation of any promissory estoppel. I therefore reject that Mr Le Souef/Somnio has any defence based on an alleged collateral contract or promissory estoppel. It is not therefore necessary for me to address the subsidiary legal argument as to whether a collateral agreement is available notwithstanding a no oral modification clause.

Winch's Performance Issue and the Counterclaim Issue

93. I agree with Mr Anderson that it is convenient to consider these two issues together although I remind myself that whether there has been a breach of Contract which gives rise to a counterclaim for damages requires me to consider a number of discrete legal and evidential issues: (a) as to the proper scope of the obligations alleged to have been breached; (b) as to whether there has been any breach; (c) if so, whether that breach has caused any properly recoverable loss and (d) if so, the quantification of that loss as damages.
94. A discrete issue arose as to the relevant burden of proof. Mr Anderson submitted that if he (on behalf of the Defendants) was correct on the Payment Terms Issue, the burden of proof was on Winch to satisfy the Court that it had performed the relevant services whereas he accepted that the burden is on them to demonstrate breach (and it seems to me the relevant loss and damage).
95. Mr Board was somewhat critical of the way in which the counterclaim has been pleaded. The Counterclaim puts the Defendants' case in two different ways: at paragraph 5 it is pleaded that, in circumstances where Winch's obligation to provide "*the Design Services* and "*Procurement Services"* were separate and severable obligations under the Contract, Winch was not entitled to withhold delivery of future instalments even if Mr Le Souef has failed to pay the Disputed Invoices and that Winch acted in breach of contract in failing to supply any further services in accordance with the timetable in the Contact. It is then said that by reason of that breach Mr Le Souef has suffered the following loss: (i) costs in procuring alternative suppliers (to be assessed) and (ii) costs in relation to delays caused to the design and construction of the Yacht (to be assessed). I will refer to this as the paragraph 5 counterclaim. Secondly, at paragraph 7 of the Counterclaim it is pleaded that if the Disputed Invoices have become due for payment, Winch has nevertheless acted in breach of contract in failing to provide "*the Design Services*" and by reason of the breach of contract, Mr Le Souef has suffered loss in the form of the value of the design services which Winch has failed to perform, such losses to be assessed pending disclosure and/or the provision of further particulars by Winch as to the work allegedly performed in respect of "*the Design Services*". As Mr Board pointed out, the counterclaim does not plead which specific services are alleged not to have been provided and when they were due and what, if any, costs have been incurred in procuring alternative suppliers and what, if any, losses have been suffered. He also submits that there is simply no evidence on these points.
96. I have already indicated that I agree with Winch's case as to the proper construction of the payment terms (in particular clauses 5.2 and 5.6 of the Terms of Engagement) in the Contract. I have also referred to clause 2.3 of the Terms of Engagement which

provided for Winch to use all reasonable endeavours to meet the performance dates specified in the Timetable but that time was not of the essence for that provision. This is reinforced by the Timetable which states that: "*The above timetable is given as a business estimate only and does not give rise to any contractual obligation as to the performance of Winch"* and the Payment Schedule itself which states that: "*The Payment Schedule is geared to progression of the Project in accordance with the timetable above"*. I also remind myself that clause 12.1 of the Terms of Engagement provided Winch with an express right to suspend the provision of services under the Contract upon giving 15 days' notice of breach by failing to pay punctually the sums due under it. I have already found that Mr Le Souef was in breach of the payment obligation in the Contract by not paying the Disputed Invoices. As Mr Le Souef expressly acknowledged in his email in response, Winch gave notice of its suspension of services on 30 June 2021 and 16 August 2021. I accept that Winch was entitled to suspend services until payment of the Disputed Invoices were received. I also accept that Winch was properly entitled to terminate the Contract by its Reply served on 16 November 2023.

97. In all of these circumstances, I am satisfied, irrespective of the fact that the Contract contemplated the stages of the work being performed in divisible parts, that Mr Board is correct to submit that, on the proper meaning and interpretation of the Contract, Winch was not obliged to provide any services by any fixed date where the Disputed Invoices had not been paid and that Winch was entitled to and did suspend the provision of services under the Contract and that accordingly there is no breach of Contract by Winch. In any event Mr Le Souf cannot take advantage of his own breach of contract by claiming that Winch has failed to perform on time.
98. If I am wrong on this and there has been a breach of contract, and even if I was prepared to overlook the deficiencies in the way the case has been pleaded, there is simply no evidence of the alleged or any loss and damage, whether in relation to the pleaded paragraph 5 Counterclaim or the paragraph 7 Counterclaim. A further discrete point arises here in that it seems to me that those pleaded losses would, if suffered at all, be losses suffered by Somnio as owner of the Yacht.
99. In my judgment, for all of these reasons, the Counterclaim fails as a matter of pleading, law and lack of evidence. In any event, it is reasonably clear from the evidence of Ms Grapin, which I accept on this point, that Winch has substantially performed the Contract by providing services including recruiting and assigning a team to work on the Project, supplying drawings and making presentations and that Mr Le Souef has acknowledged the work done in the emails which have referred to when setting out the facts. I agree with the broad submission made that the real substantive reasons for the delay to the Project were Mr Le Souef's inability to finance it and problems liaising with the shipyard and that Winch did use its reasonable endeavours to meet the performance dates specified in the Timetable in the Contract.

Disposal

100. For all of these reasons, it seems to me that Winch is entitled to an order against Mr Le Souef that he is indebted to Winch in the sum of £733,750.00 and to interest on that sum pursuant to clause 5.6 of the Contract at a rate of 3% per annum above Base Rate and I order that the Counterclaim is dismissed.
101. I invite the parties to agree, if possible, the terms of an Order which reflects my judgment and to deal with matters consequential on the judgment. If matters cannot be agreed, I will deal with them by way of oral submissions or, if strictly necessary, at a further hearing.