Neutral Citation Number: [2019] EWHC 3060 (TCC)

Case No: HT-2018-000172

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/11/2019

Before :

MR ALEXANDER NISSEN QC

(sitting as a Deputy High Court Judge)

- -

Between :

EVERWARM LIMITED	**Claimant**
- and –	
BN RENDERING LIMITED	**Defendant**

- -
- -

IAIN QUIRK (instructed by **Harper Macleod LLP**) for the **Claimant**

CATHERINE PIERCY (instructed by **Goodman Derrick LLP**) for the **Defendant**

Hearing dates: 22, 23, 24, 25 and 30 July 2019

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Approved Judgment

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

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MR ALEXANDER NISSEN QC

MR ALEXANDER NISSEN QC :

Introduction

1. In these proceedings and in the circumstances described below, the Claimant, Everwarm Limited ("Everwarm") claims £798,468 against the Defendant, BN Rendering Limited ("BN"). In turn, BN counterclaims against Everwarm, as explained below, in the sum of £1,957,905. Alternative sums are claimed to be due to BN based on differently formulated causes of action.

2. Although the facts and matters to which these proceedings relate date back to as long ago as December 2013, the present trial date was only fixed in January 2019 once the case had been transferred to the TCC. In March 2019, Fraser J ordered that the trial to which this judgment gives rise would be of all matters save for those contained in paragraphs 57 to 60 of the Amended Defence and Counterclaim. It was ordered that directions for the trial of the issues raised by those paragraphs were only to be given following a hand-down of this judgment which was intended to deal with all other issues in the case.

3. At the trial, I heard from the following witnesses on behalf of Everwarm: Mr Grandison, an assistant quantity surveyor for Everwarm; Mr Stirling, the managing director of Everwarm; Mr McMahon, an earlier commercial manager for Everwarm; Mr McMaster, the current commercial manager for Everwarm; Mr Johnston from Turner & Townsend, quantity surveyors. I heard from the following witnesses on behalf of BN: Mr Pristyak, a supervisor/administrator for BN; Mr McGill, another supervisor; Mr Nemeth, who is the sole director and shareholder of BN; and Mr Gordon, the operational manager of BN.

4. A witness statement of Kathleen Gordon was served on behalf of BN. It was agreed that her evidence could be given in written form as its contents were not controversial. Everwarm reserved the right to make submissions as to the relevance of her evidence but, in the end, none were made by either party.

5. A witness statement of Mr Wilson had been served by Everwarm. He was previously a site manager and later an area manager for Everwarm. He was unable to attend court but it was agreed that his written evidence was admissible. It was left to me to determine what weight could be placed upon it bearing in mind that Mr Wilson was not subject to cross examination in respect of it. Some submissions were made about this in closing.

6. At the end of the trial, I concluded that I would benefit from further written submissions relating, particularly, to the Counterclaim, which had attracted greater significance by the end of the trial. Those were duly provided but, in turn, gave rise to further exchanges which were also dealt with in writing. I also gave permission to both parties to comment on a recent case which had been decided by the Court of Appeal after the service of the initial written submissions. Both parties provided me with further material pursuant to that direction.

Background facts

7. Everwarm is a company which provides energy efficiency advice and related services including the provision of residential external building insulation or EWI as it is known. So far as material for the purposes of these proceedings, the provision of EWI involves two simple but effective steps: the application of insulation board to the external elevations of houses, followed by the provision of a render coating, comprising a mesh and scrim undercoat and then a top coat. In 2014, the Scottish Government injected a massive increase in funding of external wall insulation, under a scheme known as the Home Energy Efficiency Programme Area Based Scheme, the aim of which was to tackle fuel poverty in domestic households. Everwarm found itself well placed to carry out this work and secured plenty of it pursuant to the Heeps Abs Scheme as it was known. Whilst Everwarm procured materials for the insulation works, much of the work and certainly all of the work in these proceedings was carried out pursuant to labour only subcontracts. All of the work was undertaken in Scotland.

8. In late 2013, BN was a company in its infancy. BN was able to offer competitively priced labour from central and eastern Europe using a recruitment company in Hungary (Mr Nemeth's home country) and, as a result, BN subsequently became the beneficiary of huge quantities of labour only work from Everwarm in respect of the EWI works for various projects. These proceedings concern all 38 subcontracts between the parties. There came a point in time when BN was undertaking around 70 to 80% of Everwarm's EWI work.

9. At the outset and for some considerable period of time thereafter, the relationship between the two parties was remarkably informal. Very few of the activities undertaken by BN for Everwarm were ever contemporaneously recorded in writing. It is not in dispute that many of the subcontracts were themselves concluded orally. Occasional but irregular meetings took place between the management of both companies but those meetings were not minuted. The records of work undertaken on the sites, particularly in respect of additional work, are poor or non-existent. That is not the result of many documents having been lost. Rather, it reflects the way in which both companies operated. For its part, Everwarm may have had procedures in place for concluding subcontracts, for instructing, identifying and recording work and so on. But having heard from various witnesses, it is as plain as can be that those procedures were seldom adhered to. Quantity surveyors and site supervisors appear to have been quite lax in their approach. As a matter of generality work, including additional work, was instructed and undertaken without any proper record being kept on either side of the instruction or the work done pursuant to it. Occasionally, there is a written record of additional work having been ordered and undertaken e.g. in the form of a site instruction. For its part, BN was just as informal in its approach to the works undertaken pursuant to these subcontracts. Its sole director and shareholder, Mr Nemeth, admitted he was effectively operating the company from his car, without an office base or any proper administration behind him. He had no employees to deal with those matters. Despite the informal manner in which both parties conducted their relationship over the first two years, between them they managed to commission and undertake work to a staggering value of about £8 million.

10. From late 2015, Everwarm began to issue written subcontract orders. Mr McMahon notified Mr Nemeth that interim payments would be moving from a fortnightly cycle to a monthly one, with which BN was content. I do not have the general impression

that much else changed. Mr Nemeth said, and I accept, that Everwarm's site managers continued to do business in the same way as before. Even then, not all the subcontracts were in writing. Over the time which followed, various of the quantity surveyors which Everwarm had employed left the company.

11. Thus, it is common ground that between 2013 and March 2016, the parties concluded a series of subcontracts pursuant to which the EWI works were undertaken. Each one related to and was generally known by the geographical area within which the relevant properties to receive EWI works were situated e.g. Stenhousemuir or Falkirk. Interim payments were generally made on a fortnightly, later monthly, basis for each subcontract. In each case, a basic labour rate for every square metre of EWI applied was agreed (made up of three sub-rates for insulation, mesh and scrim coat and top coat finish respectively). Since EWI is applied throughout a given property, the area can, if necessary, be measured from the physical dimensions, omitting the door and window openings. In some geographical areas, such as those in Aberdeenshire, which were relatively inaccessible, a higher rate per square metre was agreed to allow for transport and accommodation costs.

12. Payments were applied for using a standard template which Everwarm had provided and which BN completed. Later, when the payment cycle changed, a new template was used. A single payment was made globally for all subcontracts but, initially at least, this was done in a way which enabled BN to work out what amount had been paid in respect of which subcontract. Later, this was not so clear.

13. One particular issue that arises between the parties to this dispute concerns "ingoes". No-one was able to identify the derivation of the word but it was generally used by these parties at the time to describe the window and door reveals. In an ideal world, it would be beneficial to apply insulation and render to those areas in addition to the elevations. Space is obviously needed to open the door or window but, in some cases, thinner insulation could still be applied beneath the render, depending on the available depth, without impairing the functionality of the door or window. Otherwise the areas would simply be finished off with render. There is a dispute about the rate of payment for work to ingoes with which I deal in more detail below. At the time, BN claimed payment for work done on ingoes by simply adding a standard quantity of $1m^2$ for each opening (be it a window or a door) to the measured work. Its case is that it did so because this was the agreed basis of measurement. The amount claimed in respect of ingoes was (generally) not separately identified from the measured work. It was therefore unsurprising that when the parties later began to compare their respective measures, they did not match.

14. The parties are now in dispute about the amounts to which BN is properly entitled in respect of each of the 38 subcontracts. At its basic level, Everwarm contends that it has overpaid BN on many of the subcontracts whereas BN claims further payments are due both in respect of those subcontracts and in respect of other ones not sued upon by Everwarm.

15. I should briefly explain the circumstances in which I find that the present dispute has arisen. In early 2016 BN formed the view that a pattern of systematic underpayments was being made. Mr Nemeth was not prepared to allow this to continue and he raised it with Everwarm. The relationship began to deteriorate. Everwarm suggested that

Mr Nemeth was personally acting dishonestly, which he denied, and that BN was claiming to have worked on some streets that did not exist (although this seems to have been simply an error of description, as Mr Nemeth explained). Nonetheless, despite these issues, further subcontracts were issued for other sites and works continued.

16. Mr Nemeth pressed his concerns about serial underpayments in May, July and October 2016. He did not get what he regarded as a satisfactory explanation. Mr Stirling and some quantity surveyors at Everwarm tried to work through the documentation to establish whether there were underpayments. Discrepancies between BN's valuations and Everwarm's measures became apparent. In retrospect, it seems a significant proportion of these were attributable to the way in which BN had claimed for ingoes, for which Everwarm made no separate allowance.

17. There was a meeting on 8 December 2016, attended by Mr Stirling, Mr McMaster, Mr McMahon, Mr Nemeth and his then solicitor, Mr Corcoran. Everwarm explained what it required in terms of substantiation in order to progress the matter. The demands were extensive. At a subsequent meeting held on 13 December 2016, Mr Nemeth presented Everwarm with a folder of emails and instructions which he said supported a large proportion of the disputed elements of additional work. The file did not satisfy Everwarm and, as a result, no further money was forthcoming. In March 2017, BN took the decision to suspend its works on all on-going subcontracts. Mr Stirling met with Mr McGill of BN and proposed that Everwarm would employ both BN's workforce and Mr McGill directly but this never happened. On 14 March 2017, Mr Stirling of Everwarm sent multiple letters alleging that the withdrawal of labour was a breach of BN's obligations under the various subcontracts.

18. In April 2017, Mr Nemeth asked Mr Gordon to help him recover what he considered was owing to BN. Mr Nemeth knew Mr Gordon well because he was in a personal relationship with Mr Gordon's daughter. Mr Gordon originally qualified as an Estates Surveyor but described himself as a general practice surveyor with 30 years in the construction industry. He had experience of local authority work and was used to dealing with and managing quantity surveyors and construction contracts. He said he had a decent knowledge and understanding of contractual procedures, payment notices and so on. He was, to my mind, an impressive witness. He plainly brought order and light to BN's business where, previously, it had been wholly lacking. To his credit, Mr Nemeth was the first to acknowledge that. It was only shortly before hiring Mr Gordon that Mr Nemeth actually found his first proper business premises.

19. Mr Gordon set about the task of trying to establish what BN was owed and how it could be recovered. He came to the conclusion that it would be easier to recover retention monies than it would underpayments for measured and additional work. A series of identical letters for each subcontract were sent to Everwarm on 4 May 2017 asserting that the subcontract works in question had been completed. This was intended as a precursor to BN claiming a right to payment in respect of retention. Letters claiming retention were then sent on 25 May 2017. Earlier, on 5 May 2017, Mr Gordon had introduced himself by email to Mr McMaster of Everwarm. Mr McMaster referred to the fact that BN had withdrawn all its labour on the various sites from 13 March 2017 and that the impact of this was still being calculated. In the meantime, Mr McMaster said that Everwarm had employed both Turner & Townsend

("T&T") and lawyers to reconcile the overall account with BN. He expressed the hope that Everwarm would soon be in a position to discuss or issue final accounts in respect of all works executed by BN but, in fact, that was not the approach which Mr McMaster later followed. I describe in more detail what T&T was asked to do and how it actually went about carrying out its instructions but, in the end, a series of Payment Sheets were produced by it for Everwarm in respect of each subcontract and, on the basis of these, Everwarm issued its monetary demands to BN pursuant to Clause 4.9 of each subcontract in a series of letters dated 21 June 2017. I set out the terms of these letters below. I reject Mr McMaster's evidence that, thereafter, his door was open for discussion with BN. By now, Everwarm's clear and express objective was to close down the accounts.

20. On 20 July 2017 BN replied to each letter of 21 June 2017 with a standard response, the detail of which I set out below. But, attached to the letters, BN provided its own statement of the total value of the Final Account for each subcontract. It is these attachments upon which BN relies in respect of its counterclaim. Everwarm did not respond to these and, instead, issued proceedings based on Clause 4.9 in October 2017.

21. It is right to record that there has been no complaint about the quality of BN's works. However, subsumed within Everwarm's claim are comparatively minor costs flowing from the dispute about termination and claims for other contra charges.

22. Standing back, it seems pretty obvious that the parties would ultimately find themselves in dispute about the amounts that were due in respect of the Final Accounts for each subcontract given both the informal way in which the parties had worked and the scale and value of work which had been undertaken. However, in my judgment, one of the key reasons why the parties have subsequently been unable to reach any consensus is because Everwarm has continually adopted a wholly unrealistic approach to the valuation exercise. It has patently failed to recognise the informal, largely oral, way in which many matters on site were conducted. Unless something was evidenced in writing, Everwarm has simply not been prepared to acknowledge it ever happened. That is why it has been unimpressed with the supporting material which BN had provided. In circumstances where almost all of Everwarm's on-site staff have since left the company, it has also been unable and unwilling to make any allowance for what may have been agreed orally on site on behalf of the company. The individuals do not appear to have been traced and, even if their files were reviewed, I do not have the impression that this was done with any diligence. In their dealings with BN, Mr Stirling and Mr McMaster have assumed a quality of performance and industry on the part of its own staff which was plainly absent. Nor did Everwarm even attempt to measure and value BN's works using its own contemporary records. For example, where site instructions were issued in writing, the practice was that two copies would (or should) have been kept by Everwarm. Yet, during this period, Everwarm insisted that BN provide its own copies of site instructions in order for them to be taken into account despite the fact that it should have been able to use its own records, had it been of a mind to do so. None of these observations are intended to suggest a finding on my part that, in every case where an oral agreement or method of working is alleged by BN, such in fact happened. Rather, I am suggesting that it was unrealistic for Everwarm to have proceeded on the basis that anything not evidenced in writing did not happen and

cannot attract a value. The unreasonableness of Everwarm's approach was apparent in other ways too: for example, BN asked to be provided with the dimensions of Everwarm's measures for comparison but they were not sent, thereby precluding any discussion about them; and Mr McMaster absurdly complained that BN's dimensions were too accurate because they had been carried out to three decimal places.

23. Everwarm's claim in these proceedings is based solely on the application of a specific written contractual provision in Clause 4.9 of Revisions 7 and 8 of its terms and conditions ("Rev 7" or "Rev 8" as applicable) which, on its case, allows it to make an assessment of the sum due to BN and to reclaim any overpayment arising from the difference between the assessment and the sum paid. It is common ground that this written term was first introduced in December 2015 (the Dunfermline subcontract) by which time a good number of earlier subcontracts had already been concluded. In the case of the later, written, subcontracts, there is no dispute that the clause was incorporated but BN raises a variety of defences to the claim based on the provision. In the case of other subcontracts, BN says the clause was not incorporated at all. It is common ground that a number of the subcontracts were made orally. But in such cases Everwarm relied on Clause 4.9 anyway, either because it says the oral subcontract was made on terms which incorporated by reference the written provisions of which, by then, BN had notice or because the subcontracts which pre-dated such notice were later varied to include the written terms. Given that the latter contention had not been pleaded, Ms Piercy, who appeared for BN, objected to this being raised at trial and, sensibly, Mr Quirk, who appeared for Everwarm, did not pursue it. Indeed, in closing submissions, Everwarm conceded that Clause 4.9 did not apply to any subcontracts entered into prior to 21 December 2015. This concession significantly reduced the value of Everwarm's claim in this action.

24. There was no response to BN's letters of 4 May 2017 about the completion dates and, as I have said, these were followed up with demands for release of retention on 25 May 2017. BN now counterclaims for the release of retentions under the subcontracts. In addition, although this is a substantive trial, BN's counterclaim is based on an alleged failure by Everwarm to provide a payment notice, or pay less notice, in respect of the Final Account payment under each subcontract as required pursuant to the Housing, Grants (Construction and Regeneration) Act ("HGCRA"). This claim is based on the letters of 20 July 2017 to which there was no response. This is the type of claim more conventionally raised in adjudication, Part 8 proceedings or by way of summary judgment but there is nothing to stop it being raised as part of a Part 7 trial. BN's alternative claim is for an assessment of the correct value of the final payments due to it under each subcontract. That is the matter which did not form part of the trial leading up to this judgment.

The Issues

25. The parties agreed that the issues which fell for determination in this trial were as follows:

    1. Did the Claimant's standard terms and conditions apply to all of the Sub-Contracts and if so which revision of the "Standard Terms" applied to each subcontract?
    2. Were there any terms to be implied into the Sub-Contracts?

3. In respect of each Sub-Contract into which Clause 4.9 and/or Clause 4 of the Claimant's standard terms and conditions is found to have been incorporated, are such terms void or unenforceable?
4. Was what the Defendant calls the Agreed Method (RADC, para. 5) (including that an allowance of 1 m^2 was to be added back into the measurement of the properties for any large opening, such as a window or door) agreed by the parties in respect of the Sub-Contracts, so as to amend the standard procedure for measurement of the properties?
5. What rate was agreed in respect of each Subcontract?
6. Has the Claimant carried out its assessment in accordance with the express and implied terms of each of the Sub-Contracts?
7. Is the Claimant entitled to £798,468 (together with interest) as a debt due and owing pursuant to Clause 4.9 of the Claimant's standard terms and conditions?
8. Is the Defendant entitled to:
    a. the sums set out in its final accounts submitted to the Claimant, in the total remaining amount of £1,225,571.82 plus applicable VAT of £245,114.36;
    b. the sum claimed in respect of retentions, namely £406,015.90 plus VAT of £81,203.26 and interest?

26. I do not intend to deal with these issues in the order listed but the final section of this judgment provides the conclusions I have reached in respect of each issue.

The Subcontracts

27. I must first determine the basis and terms upon which each of the subcontracts was made. That is not only relevant to Everwarm's case based on Clause 4.9 but is also relevant to issues arising pursuant to the counterclaim.

RANDCHA

28. Inevitably, I must start with the first subcontract. This was for a project known as RANDCHA, which was no doubt a welcome abbreviation for work undertaken for the Rutherglen and Cambuslang Housing Association. The circumstances in which this subcontract came into being were not initially in issue on the pleadings. Everwarm did not describe the RANDCHA subcontract as a written subcontract, which must necessarily have meant it was alleging that the subcontract was made orally. Moreover, BN had pleaded in terms that the subcontract was an oral one and Everwarm then admitted this. But by the time of trial it became clear that Everwarm's case had shifted to one in which it was submitting that this subcontract was concluded in writing on the basis of Everwarm's terms and conditions dated 2013. Ms Piercy objected to Everwarm's change of position both orally and in the subsequent submissions provided in writing. She alleged that BN was prejudiced because it had not been provided with the 2013 terms until disclosure and, even then, had attached no importance to them in the absence of any plea dependent on them. She pointed out that the 2013 terms were now being relied on by way of defence to the counterclaim.

29. Mr Quirk accepted that Everwarm's position had changed but said that I should have regard to the evidence as it was. This evidence included Mr Nemeth's own admission within his witness statement (confirmed orally at trial) that, on behalf of BN, he was

provided with a written document which made reference to the written terms. At paragraph 42 of Mr Nemeth's own witness statement he said:

> *"As this was BN's first job with Everwarm, I asked for a written contract. This request lead to the issuing of a sub-contract order, dated 17 December 2013. Exhibit LN1/66 attached is a scanned copy of the sub-contract order for RANCHA as provided to me and signed by me."*

30. The failure by both parties to properly identify the impact of this evidence has therefore given rise to various difficulties. Given Mr Nemeth's own evidence, described above, BN can hardly have been taken by surprise by an allegation that this was a contract concluded, at least in part, in writing. There was force in Mr Quirk's point that I could not be artificially constrained by the pleadings to make fictional findings of fact which were plainly contrary to BN's own evidence.

31. However, the same approach to pleading must apply equally to Everwarm in this context. For other purposes, Mr Quirk later sought to make capital from the fact that BN had not pleaded that there was an agreement to fortnightly payments at this initial meeting nor that there was to be an agreed template for administering payments. But that had always been Mr Nemeth's written evidence[1] and, in any event, the written order upon which Everwarm itself now relies specifically states that payments were to be made fortnightly.

32. In short, it seemed to me that the fairest way to deal with this difficulty was to allow both parties to rely on and make submissions in respect of the written and oral evidence as it was given at trial. Whilst accepting that no application was made to amend the pleadings on either side in relation to this meeting, the basis and terms of the first subcontract between these parties is potentially fundamental to the rest of the case and I consider that I must decide the facts relating to that subcontract in light of the evidence as it was adduced and cross examined upon on both sides. In my judgment, both parties had a full and sufficient opportunity to deal with the facts surrounding the new case on the making of this subcontract and neither was prejudiced by the development of it.

33. I should also record that although Ms Piercy accepted that a consequence of my upholding her pleading objection would have been that she would similarly be unable to rely on the two terms to which Mr Quirk objected, I did not understand her to concede that, if I rejected her pleading objection, as I have done, she should be unable to rely on those two terms.

34. Having got those preliminary points out of the way, I now turn to the substance of the matter. Evidence as to the circumstances in which the RANDCHA subcontract was made was given by Mr McMahon on behalf of Everwarm and Mr Nemeth on behalf of BN. Mr McMahon no longer works for Everwarm but at the time, namely December 2013, he was a commercial manager. I have already mentioned that Mr Nemeth is the sole director of BN. It is common ground that a meeting took place in December 2013 between Mr Nemeth, Mr McMahon and a Mr Hughes of Everwarm. For immaterial reasons, Everwarm chose not to serve any evidence from Mr Hughes.

[1] See paragraph 41 of his witness statement.

There are no written notes of the meeting. Mr Nemeth and Mr McMahon both did their best to assist the Court with their recollection of events which occurred over five years ago. But I accept that the meeting would have seemed more important to Mr Nemeth, given that it was a major opportunity for him to grow his newly formed business, and that he was more likely to remember the initial details as a result.

35. Mr Nemeth's recollection is that an agreement was reached at the meeting as to the terms upon which BN would undertake the RANDCHA works. The basic terms were that BN would be paid at the rate of £21.50/m² for the provision of labour to carry out the EWI works at properties. Payments would be made fortnightly. Mr Nemeth did not differentiate between the fortnightly interim payments and the final payment which would be the ultimate reconciliation but I conclude he must have understood and orally agreed to a regime of both interim and final payments. That was also Mr McMahon's understanding. It was also agreed that the works would begin on 6 January 2014 and would be at the properties to be identified by Everwarm. There was no discussion about retention but Mr Nemeth signed the one-page Order which, on its face, provided for retention. Mr Nemeth says that at the meeting he asked for a written document by way of confirmation and was provided with a one-page Sub-Contract Order which he signed in the presence of Mr McMahon and Mr Hughes. He did not ask for and was never shown the five-page Everwarm Terms and Conditions referred to on the single page. He took the signed Order away with him. He denies ever receiving anything else in writing then or subsequently.

36. Mr McMahon's evidence was that the meeting was to discuss and agree terms but the subcontract could not have been and was not reduced to writing until after the meeting had concluded those terms. His evidence was that no written document was handed to Mr Nemeth at the meeting but that, on or around 17 December 2013, BN was provided with the Order, a Contract Sum Analysis and the five-page conditions. The Order bears the typed name of Mr Clocherty, Quantity Surveyor for Everwarm.

37. I am satisfied that, on this issue, Mr Nemeth's evidence is to be preferred. It is simply a more credible version of events. Fundamentally, there is no evidence of any email (that being the subsequently preferred mode of communication) from Everwarm sending a written order to BN. If such had existed, I am quite sure I would have been shown it. There was no direct evidence that anything was given or posted by Everwarm either. Mr McMahon's evidence was that a QS was responsible for issuing the written terms but Everwarm adduced no evidence from any QS, particularly Mr Clocherty, to demonstrate that he did so. Mr McMahon's evidence that a written Subcontract Order would have been issued was, therefore, no more than an assumption on his part. In this respect, I do not accept it as evidence of what actually happened. Mr McMahon's evidence was that he expected a Subcontract Order to be in place for each following subcontract yet, it is clear, there were multiple subcontracts which were concluded orally without the delivery of any written subcontracts. It is therefore clear that there was a divergence between what Mr McMahon was expecting members of his QS team to do and what they were actually doing in practice.

38. Moreover, the pack of documents included in the trial bundle as those purportedly sent to BN were plainly not the right documents for a labour only subcontract with BN because they included a contract sum analysis for an entirely different

subcontractor, namely Insulated Render Systems, who were providing both labour and materials. Nor is there any evidence of Everwarm chasing BN for written acceptance of the terms. I also accept Mr Nemeth would have wanted to take away written confirmation of the agreed terms because he needed to secure labour to perform the works. This was a new relationship and he wanted some proof that this was a legally binding commitment by Everwarm to employ BN.

39. I therefore conclude that this subcontract was concluded at the meeting in December 2013 at which BN agreed to and signed a one-page written subcontract which was provided to it. It was therefore a contract which was concluded both orally and in writing.

40. The next question is whether that subcontract incorporated Everwarm's five-page terms and conditions. The Subcontract Order says:

> *"Please supply all necessary labour, small plant and tools required to carry out the External Wall Insulation including the installation of all trims, beads etc.*
>
> *1. Contract Sum Analysis*
>
> *2. Everwarm's Subcontract Terms and Conditions – 5 pages*
> *ALL FOR THE AGREED RATE OF £21.50 PER M2*
>
> *ANTICIPATED DATE OF COMMENCEMENT OF SUB CONTRACT WORKS: As per programme of works*
>
> *PERIOD OF NOTICE TO COMMENCE SUB CONTRACT WORKS: 1 week*
>
> *DURATION OF SUB CONTRACT WORKS: As per programme of works*
>
> *RETENTION: 2.5% DISCOUNT: 0.00%*
>
> *DEFECTS LIABILITY PERIOD: 12 months*
>
> *PAYMENT TERMS: Fortnightly*
>
> *The Site Manager for the project will be To Be Confirmed who can be contacted on To Be Confirmed. Please contact the Site Manager upon receipt of Sub Contract Order.*
>
> *It should be stressed that no Sub-Contract exists until Everwarm receives your signed copy of this Order, thereby indicating your agreement to its terms and conditions. If a signed copy of Order is not returned within 7 days of receipt of same, then it will be deemed that you have accepted its contents and will comply with the terms and conditions…"*

41. Ms Piercy submitted that the content of the one-page written Order was not binding because Mr Nemeth had only asked for written confirmation of the terms which had already been agreed orally and, therefore, that written terms which had not been the subject of oral discussion could not properly form part of that written record. Alternatively, she submits that even if the one-page written Order was binding, the five-page terms and conditions referred to within it were not incorporated. Mr Quirk submitted that the five-page terms and conditions were both accepted and incorporated. It is convenient to take these points together.

42. On the evidence, I am satisfied that Mr Nemeth asked for and was, to his knowledge, provided with a written Subcontract Order. Insofar as he occasionally suggested in his oral evidence that his request was only for some form of verification or confirmation, rather than a Subcontract Order, I reject it. That is because he also accepted in evidence that he asked for and was provided with a written contract. Anyone seeing the document provided to him would have known that this was a contract document and that it contained terms. I am satisfied that Mr Nemeth himself knew this, not least because it was what he had asked for.

43. Mr Nemeth's evidence was that he read the reference to Everwarm's terms and conditions in point numbered 2 but thought nothing of it. I accept that evidence. It was open to him to ask those present for a copy of those terms and conditions but he chose not to do so.

44. Mr Nemeth publicly indicated BN's consent to the terms of the written subcontract order by signing it in front of the two Everwarm representatives. It is irrelevant that it was Mr Nemeth who took away the only signed copy. I consider this action of signing in the presence of Everwarm was sufficient to comply with the prescribed mode of acceptance in the final paragraph of the written Order but, even if it was not, a subcontract would, by default, have come into existence 7 days later.

45. Leaving aside the five-page terms and conditions, it is clear that the written terms went beyond those discussed orally. In particular, there was no oral discussion about retention. But in my judgment, by reading and signing the one-page written order, Mr Nemeth agreed on behalf of BN a term on the face of that order that the payments to which BN was entitled would be subject to a retention of 2.5% for the duration of the defects liability period, namely 12 months. The parties must have intended that the defects liability period would commence on completion of the works.

46. In respect of the Everwarm terms and conditions both Ms Piercy and Mr Quirk referred me to Chitty on Contracts 33rd edition. Paragraph 13-009 states:

> *"Where the conditions are contained in a document, the document must be of a class which either the party receiving it knows, or which a reasonable man would expect, to contain contractual conditions."*

47. Paragraph 13-013 states:

> *"It is not necessary that the conditions contained in the standard form document should have been read by the person receiving it, or that he should have been made subjectively aware of their import or effect. The rules which have been laid down by the courts regarding notice in such circumstances are three in number:*
>
> *(1) if the person receiving the document did not know that there was writing or printing on it, he is not bound;*
> *(2) if he knew that the writing or printing contained or referred to conditions, he is bound;*
> (3) *if the party tendering the document did what was reasonably sufficient to give the other party notice of the conditions, and if the other party knew that*

> *there was writing or printing on the document, but did not know it contained conditions, then the conditions will become terms of the contract between them."*

48. Paragraph 13-014 continues:

> *"It is not necessary that the conditions themselves should be set out in the document tendered: they may be incorporated by reference, provided that reasonable notice of them has been given."*

49. I am satisfied on the evidence that Mr Nemeth knew that the one-page written subcontract order referred to terms and conditions. He was simply not interested in their content. Accordingly, BN is bound, pursuant to the second principle identified in Chitty on Contracts.

50. But, in any event, I conclude that Everwarm did what was reasonably sufficient to give BN notice of the terms and conditions. Mr Nemeth knew that the one-page subcontract contained writing on it and, even if he did not know it contained reference to terms and conditions, Everwarm had done what was sufficient to make that clear. I reject Ms Piercy's submission that Everwarm did absolutely nothing to draw to BN's attention the fact that the order was subject to terms and conditions. I agree this was not expressed orally but it was clearly stated on the face of the one-page document. Indeed, the terms and conditions were referred to twice on that page. Ms Piercy described the reference as "a small one line" but that is all that is required. It was clear and legible. I reject Ms Piercy's submission that all Everwarm did was to put a document under BN's nose which was then signed. It was Mr Nemeth who asked for a written contract. Once he was given the one-page document it was open to him to take as long as he wanted to read it before signing it. He chose not to read it. Whilst he is Hungarian, his command of English was, in my judgment, sufficient to understand that terms and conditions were being referred to on the face of the Order. Indeed, as I have said, Mr Nemeth knew that. I have no reason to doubt that, if asked by Mr Nemeth, Everwarm would have agreed to provide BN with a copy of those terms and conditions. I do not need specific evidence from Mr McMahon to reach that conclusion. It would have been standard commercial practice for any business, such as Everwarm, to have done so, if asked. Accordingly, I would find in the alternative that BN is bound by the terms and conditions, pursuant to the third principle identified in Chitty on Contracts.

51. Ms Piercy also submitted that there is no evidence that the Everwarm terms and conditions contained in the form disclosed by Everwarm (subsequently included in the trial bundle) were the applicable terms in any event. I am satisfied that they were. I draw that conclusion because they are, as described, five-pages long and because they were found on Everwarm's disclosure to have been attached to the one-page Order bearing BN's name. I accept that this pack of documentation was not sent to BN. I also agree that the pack includes a Contract Sum Analysis which relates to an entirely different subcontractor. But both of those are beside the point. The issue is whether the terms and conditions which were included in the pack were the ones to which reference was made on the face of the Order. Given the date, it is a fair conclusion that they were. In contrast to the position which occurred later, there is no evidence of there being any rival set of terms and conditions in circulation at the time.

The subsequent oral contracts after RANDCHA

52. It is common ground that for some time following the RANDCHA Subcontract Order, the parties operated entirely without reference to written subcontract documents. This period of informality ended on 21 December 2015. On that date, it is common ground that, for the first time, Everwarm issued a written Subcontract Order for the Dunfermline works appending its Rev 7 terms and conditions. Thereafter, subject to two exceptions to which I will return, written orders were invariably issued. I must therefore consider the basis upon which Everwarm engaged BN in the period between RANDCHA and 21 December 2015.

53. As I have said, whilst it was Mr McMahon's expectation that subcontracts would have all been in writing, even he acknowledged that there were exceptions during very busy times. I find that these were very busy times. The amount of work to be undertaken by Everwarm and, in turn, BN grew exponentially.

54. Each subcontract in this period was therefore concluded in a rudimentary way. Mr Nemeth explained that everything was very informal. Matters were agreed orally, whether on site, on the telephone or at Everwarm's head office. The standard £/m² rate was agreed in this way. Higher rates were agreed for locations that were more inaccessible. Over time, the standard rate also increased because there was a high demand in the market.

55. I therefore find that, for each new subcontract presently under consideration, there was an informal oral exchange whereby BN would agree to undertake the EWI works for Everwarm, for the rate which was discussed, at the site to which the agreement related.

56. Everwarm's case is that, in respect of those oral subcontracts, the parties operated on the basis that the same terms as those applicable to RANDCHA (which I have found included the five-page terms and conditions) applied thereafter. In support of that case, Mr Quirk relies on evidence from Mr Nemeth in which this exchange occurred:

> *"Q: Now, you say that was because it was the first job you didn't ask for a written contract in relation to the second job or the third job etc?*
> *A: No.*
> *Q: And the reason for that was because you were working on the assumption that the same terms would apply, is that right?*
> *A: What we discussed, yeah. Definitely, yeah"*

57. Mr Quirk accepts that this exchange was referring only to the oral terms discussed in the meeting but submits that if, on analysis, the five-page written terms and conditions also apply to the first job, the same intention objectively ascertained, holds good. His submission was that the parties must have intended to operate on the basis of all of the RANDCHA terms, whatever they were.

58. By contrast, in line with the pleadings, Ms Piercy submitted that the only terms to which these subcontracts were subject were the terms which were orally discussed. In each case these primarily related to the identification of the site, the applicable

£/m² rate and the interim payment cycle. She submitted that there was no notice provided to BN at all that the Rev 7 (or 8) terms would apply to those oral contracts.

59. I agree that Mr Nemeth's evidence set out above was concerned only with the terms agreed in the meeting and was not a concession on his part that if I were to hold the written standard terms applied to RANDCHA he intended them to apply equally thereafter. But I do accept his evidence that his intention was that the other terms which were orally agreed at the meeting would be the same. I also find that that was Everwarm's intention.

60. So, it becomes necessary to examine Mr Quirk's submission that the intention of the parties, objectively ascertained, was that the five-page terms and conditions would apply to the oral subcontracts agreed subsequently. I am not satisfied that on each, or any, subsequent occasion that was their common intention. In contrast to the RANDCHA subcontract, which was concluded partly orally and partly in writing, the second subcontract was purely oral. It was wholly informal. Everwarm could have, but chose not to, issue a formal subcontract order of the type used on RANDCHA. Unlike on RANDCHA, BN did not ask for one to be provided. There is no evidence of any discussion that the same five-page terms and conditions would apply. No attempt had been made to remind BN of the Everwarm terms and conditions. They were simply not referred to at all. As is pointed out in Chitty on Contracts at 13-011:

> *"Conditions will not necessarily be incorporated into a contract by reason of the fact that the parties have, on previous occasions, dealt with each other subject to those conditions."*

61. In this case, the mere conclusion of one prior subcontract, namely RANDCHA, on the basis of the five-page terms and conditions is not a sufficient basis upon which I consider that a course of dealing on those terms had arisen for the second, third or subsequent subcontracts.

62. I therefore conclude that the subcontracts concluded orally in the period between RANDCHA and 21 December 2015 were oral contracts that did not contain and were not subject to Everwarm's written terms and conditions which applied to the RANDCHA subcontract. These oral subcontracts are: (2014): Holytown, Chapelhall, Petersburn, Carntyne, Aberdeenshire; (2015): Loanhead/Mid Lothian; Kilsyth Heeps; Redcraigs; Blackcraigs; Stenhousemuir; Deans West Lothian; Huntley Terrace, Port Glasgow; John Street Greenock, Falkirk, Bardrainney 14/15 Heeps; Ferguslie Park; Armadale Ph 1 and 2; Ballingry; Irvine Ph 1 and Ph 2; Millport; Faifley; Haghill Ph 1 and Ph 2B; Aberdeen City; and Easthall Park HA Ph 1.

63. In respect of Irvine, I accept BN's position that, although Phase 2 was introduced later, it was treated as one subcontract. There is no evidence of a written order for the later phase. It is common ground that both phases of Haghill were the subject of one oral subcontract.

Milton and St Andrews Primary

64. As I have set out above, on 21 December 2015, Everwarm first provided BN with written terms for the Dunfermline subcontract including Rev 7. In 2016, there were

two subcontracts which, it is common ground, were made orally. Milton was agreed in February 2016. St Andrews Primary was agreed in April 2016. Accordingly, these were both concluded after the date upon which BN had notice of Everwarm's written terms and conditions.

65. Notwithstanding that these two subcontracts were concluded orally, Everwarm contends that they are subject to its Rev 7 or Rev 8 terms and conditions. It does so on the grounds that Clause 1.2 of the Rev 7 and Rev 8 terms and conditions, both of which by those dates BN had knowledge, says:

> *"These terms and conditions shall be deemed to be incorporated in any contract, agreement or Order between the Company and the Sub-Contractor and shall be in substitution for any other terms and conditions introduced before or after the date of the Order (unless expressly identified and agreed in writing by the Company). Furthermore, any action undertaken by the Sub-Contractor in pursuit of their obligations under this Sub-Contract will be deemed an explicit agreement to these Sub-Contract terms and conditions and cannot be rescinded, altered or amended in any way without mutual agreement by the parties to this Sub-Contract."*

66. Everwarm's case is that, on a proper construction of this provision, the parties must be taken to have agreed to the incorporation of the terms and conditions into the two oral subcontracts in question.

67. I cannot see that the second sentence in Clause 1.2 avails Everwarm. That part of the clause applies to any *"action undertaken by the Sub-Contractor in pursuit of their obligations under this Sub-Contract"* (being the Dunfermline subcontract sent on 21 December 2015) but the premise here is that the terms are rendered applicable to actions undertaken in pursuit of obligations under an entirely different subcontract, namely Milton or St Andrews Primary. That leaves the first (but quite separate) part of the clause which contains a provision that the terms and conditions would be *"deemed to be incorporated"* in any contract, agreement or Order between the parties.

68. Ms Piercy submitted that there was no Order for Milton or St Andrews Primary so the clause has no effect. She points out that the concept of an Order is central because the Subcontractor is defined as the person, firm or company identified in the Order. Whilst I see the force of that point, the clause in question refers not only to an Order but to any "contract" or "agreement" which surely means that the clause could apply despite the absence of an Order. Ms Piercy pointed out, and I agree, that there is no evidence that Everwarm ever discussed or made reference to the Rev 7 or 8 terms when concluding the Milton and St Andrews Primary subcontract.

69. In my judgment, the clause is, in principle, broad enough to apply to an oral agreement. But for it to do so, there would have to be some evidence of the parties' consent to its application, particularly in circumstances where the oral agreements made no reference to these terms and conditions, still less to Clause 1.2 specifically. In this respect, there is simply no evidence of such consent. It is a bootstraps argument to say that by virtue of Clause 1.2 the parties intended the terms and conditions,

including Clause 1.2, to apply, if there is no evidence of any agreement to the application of Clause 1.2 in the first place.

70. Mr Quirk's case was that, even if the parties did not have time to reduce the two oral subcontracts to writing, those oral contracts should not operate in a legal no-man's land devoid of terms. He submits that would be a bizarre and uncommercial outcome. However, in circumstances where, by this date, the parties had already had a lengthy history of agreeing oral subcontracts without reference to any applicable terms and conditions, I reject the submission that it would be a bizarre and uncommercial outcome for them to agree two more subcontracts on exactly the same basis.

71. In reliance on the passage from Chitty on Contracts identified above, Mr Quirk also contended that the written terms were incorporated by a course of dealing. By the time of the Milton subcontract in February 2016, there had been two written subcontracts but one was on Rev 7 terms and the other was on Rev 8 terms. By the time of the St Andrews Primary subcontract in April 2016, there had been two further written subcontracts, again one based on Rev 7 and the other based on Rev 8.

72. Ms Piercy says that this is an insufficient foundation upon which to incorporate the terms by a course of dealing. I agree. Any analysis of a course of dealing would have to take into account the entire history of dealing which passed between the parties. As I have earlier decided, during 2014 and 2015 there were many contracts concluded orally between the parties that were not subject to any written terms and conditions. That accorded with the parties' intentions. I reject the proposition that the parties intended differently in 2016 merely because, on a handful of later occasions, they also concluded a few written subcontracts subject to written terms and conditions. The same can be said of Clause 1.2 in particular. Given the number of occasions on which the parties had transacted without Clause 1.2, I cannot infer that BN agreed by implication that that clause in particular should regulate their dealings going forward. Ms Piercy also points out that at no stage did Everwarm draw the terms and conditions to BN's attention for the purposes of these oral agreements. I agree.

73. There is a further difficulty. Given that, in the period before the Milton subcontract, one written subcontract was on Rev 7 terms and another was on Rev 8 terms, it is quite impossible to say upon which set of terms the course of dealing was founded. The same point applies to the two subsequent written subcontracts sent out in the period before the St Andrews Primary subcontract was concluded. The terms are similar but not identical and, in my judgment, a case based on a course of dealing must be one capable of ascertainment with certainty. Even if Clause 1.2 was otherwise capable of being applied to oral agreements without specific evidence of consent to its application, given that BN had notice of both the Rev 7 and Rev 8 terms, it is simply not possible to reach a concluded view as to which set of terms was *"deemed to be incorporated"*. Both sets of terms cannot be deemed incorporated at the same time and as Ms Piercy submitted, there is no pleaded or evidential basis for concluding that the Rev 7 terms should apply over the Rev 8 terms or vice versa.

74. For these reasons, I have decided that the subcontracts in respect of Milton and St Andrews Primary were concluded orally and were not subject to either the Rev 7 or the Rev 8 terms.

75. I should add that although, in 2017, BN issued correspondence for these and other subcontracts relying on terms which came from Rev 7 or Rev 8, nothing turns on this. BN did so indiscriminately even in respect of subcontracts which, it is now common ground, were not subject to those terms.

The remaining subcontracts

76. The remaining subcontracts were concluded in writing and, although the pre-printed text of the orders suggested that Rev 6 terms were applicable, in no case was a set of terms and conditions meeting that description ever provided. Neither party pleaded that Rev 6 terms and conditions were applicable and, indeed, no evidence of the content of those terms was adduced. Instead, each order was physically accompanied either by the Rev 7 terms or the Rev 8 terms. I therefore conclude that the reference to Rev 6 was simply an obvious mistake. It should have been a reference to whichever set of terms was physically sent with that order. Neither party could have intended the Rev 6 terms to apply in circumstances where they had not been appended but, instead, a different set of terms and conditions had been appended. That presumably explains why it is neither party's case that Rev 6 terms and conditions apply.

77. As I understand it, it is therefore common ground that those written subcontracts were subject to either the Rev 7 or the Rev 8 terms, depending on which set was sent out with the relevant Subcontract Order. Those subcontracts are: Easthall Park HA (Phase 2); Dalmuir Housing Association; Haliburton Waverley Housing; Dunfermline; Dumbiedykes; Falkirk Council; Kincardine (Fourdan); SWI – Southside; Fife Kirkcaldy; Motherwell HEEPS; Tweedbank; and Wellhouse.

78. I should briefly record the circumstances in which there came to be two rival versions of the terms and conditions in existence at the same time. Everwarm had been using its own standard terms and conditions since it was first incorporated back in December 2010. In April 2014, it merged with Lakehouse Contracts Ltd ("Lakehouse"). Lakehouse is based in England so the merger was beneficial because it meant that the two companies could now operate UK wide. From the time of the merger, Everwarm began to deploy the terms and conditions which Lakehouse had been using before the merger. That must have included the Rev 7 terms which are dated January 2015. The "Company" named within those terms and conditions is Lakehouse Contracts Ltd (Company Number 2603357). The Rev 8 terms are also dated January 2015 but, in those terms and conditions, the "Company" named is Everwarm. It therefore seems likely that, on occasions when Everwarm's quantity surveyors issued their written orders, insufficient thought was given to the fact that the subcontracts were with Everwarm, not Lakehouse. There appeared to be no logic about which revision was used for a given subcontract.

The Payment Terms

79. I now turn to consider the payment terms applicable to each of the subcontracts.

RANDCHA

80. I have determined that this subcontract was agreed orally and in writing but, in addition, was also subject to the 5-page terms and conditions. Ms Piercy's earlier pleading objection raises its head again at this juncture. She complains that BN should

not be faced with having to meet a case on the written terms contained in the 2013 subcontract Order or incorporated by reference. I accept that this was not a matter which BN expected to have to deal with but it was an obvious potential consequence of Mr Nemeth's own evidence that he signed the one-page written subcontract referring to those terms and conditions. I am satisfied that, during the course of submissions made at the end of the trial and subsequently, BN has had a sufficient opportunity to consider the proper construction of the 2013 terms and conditions. As it turns out, the consequence of my earlier findings is that these terms and conditions apply only to the RANDCHA subcontract.

81. I have already set out the terms of the one-page Order.

82. As to the five-page terms and conditions, Clause 13, which concerns payment, is in the following terms:

> *"13. PAYMENT TO THE SUB-CONTRACTOR*
>
> *13.1 Unless otherwise specified in the Order or agreed (and subject to the applicability of conditions 13.4 and 13.5 and the operation of conditions 13.7 and 2.2 hereof) the Sub-contractor shall after the commencement of the Sub-Contract Works on Site and 3 days before each Valuation Date submit to the Contractor a detailed statement (identifying by reference to relevant rates and quantities and a sufficient breakdown of the work done) of the Sub-Contractor's estimate of the value of the Sub-Contract Works properly executed. Provided the Sub-Contractor applies as aforesaid the Contractor shall upon the Valuation Date ascertain the value of work properly performed by the Sub-Contractor and conforming materials delivered to Site by the Sub-Contractor and any other work required by the Order to be valued at each Valuation Date.*
>
> *13.2 The value of the Sub-Contract Works ascertained in accordance with condition 13.1 less:*
>
> *(a) any retention discount and/or CITB levy as specified in the Order; and*
>
> *(b) deductions pursuant to condition 14; and*
>
> *(c) deductions pursuant to condition 5; and*
>
> *(d) payments in respect of sums previously due and paid;*
>
> *shall become due to the Sub-Contractor 45 days after each Valuation Date.*
>
> *13.3 The final date for payment of the sums due in accordance with condition 13.2 shall be 5 days after the due date.*

13.4 Weekly payment – Where the Order specifies weekly payment of the Sub-Contractor the value of the Sub-Contract Work shall be ascertained (using the criteria specified in condition 13.1) by the Contractor on the Friday of each working week and (after adjustment as provided in condition 13.2) shall become due on the following Wednesday and final payment of the sum due shall be made on the Monday following the due date.

13.5 Fortnightly payment – Where the Order specifies fortnightly payment of the Sub-Contractor the value of the Sub-Contract Work shall be ascertained (using the criteria specified in clause 13.1) by the Contractor on the second Friday after commencement of work and every second Friday thereafter and the value so ascertained (after adjustment as provided in condition 13.2) shall become due on the Wednesday following the ascertainment date and final payment of the sum due shall be made on the Monday following the due date.

13.6 The Contractor will not later than 5 days after the due date determined in accordance with conditions 13.2 or 13.4 or 13.5 above and conditions 13.9 and 15 below give notice (generally, but not exclusively, in accordance with the pro forma appended to the Order) of the amount of the payment made or proposed to be made and which shall specify the basis on which that amount was calculated.

13.7 The Contractor shall not be obliged to pay any sum due if before the Contractor pays the sum due the Employer or any person from whom the Employer is dependent for payment becomes insolvent (as defined in the Act) with the effect that the Contractor has not been or will not be paid in respect of the Sub-Contract Works to which the payment due relates.

13.8 Daywork – To the extent that any work falls to be valued at Daywork rates the appropriate rates and/or percentages as are reasonable shall apply. Provided that in either case vouchers identifying the time spent each day, the workman's name, the plant and materials utilised shall be submitted to the Contractor for verification by the Wednesday in the week next following the week in which such Daywork is presumed. The ascertainment value of such Daywork and to which the Sub-Contractor is entitled shall be included in the ascertainment of the sum due at the next Valuation Date.

13.9 Without derogation from the requirements of conditions 13.1 and 13.2 and 13.3 upon practical completion of the Sub-Contract Works the Sub-Contractor shall submit to the Contractor within 14 days a final detailed statement of the value of the Sub-Contract Works and provided such a final detailed statement is submitted the Contractor shall upon the expiry of 26 weeks from practical completion of the Sub-Contract Works

> *ascertain the final value of the Sub-Contract Works and any further amount so ascertained shall (after adjustment as provided in condition 13.3 above) become due to the Sub-Contractor 30 days after ascertainment. The final date for payment of the sum so due shall be 35 days after ascertainment.*
>
> *13.9(sic) If as a result of the ascertainment referred to in condition 13.9 a sum is due to the Contractor then such sum shall become a debt due to the Contractor 14 days thereafter in which event the Sub-Contractor will give notice in accordance with condition 13.6. The final date for payment to the Contractor of the sum so due shall be 14 days after the due date".*

83. As set out above in the Order, the basic rate of payment was £21.50/m² payable for the areas of EWI applied. Interim payments were to be made fortnightly (as contemplated by Clause 13.5) and were subject to a 2.5% retention (as contemplated in Clause 14). As I have said, although retention was not discussed orally at the meeting, BN signed an Order which made provision for retention and is therefore bound by that term. Provision for the final payment is addressed in Clause 13.9. Variations are dealt with in Clause 6.

84. On behalf of Everwarm, Mr Quirk submits that Clause 13 contains a full and adequate mechanism for payment and, as such, there is no need to look to the Scheme for Construction Contracts ("the Scheme[2]") to import any other provisions. In respect of interim payments, I am not aware of any specific areas in which BN contended otherwise and am content to proceed on that basis. BN does, however, submit that Clause 13.9, which deals with the Final Account, does not comply with the HGCRA. I will have to consider that issue in the context of the counterclaim based on BN's Final Account entitlement.

The oral subcontracts up to 21 December 2015

85. As set out above, the oral subcontracts did contain some terms as to payment but were not subject to Everwarm's written terms and conditions which only applied to RANDCHA. Inevitably, therefore, it is necessary to consider what the payment terms were, the extent to which those payment terms comply with the minimum requirements of the HGCRA and whether any other terms should be implied.

86. The fact that terms of a subcontract were agreed orally does not mean that the subcontract was non-compliant with the HGCRA. A consequence of the repeal of s.107 is that oral contracts are subject to the Act. The existence and proper construction of oral terms must be determined before a conclusion can be reached that it is necessary to import the Scheme to any extent.

87. Pursuant to the oral subcontracts, the basic payment rate was agreed at £21.50/m² or, later, a higher rate for certain sites. The basic rate was, itself, later increased to £24/m². In principle there was to be a regime of fortnightly interim payments (later monthly). The parties also understood that the interim payments would be followed

[2] In each case, the original Scheme for Construction Contracts 1998 is subject to the applicable Amendment Regulations 2011.

by a final payment representing the Final Account, though there was no agreement as when the latter would be made. Retention was provided for in the one-page Order on RANDCHA which Mr Nemeth signed and I find that the common intention of these parties to the oral subcontracts was that they were subject to the same regime as set out there i.e. retention at 2.5% to be withheld for a period of 12m.

88. It is common ground that these subcontracts are subject to an implied term in respect of such additional works as Everwarm may request. The implied term is that BN is entitled to be paid for such work at the price or rate, if any, which is agreed at or around the time of the instruction. If nothing was agreed in this respect, I conclude that there is an implied term that a reasonable sum for the additional work should be payable. An implied term as to a reasonable sum is entirely conventional where there is no express agreement and, even though it was denied by Everwarm on the pleadings, I cannot see any reason for rejecting it.

89. These terms do not contain all that is necessary to comply with the requirements of the HGCRA. For example, there is no agreement about due and final dates for payment. As I have said, the date for the final payment was not addressed. Nor is there any agreement about notices. To that extent, the Scheme applies to import the necessary provisions. As the work on each of these subcontracts was being executed in Scotland, the relevant Scheme would be the Scheme for Construction Contracts (Scotland) Regulations 1998.

Milton and St Andrews Primary

90. As set out above, these two oral subcontracts contained the same terms as to payment as those which pre-dated them but they were not subject to Everwarm's terms and conditions.

91. These two subcontracts were therefore subject to the regime described immediately, above.

The written subcontracts

92. It is now appropriate to set out the express payment terms as they appear in Clause 4 of Everwarm's standard terms. Omitting Clause 4.9 for present purposes, I will set out those which are contained within Rev 7. There are differences between the two revisions but the basic structure is the same in both cases.

> *"4.* ***PAYMENT***
>
> *4.1 The Company shall pay the Sub-Contractor the Sub-Contract Sum (together with any proper adjustments) for carrying out the Sub-Contract Works in accordance with either clause 4.2 or 4.3 below (whichever is applicable).*
>
> *4.2 Where it is stated in the Order that the Period for Completion is less than 45 working days the Sub-Contractor shall not be entitled to receive any stage or interim payments and any such stage or interim payments shall be entirely at the Company's discretion and dealt with in line with clause 4.3.*

4.3 Where it is stated in the Order that the Period for Completion is 45 days or more:

4.3.1 The Sub-Contractor shall be entitled to interim payments. Unless otherwise stated, these are to be in line with the Main Contract valuation dates, as set out in the Schedule of Dates (each being a Valuation Date), up to one calendar month after a notification of completion of the Sub-Contract Works by either the Company or the Sub-Contractor, or in accordance with clause 2.3, and subject to the sole discretion of the Company thereafter (unless otherwise stated in these items).

4.3.2 The amount of each interim payment shall be the aggregate of the value of all work properly performed and all other sums properly incurred from the date of commencement of the Sub-Contract Works up to the applicable Valuation Date calculated in accordance with these terms and conditions LESS the aggregate sum of the amounts paid or due to be paid in all previous interim payments and any other sums which the Company may be entitled to deduct or claim under these terms and conditions or otherwise.

4.3.3 The Sub-Contractor shall submit a fully detailed application for payment to the Company not less than 7 calendar days before each Valuation Date identifying the value of the Sub-Contract Works completed at the date of submission and all sums properly projected to be due up to the relevant Valuation Date.

4.3.4 Subject to the submission by the Sub-Contractor of a valid application for payment in accordance with this Sub-Contract, the due date for payment of an interim payment shall be the relevant Valuation Date.

4.3.5 An application submitted in accordance with sub-clause 4.3.3 is not eligible to become a default payment notice unless: a) it provides full details of the net sum due and the basis upon which it has been calculated b) it is submitted no later than 7 days before the Valuation Date; and c) the Sub-Contractor can provide evidence that it was actually received by the Company (and where issued by email, evidence that it was opened by the Company).

4.3.6 Within 5 calendar days of each Valuation Date the Company shall give a payment notice to the Sub-Contractor specifying the amount of the interim payment to be made and the basis on which such amount is calculated (a "Payment Notice"). If the Company fails to issue a Payment Notice in time the application will become the payment notice by default only where it complies with clause 4.3.6. Otherwise a compliant default payment notice will need to be issued by the Sub-Contractor and the final date for payment will be postponed by

the same period that the default notice is issued beyond 5 days after the Valuation Date.

4.3.7 Each interim payment shall become eligible for payment 45 calendar days after the Valuation Date. Once the monies become eligible for payment they will normally be paid in the next weekly payment run. Notwithstanding this, and subject to clause 4.3.7, the final date for payment will always be 55 days after the due date for payment.

4.3.8 If the Company intends to pay less than the amount stated in a Payment Notice (or any term of default payment notice) then the Company shall give a pay less notice to the Sub-Contractor not later than 2 days before the final date for payment for that payment specifying the revised amount of the interim payment to be made and the basis on which such amount is calculated.

4.3.9 If the Company issues a Payment Notice later than the date required under clause 4.3.6 or a compliant default payment notice exists then provided the Payment Notice complies with the requirements of clause 4.3.8 (save as to timing) it shall be deemed to be a pay less notice.

4.3.10 Where any payment period is varied in the Order or otherwise in writing then the only period that can be varied is the 45 days eligible for payment period stated in clause 4.3.7. Any such variation will not be considered valid unless a full Schedule of Dates is issued by the Company stipulating the details of any variation from the standard period.

4.3.11 Notwithstanding any other provision of the Sub-Contract, save in circumstances where the Sub-Contractor has 'self-billing' status for the purposes of VAT, it shall be a condition precedent to the Sub-Contractor's entitlement to any payment under the Sub-Contract that he shall have issued to the Company a valid VAT invoice in respect of the amount being claimed as due.

4.3.12 All interim payments shall be on account, shall be subject to adjustment and review following completion of the Sub-Contract Works and shall not signify any approval by the Company of workmanship or materials.

4.3.13 If the Sub-Contractor remains entitled to interim payments following the last of the Valuation Dates set out in the original Schedule of Dates, the Schedule of Dates shall be deemed to be extended to include such subsequent Valuation Dates as are consistent with, and by reference to the periods within, the original Schedule of Dates, provided that nothing in

this clause 4.3.13 shall entitle the Sub-Contractor to interim payments beyond the date referred to in clause 4.3.1.

Final Account

4.4 Within 3 months of the date of completion of the Sub-Contract Works the Sub-Contractor shall submit an account representing the total value of the Sub-Contract Works carried out by the Sub-Contractor and calculated in accordance with the Sub-Contract for ascertainment of the value of the Sub-Contract Works by the Company. The Company shall notify the Sub-Contractor of its ascertainment of the value of the Sub-Contract Works within 3 months of receipt of the Sub-Contractor's account representing the value of the Sub-Contract Works.

4.5 The Sub-Contractor's account shall contain such details as the Company may reasonably require in order to properly ascertain the value of the Sub-Contract Works and calculate the final payment.

4.6 If the Sub-Contractor fails to submit an account within 3 months of the date of completion of the Sub-Contract Works the Company may within 6 months of the date of completion of the Sub-Contract Works value the Sub-Contract Works from the information then in its possession and notify such valuation to the Sub-Contractor and if the Sub-Contractor does not dissent from the Company's valuation within 1 month of its submission to the Sub-Contractor the Company's valuation shall have effect in any proceedings under or arising out of or in connection with the Sub-Contract as conclusive evidence that any necessary effect has been given to all the terms of this agreement which require an amount to be added to or subtracted from the Sub-Contract Sum and that all and only such extensions of the Period for Completion as are due under clause 2.5 have been given.

4.7 Any interim payments paid or due to be paid to the Sub-contractor by the Company under clause 4.3, or otherwise, shall be deducted from the Company's ascertained value of the Sub-Contract Works under clause 4.4 or from the Company's valuation of the Sub-Contract Works under clause 4.6 as applicable and any balance shall be the final payment due to the Sub-Contractor from the Company or the final payment due to the Company from the Sub-Contractor as appropriate.

4.8 The due date for payment of the Final Account shall be the date being 14 calendar days after the issue of the Final Account by the Company to the Sub-Contractor written and payment thereafter will be dealt with in accordance with clause 4.3.6 to 4.3.12".

93. Retention is provided for in Clauses 4.11 to 4.13 though I consider below the extent to which those provisions are applicable. Variations are addressed in Clause 3.12 to 3.16.

The Agreed Rates

94. Most of the rates had been admitted on the pleadings. Whatever limited issues remained on the pleadings, there was no discernible issue about rates during the trial.

95. The only Everwarm witness who gave direct evidence on rates was Mr McMahon who, in his written evidence, accepted that the rates pleaded in Schedule 1 to the Re-Amended Defence and Counterclaim were not too dissimilar to those he agreed with BN. In cross examination there was no challenge to BN's witnesses who had given evidence on rates. I therefore find that the contractual rates which Mr Nemeth gives in his witness statement in respect of each subcontract were the agreed rates.

96. On that basis, Ms Piercy invites me to find that the rates pleaded by BN in the third column of Schedule 1 to the Re-Amended Defence and Counterclaim were the agreed rates and I do so.

97. In his written Opening, Mr Quirk contended that some of the rates shown in the third column to Schedule 1 were in respect of additional works (not the original subcontract works) and, on that basis, were not agreed rates. These rates were not separately identified by Everwarm at that time. Mr Quirk's opening submission was not developed either during or after the trial. None of the rates evidenced by Mr Nemeth were challenged and Mr McMahon's evidence, broadly accepting the rates set out in Schedule 1, did not make any distinction between subcontract works and rates for additional works.

98. Appended to this judgment is a schedule setting out the applicable rates for each of the subcontracts in the order in which they appear in the first column to Schedule 1 to the Re-Amended Defence and Counterclaim, Parts 1, 2, 3 and 4.

Ingoes

99. I have earlier described the ingoes which are, essentially, the reveals of windows and doors. A substantial proportion of the overall difference in value between the parties in this litigation concerns the ingoes. BN's case is that, at a meeting in February 2015, there was an oral agreement between Mr Nemeth for BN and Mr Hughes and Mr McMahon for Everwarm (at which Mr Quigley of Everwarm was also said to be present) whereby it was agreed that BN would be paid in accordance with "the Agreed Method" as defined in the pleadings. Everwarm did not admit that there was ever a meeting in February 2015 but, in any event, denied that there was any such agreement. The Agreed Method is pleaded as follows:

> *"(a) The dimensions of the external walls subject to the EWI Works would be measured and their total gross area calculated;*
>
> *(b) The dimensions of any large opening, such as a window or door, would be measured and deducted from the figure calculated at (a); and*

> *(c) An allowance of 1m² would be added back for each such opening as described at (b) above for the reveals."*

100. Mr Nemeth and Mr McMahon dealt with this meeting both in their witness statements and in their oral evidence. There are no minutes of the alleged meeting. Mr Nemeth explained that at the outset BN used a roughband render finish within the reveals but that, subsequently, in 2014, BN was asked by Mr Hughes to use a smoothband finish which cost more. For some time, he said that BN bore that additional cost itself but, in February 2015, he asked for additional payment. Rather than measure the ingoes, he says the simple method of adding in 1m² per opening was agreed with Mr McMahon. Thereafter, BN claimed payment for this additional measure but, with the exception of Motherwell, did not separately identify it as such within the payment applications. He says he assumed the claim was uncontroversial because it was never queried but was simply paid. Mr McMahon said he could not recall a meeting in February 2015 but accepted it was possible that one took place. He denied reaching any special agreement as to the method of valuing work to ingoes.

101. Both witnesses were cross examined on this issue and the parties have subsequently made submissions as to why I should prefer the evidence of one over the other. There was some additional evidence from various witnesses as to whether payment on this basis would or would not have been industry practice. I was not assisted by this evidence which, in any event, would properly be the remit of expert evidence. Whether or not it was industry practice, the question is simply one of fact: was there an agreement or not.

102. Two factors seem to me to be neutral. Firstly, the lack of any written record of or evidencing the meeting or the agreement. So little was recorded in writing between these parties that the lack of any record is unsurprising. Secondly, the fact that for some time Everwarm paid for work done on ingoes at the rate of 1m² on an interim basis without challenge. In all cases except one, the claim was hidden within the overall measure so I cannot infer that Everwarm made those payments knowing that they included payment for ingoes at the rate of 1m² per opening. The exception was Motherwell but the amount included was so small (7m²) that I am unable to infer acceptance from that alone. I cannot assume that Everwarm's quantity surveyors would have picked it up.

103. On the key issue, I prefer the recollection of Mr McMahon that there was no such agreement. In connection with the meeting in December 2013 I preferred the evidence of Mr Nemeth to that of Mr McMahon but it seems to me that, on this point, Mr Nemeth's recollection is simply not right. I suspect he has convinced himself that this agreement was made because it would be easier for him to have claimed payment on that basis than if BN had to show any legitimate, extra, entitlement for additional work done on ingoes in specific cases.

104. In short, I accept Everwarm's case that there was no such agreement. BN did not provide any photographic evidence of having initially provided roughband finish on RANDCHA, which would have been an easy thing to do (even during the trial) to corroborate its story. It is more likely that the same finish was applied throughout. Mr McMahon says, and I accept, that he would have recalled a change in the specification if there had been one. Mr Nemeth made no mention of the discussion

with Mr Hughes in June 2014 about the change in specification until he gave oral evidence. I did not find convincing Mr Nemeth's explanation for not claiming payment in the period between June 2014 and February 2015. He said he was too busy to arrange a meeting to discuss making a claim, which seems unrealistic. As to the meeting in February 2015, Mr McMahon was credible and forthright on the point. Whilst there may have been a meeting, no agreement on payment for ingoes was reached. He would have remembered making such an agreement because news of it would have spread to other subcontractors who would then not have been paid on the same basis.

105. I therefore conclude that there was no Agreed Method of payment for ingoes as suggested. But I must still decide upon what basis BN was to be paid for ingoes. Where all that BN did was to apply a render finish in the ingoes to close off the EWI on the elevations, that work was included within the overall m² rate for the elevations. In circumstances where the ingoes were large enough to and did accommodate insulation, I consider that should be treated as additional work. In the absence of an express agreement, a reasonable sum for the additional work (which could be rate based) would have to be established taking into account the fact that a render finish would always have been included in the original work. If this cannot be agreed and becomes material, expert evidence will be required to quantify this in due course.

Clause 4.9

106. Everwarm's claim in this action is founded solely on Clause 4.9. I have already concluded that Clause 4.9 does not apply to the RANDCHA subcontract nor to any of the oral subcontracts. However, it does apply to each of the written subcontracts. As regards the clause itself, there are differences between the Rev 7 terms and the Rev 8 terms but neither party positively suggested that they were material to the issues that arise in respect of it.

107. In Rev 7, Clause 4.9 provides as follows:

> *"The Company may at any time whatsoever (including without limitation between Valuation Dates) make an assessment of the aggregate of the value of all work properly performed and all other sums properly incurred in relation to the Sub-Contract Works up to the selected assessment date, calculated in accordance with the Subcontract ("the Assessment"). The Company shall be entitled to deduct from or set off against any payments otherwise due to the Sub-Contractor under the Sub-Contract or any other agreement between the Company and the Sub-Contractor the difference between (1) the Assessment together with the aggregate of any other sums which the Company may be entitled to deduct or claim under the Sub-Contract or otherwise and (2) the aggregate of the sums paid and those established as due to be paid to the Sub-Contractor in relation to the Sub-Contract Works. Furthermore, to the extent that any difference above shows that a sum is due and owing to the Company such difference shall be a debt due and payable by the Sub-Contractor within 7 days, without any right of set-off and/or deduction."*

108. In Rev 8, Clause 4.9 provides as follows:

> ***"Discretionary Assessment***
>
> *Notwithstanding any other provision of the Sub-Contract, the Company may at any time whatsoever (including without limitation between Valuation Dates) make an assessment of the aggregate of the value of all work properly performed and all other sums properly incurred and/or owing in relation to the Sub-Contract Works up to the selected assessment date, and otherwise calculated in accordance with the Subcontract ("the Assessment"). To the extent that any Assessment shows that a sum is due and owing to the Company such difference shall be a debt due and payable by the Sub-Contractor within 7 days, without any right of set-off and/or deduction."*

109. Everwarm's case was that, in respect of each material subcontract, it carried out an Assessment and, where that Assessment showed a sum due and owing to it, BN was liable to pay Everwarm that amount, free of set off or deduction. The pleaded claim based on the various Assessments purportedly undertaken pursuant to Clause 4.9 was for the sum of £798,468. However, by the end of the trial, Everwarm's concession that Clause 4.9 did not apply to those subcontracts concluded prior to 21 December 2015 significantly eroded the value of its claim which was now worth, at best, only £37,004. Even this included a claim in respect of an Assessment for St Andrews Primary which I have decided was also not subject to Clause 4.9. Nonetheless, the issues arising out of Clause 4.9 remain and I must deal with them.

110. Based on my earlier findings and Everwarm's concession, the subcontracts in respect of which Everwarm is entitled to pursue its claim pursuant to Clause 4.9 are: Dunfermline (£11,325); Halliburton (£3,198); Falkirk Council (£1,844); Dalmuir HA (£617); Dumbiedykes (£2,667); and Wellhouse (£12,582). I refer to these as the "Clause 4.9 subcontracts". I should record that, as far as I am aware, none of these subcontracts contain claims for contra-charges.

111. There were multiple ways in which BN contested the claims based on Clause 4.9 wherever they applied. First, BN contended that, on a proper construction of the provision when applied to the facts of this case, it was too late for Everwarm to have carried out any Assessment pursuant to the clause. Second, BN submitted that the discretion to be exercised when undertaking the Assessment was subject to an implied term as to the manner of its exercise and that, on the evidence, Everwarm was in breach of that term. In parallel, it was also contended that any Assessment had to be carried out in accordance with the express terms and, if it was not, it was also not a valid Assessment. BN's third submission was that the clause was contrary to the HGCRA and effect should not be given to it. Fourthly, BN submitted that the term was subject to the Unfair Contract Terms Act 1977 and was unreasonable and unenforceable.

112. The starting point for all the defences must be the proper construction of the provision itself. I construe the provision by applying the conventional and well-known case law about the proper construction of contracts, most recently articulated in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24.

113. It is right to observe that the Everwarm terms and conditions make reference to and define the Construction Act as the Housing Grants Construction and Regeneration Act 1996 as amended by the Local Democracy, Economic Development and Construction Act 2009. The parties therefore had the statutory provisions well in mind. That cannot, in and of itself, determine that the provisions in the contracts based on those terms and conditions are compliant. But it may provide some assistance in determining how the provisions should be construed.

114. Mr Quirk described the provision in Clause 4.9 as a self-help clause which could be deployed by Everwarm when other mechanisms in the contract were not working. He then made a series of subsequent points with which I agree. He pointed out that a feature of the clause is that it only requires payment to be made when the Assessment shows a sum is due and owing to Everwarm. In that respect it differs from the interim payment provisions in Clause 4 which only concern payments to BN pursuant to applications made by BN. In circumstances where Everwarm contends that an overpayment has occurred in respect of an interim application, it can carry out an Assessment and, if that shows an overpayment has been made, that sum must be repaid. He ultimately accepted that Clause 4.9 could not be exercised once there had been a valuation undertaken pursuant to the Final Account provisions in Clauses 4.4 or 4.6, although that had not been Everwarm's earlier position.

115. In principle, an employer (or main contractor in a subcontract) can include a contractual provision allowing for corrective payments to be made back to it. One particular reason for wanting to include a provision of that type is to counter the effect of a payer not having served timely notices in respect of a given interim payment. A provision which allows a corrective payment to be made could be included within the very same interim payment clause as entitles the contractor to payment in the first place (such as appears in the NEC form, which allows payments to be made in either direction) or, as here, it can be the subject of its own clause. An additional regime such as this can sit alongside the regular interim payments which are made in the other direction. There is no particular reason why a party who has overpaid should have to wait until the Final Account for the position to be corrected. Of course, even without a clause such as this, an overpayment can be still corrected pursuant to a "true value" adjudication[3] but an advantage of this type of provision is that it does not require a decision from a tribunal in order to obtain the benefit of the correction but, instead, it can be established by the payer himself in accordance with the clause, properly operated. However, a contractual provision such as this must itself comply with the HGCRA and must not be construed in a way that undermines the purpose behind the Act. I deal with the impact of the HGCRA below.

116. It is right to record that Everwarm's case on the effect of a Clause 4.9 Assessment underwent something of a transformation during the course of these proceedings. Until the start of the trial, Everwarm's case was that the Assessments were, in effect, untouchable and unimpeachable. For example, at paragraph 36(2) of the Amended Reply and Defence to Counterclaim, it was claimed that the Assessments were: *"final assessments because the Defendant had failed to produce and issue final accounts to the Claimant"*. In his witness statement Mr Stirling, the managing director of

[3] *S&T(UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2446

Everwarm, described the purpose of the Assessments as bringing BN's accounts to a final account stage and, indeed, he described them as final accounts. In his oral evidence, he went further and stated that by issuing the Assessments he was trying to *"close down the accounts"*. These observations reflected Everwarm's case that there could simply be no legitimate challenge to the Assessments once they had been issued. Similarly, at an interlocutory stage when the Court was considering the need for expert evidence, Ms Morgan, a partner in the firm of Harper Macleod LLP acting on behalf of Everwarm, filed a witness statement which contended that an Assessment made pursuant to Clause 4.9 was *"contractually binding"*. She then continued:

> *"A valuation, which the defendant now seeks to bring into the claim, is completely beside the point. The parties agreed in the Sub-Contracts on a straightforward and cost effective valuation mechanism which would give finality and not require the parties to instruct experts and the like to carry out time consuming and expensive valuation reports."*

117. But by the end of the trial, Mr Quirk was prepared to accept that a dispute as to whether Clause 4.9 had been properly implemented in accordance with its terms was a pure defence to a claim based on Clause 4.9 and, once raised, could be determined by an adjudicator or by the Court. He also accepted that it would be open to BN to advance a claim for the true value of the works which had been the subject of a Clause 4.9 Assessment. However, Mr Quirk continued to contend that, pending such a determination of the true value of the works, there was an obligation to pay the amount which had been assessed. If he is right, this could be material to the cashflow position as between the parties in the present case because the true value of the works is not being determined in the present trial. Whether Mr Quirk is right is a matter which I will deal with later in this judgment. At this stage, I would add only this. Clear words would have been needed within the contract to suggest that any Assessment made by Everwarm was to be final and conclusive. The expression of conclusivity was used in Clause 4.6 but, notably, not in Clause 4.9. Clause 4.9 could never have been used to *"close down the accounts"* as a substitute for completion of the Final Account process. Mr Quirk accepted that any Assessment carried out by Everwarm pursuant to Clause 4.9 would not be capable of finally determining the position in respect of the Final Account.

118. It is not in dispute that, on the facts of this case, the purported Assessments were all made after the works on each subcontract had been completed. BN has contended that there was an implied term that Clause 4.9 would not be operated once the works had been completed. On reflection, Ms Piercy was content to express this argument as one based on the proper construction of the express term, rather than by means of the implication of another term. In my judgment that is indeed the correct approach. A key question of construction is, therefore, whether it is permissible for Everwarm to have carried out an Assessment after the works had been completed.

119. Mr Quirk submits that, applying the express words, the Assessment can be made *"at any time"*. On a literal construction, the Assessment could indeed be made at any time but, in my judgment, that cannot be the correct construction. For example, the parties cannot have intended that Everwarm could make an Assessment after a Court had ruled on the correct value of BN's entitlement. Nor, as Mr Quirk rightly accepted,

could the parties have intended that Everwarm was entitled to make an Assessment after it had implemented and completed the Final Account process envisaged in Clauses 4.4 to 4.8 because otherwise that final process could be completely undermined by the Assessment. It therefore follows that there must be some limitation in time beyond which it is no longer possible to carry out an Assessment. In my judgment, Everwarm could make any Assessment at any time until the Final Account process had been completed. Ms Piercy's submission was that an Assessment cannot be made between the completion of the works and the conclusion of the Final Account process. She suggested that, at completion, the need to make provision for repayment from BN to Everwarm passes, because thereafter payment could go in either direction at the Final Account stage. I reject this submission. An Assessment made during the period between the completion of the works and the conclusion of the Final Account process would not undermine that Final Account process because that would continue to operate in the meantime. It would be entirely unaffected by an Assessment. It is not uncommon for interim assessments or valuations to be made during the post completion period but before the Final Account is resolved. Indeed, Ms Piercy accepted that at least one such payment was contemplated by Clause 4.3.1. The subcontract envisages the Final Account process taking six months and I see no reason why an Assessment could not be made at any point within that period. Moreover, the period for resolving the Final Account could last several months more than that if the parties did not adhere to the time limits specified or if a dispute meant that it remained unresolved for longer than the contract envisaged.

120. I now turn to BN's second case, namely that the discretion provided in Clause 4.9 should not be exercised for an improper purpose, capriciously, arbitrarily or in a way that no reasonable person, acting reasonably, would act. Ms Piercy relies on the heading of *"Discretionary Assessment"* (in Rev 8, not Rev 7) but, by reason of Clause 1.1, headings and sub-headings are not to affect the interpretation of the terms so I do not accept she can rely on it. In that context, the heading of *"Final Account"* which sits above Clauses 4.4 to 4.9 inclusive in Rev 7 is equally irrelevant. More substantively, she relies on *Braganza v BP Shipping Ltd* [2015] UKSC 17 for the notion that the courts have sought to ensure that contractual powers, particularly those relating to the exercise of a discretion, are not abused but are, instead, controlled by an implied term:

> *"as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given."*

121. Ms Piercy also cites *Mid Essex Hospital Services NHS Trust v Compass Group UK* [2013] EWCA Civ 200 at [83] in which Jackson LJ said:

> *"An important feature of the above line of authorities is that in each case the discretion did not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is permitted to exercise such a discretion, there is an implied term. The precise formulation of that term has been variously expressed in the*

> *authorities. In essence, however, it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner. Such a term is extremely difficult to exclude, although I would not say it is utterly impossible to do so. Certainly clause 1.1.5 of the conditions in the present case is not effective to exclude such a term, if it is otherwise to be implied."*

122. Mr Quirk rejects that argument. On Everwarm's case, Clause 4.9 is simply part of the payment provisions in Clause 4. He says an Assessment is intended to be a self-help remedy where sums are due to Everwarm but which have not been paid. He suggests the clause does not contain a contractual discretion in any sense and, instead, invites me to regard the provision as akin to one permitting a party to terminate for breach. In such a case one party can act in his own interests by terminating, even though its decision to do so plainly has an impact on the other party.

123. I reject that analogy. I do not regard Clause 4.9 as comparable to a provision which entitles one party to terminate a contract upon a breach by the other party. In my judgment, Mr Quirk's submissions based on termination also overlook the fact that, in order to exercise the remedy of securing a payment from BN to Everwarm, Everwarm must first perform the Assessment. In this case an Assessment made pursuant to Clause 4.9 affects the rights of both parties because it can determine the amount, if any, which BN has to pay to Everwarm as a debt. It is necessary to impose some limit on the manner in which the discretion was exercised. For example, it would be absurd to suggest that Everwarm could make an Assessment that a sum of £1m was due to it in circumstances where the value of the subcontract works was only £50,000. It would be no comfort to BN that it could subsequently adjudicate a dispute over the true value of its entitlement if, as Mr Quirk submitted, it would have to pay the sum due in respect of the Assessment in the meantime. I am therefore satisfied that there was an implied term that any Assessment carried out pursuant to Clause 4.9 would not be undertaken in an arbitrary, capricious or irrational manner.

124. In light of this conclusion it is necessary to consider the evidence which was adduced in respect of the Assessments. These were undertaken by T&T on Everwarm's behalf. At the trial, Mr Johnson of T&T explained that his firm was asked by Everwarm to carry out final accounts for the works undertaken by BN. Mr Johnston did not undertake the work himself but oversaw the work done by others at T&T, namely Mr Hepburn and Mr Williams. In a number of respects, the manner in which the exercise had to be undertaken was unsatisfactory. For example, as I have already said, most of the Everwarm staff with contemporaneous knowledge of events on site had left. In addition, no written records of the terms or rates for a number of the subcontracts were made available to T&T. Everwarm's own record keeping had left much to be desired. Despite these difficulties, on 22 May 2017, which was about a month after T&T had been engaged, T&T produced its assessments which, globally, showed a sum due to BN of £445,103 including the wholesale release of retention. These assessments had been undertaken by measuring BN's works under each subcontract as a desk top exercise. A meeting was arranged with Everwarm for the following day. At that meeting on 23 May 2017, T&T was instructed by Everwarm to take an entirely different approach to valuation, namely one based on a physical measure. Mr Johnston suggested that the initiative was jointly agreed, rather than an instruction, but I reject his evidence on that. A physical measure had already been

undertaken by Everwarm for one of the sites upon which BN had worked, namely Kirkcaldy, apparently for the purposes of the main contract with the ultimate client, Fife Council. A measure was subsequently agreed with Fife Council but it was not demonstrated to me that it was that version which was provided by Everwarm to T&T. T&T had not checked the Fife measure with which it was provided.

125. In greater detail, the new approach which was to be adopted was to physically measure sample properties on two further sites (5 house types at Motherwell and 3 house types at Carntyne) and, also using the Kirkcaldy measure, compare the measures on those three sites with the measures claimed by BN for work done on those three sites, thereby identifying a % factor by which BN's measure was an under-measure or, as it transpired, an over-measure. Once the factor had been identified, it could then be and was applied across the board to all the other subcontracts. I am satisfied that the instruction to remeasure in this way was given because the prior conclusion that BN was overall the net recipient was an unacceptable one to Everwarm and it was hoped that a different approach might produce a more satisfactory outcome from its perspective. I also consider that if, as it clearly did, T&T had thought it a sensible approach to carry out any form of physical measure, rather than a desk top exercise, it should have undertaken one from the outset when there was no particular urgency about the work to be done. Had it done so from the start, I am quite satisfied it could have been undertaken without a need for sampling. It would not have taken that long to do. Insofar as Mr Johnston suggested otherwise, I reject his evidence. However, by 23 May 2017, time was pressing and T&T was put under pressure to produce its results with some speed. Sample physical measures were therefore undertaken on the two further sites within the next two days and reported upon the following day. The outturn result was far more palatable to Everwarm. Overall, it showed BN indebted to Everwarm in the sum of £381,000 or nearly £800,000 including the release of retention (which the Assessments ultimately issued did not allow for). Ms Piercy put to Mr Johnston that all T&T's work done in the previous month was, effectively, thrown away and replaced with the new approach resulting from the sampling undertaken in just three days. He rejected this suggestion but I find it to be accurate. None of this is a promising background against which to consider whether the Assessments were properly carried out.

126. For each subcontract, T&T produced a Payment Sheet (comprising a handful of pages but with no supporting evidence) which was then relied on by Everwarm as the "Assessment". Some Assessments showed that monies were due to BN. Others showed that monies were due from BN and, obviously, it was the latter upon which Everwarm had based its claim in these proceedings. A typical Payment Sheet of the type showing a payment due to Everwarm was in these terms:

"PAYMENT SHEET – WELLHOUSE PHASE 2 EWI5125

Last Valuation Date: Jan 17

	BN rendering claim	***Everwarm paid***	***Paid Difference***
Gross	*154,580*	*112,515*	*42,065*

Deduct			
Variations not substantiated	*-8323*		
Additional measure not substantiated	*-36,564*		
Method of measurement	*-12,817*		
	96,876	*112,515*	*-15,639*
Deduct			
Retention		*3,057*	
Nett to date	*96,876*	*109,458*	
Retention released		*0*	*3,057*

Total paid inc. retention £109,458

T&T Assessment – monies due to BN Rendering -£12,582"

127. On 21 June 2017, Everwarm sent out multiple letters which attached the Payment Sheets prepared by T&T. There was one for each subcontract in respect of which an overpayment had been identified. In cases where the individual Payment Sheet showed a sum due to Everwarm the letters materially stated:

> ***"Notice of Assessment of Value of Sub-Contract Works***
>
> *We refer to the Sub-Contract between Everwarm Limited and BN Rendering Limited for external wall insulation works (labour only) constituted by our Sub-Contract Order Number [x].*
>
> *We hereby give you notice that assessments have been carried out on our behalf by Turner & Townsend.*
>
> *We attach a copy of the Payment Sheet prepared by Turner & Townsend which discloses an overpayment by Everwarm Limited in the amount of £[y].*
>
> *Please arrange to make payment of such balance due and owing to Everwarm Limited within 7 days failing which action will be taken by us to recover such amount as a debt."*

128. In respect of those cases where the individual Payment Sheet showed a sum due to BN (which are not the subject of the claim) the letters materially stated:

> *"We refer to the Sub-Contract between Everwarm Limited and BN Rendering Limited for external wall insulation works (labour only) constituted by our Sub-Contract Order Number [x].*
>
> *We hereby give notice that assessments have been carried out on our behalf by Turner & Townend:*
>
> - *of the value of the Sub-Contract Works under the above Sub-Contract Order; and*
>
> - *of the value of the Sub-Contract Works under the other Sub-contracts with your company.*
>
> *We attached for your reference:*
>
> - *a copy of the Payment Sheet prepared by Turner & Townsend which discloses an unpaid value due to your company for the above Sub-Contract Order of £[y]; and*
>
> - *a copy of the Summary Sheet prepared by Turner & Townsend for all the Sub-Contracts with your company which discloses a total overpayment by Everwarm Limited to your company of £416,406*
>
> *We confirm that the sum of £416,406 disclosed as the due total to Everwarm Limited is set off against the balance otherwise due under Sub-Contract Order 5116 and is due and payable by your company.*
>
> *Please arrange to make payment of such balance due and owing to Everwarm Limited within 7 days failing which action will be taken by us to recover such amount as a debt".*

129. BN forcefully criticised the Assessments which T&T had undertaken, both on the basis that they had not been undertaken in accordance with the regime set out in Clause 4.9 and on the basis that they were undertaken in breach of the implied term which I have found to apply. In general, I find those criticisms to be justified.

130. It is not necessary to identify all of the failings but, in my judgment, the principal ones are:

(a) It would have been the expectation of the parties to a given subcontract that any Assessment of the value of the works performed pursuant to that subcontract would be undertaken by reference only to work done on that subcontract, not to the value of work done on another subcontract altogether. Mr Johnson accepted that when undertaking a final account exercise under a subcontract, he would not normally go and measure properties that are not the subject of that subcontract for the purposes of doing a measurement exercise.

(b) The method of valuation used was arbitrary. The Assessments for all subcontracts included a standard % reduction to BN's valuations which was based on an

extrapolation of measures carried out pursuant to only a small handful of subcontracts. Everwarm instructed T&T to carry out a physical measure of only a small number of properties on two sites and to use that measure (together with one which T&T did not undertake or check) as the basis for the Assessments of all the work undertaken on 38 subcontracts. There was no evidence that this was a statistically sound proportion of the whole upon which to base a standard reduction as part of the Assessment. I am not satisfied that it was.

(c) The use of a blanket % reduction was itself arbitrary. If, as T&T concluded, BN had over-measured on one or two subcontracts within the sample, it by no means followed that it had invariably done so on all the subcontracts. The arbitrary consequence of this was highlighted by the fact that T&T even applied a blanket reduction to an account with which it had no valuation issue. This was most clearly apparent in the case of Carntyne and Motherwell where the actual measures were known.

(d) The Assessments should have included an allowance for any variations since they formed part of the sum to which BN was entitled. T&T recognised the obligation to include a measure for additional works and, originally, had made some allowance for such variations even if there was no documentary record to substantiate them. However, T&T then followed Everwarm's wholesale instruction not to provide any allowance at all against any claimed variations and none were allowed for in the Assessments, pursuant to that instruction. Instead, T&T applied the standard rubric that variations had not been substantiated.

(e) Even in relation to the subcontracts which were actually measured, T&T did not include all of the properties on which BN had worked. No sampling method was adopted to ensure that the property types measured were in the same proportion as those property types worked on in any other given subcontract. The sample measure did not even include all the house types (as some were missed) and yet there are material differences between them. No account was taken of special features such as porches. In relation to the sample measure on Kirkcaldy, T&T did not themselves undertake the measure and nor did they even check it. The impact of including Kirkcaldy in the blanket reduction had a significant impact on the outcome because the scale of alleged over-measure on that site was 11.43%, whereas, on the others, it was 2.65% and 5.05% respectively.

(f) On six sites, the contemporaneous measurements taken at interim stage were actually done on BN's behalf by an area manager of Everwarm, Mr Wilson[4]. BN did not itself carry out any of these measures and, as Mr Nemeth explained, everything was agreed directly between Mr Wilson and Mr Hughes of Everwarm. The over-measure used in the Assessments was applied indiscriminately to all subcontracts including these six, which Mr Wilson of Everwarm had himself measured on behalf of BN. This is further demonstration of the inherent unreliability of the approach adopted.

[4] This was the witness who was unable to attend to give evidence in person. On the matters described in this paragraph, I accept the evidence of Mr Nemeth (whose evidence on this point was not challenged) in preference to the written evidence of Mr Wilson.

(g) The Assessments made no allowance for the release of retention. Instead, retention was indiscriminately deducted. Any Assessment should have ascertained the terms for release of retention and determined whether or not the point in time had been reached for its release. In no case was retention released because the Assessments did not even address this point.

131. I therefore find that Everwarm has not carried out its Assessments in accordance with the express and implied subcontract terms. To varying degrees, these failings must apply to each of the Assessments made in respect of the Clause 4.9 subcontracts and therefore renders the claims made on the basis of each of them unenforceable. For that reason, I must dismiss the claims made in respect of the Clause 4.9 subcontracts.

132. I should add that there was no requirement for Everwarm to carry out the Assessments using external quantity surveyors. It could have undertaken the exercise itself without any outside professional assistance. But in so far as Everwarm sought to enhance the credibility of its Assessments by relying on the fact that the work was done "independently" by T&T, such was misplaced because T&T did not act truly independently but followed the instructions of Everwarm about how to carry out the Assessments. Moreover, it was not T&T that carried out the measure on Kirkcaldy which had a significant monetary impact on the level of over-measure used in that Assessment.

133. BN also argued that, in respect of each subcontract, even the discretionary decision to carry out the Assessment in the first place was improperly exercised in breach of the implied term. It was said that the Assessment was only undertaken to avoid paying BN the sums properly due to it. For completeness, I should say that I do not accept this contention. The very purpose of Clause 4.9 was to enable an Assessment to be undertaken if Everwarm considered it had overpaid. It would not be arbitrary, capricious or irrational to undertake an Assessment if, bona fide, it considered those very circumstances had arisen.

134. BN's next submission is that, in any event, a contract which includes Clause 4.9 is not one which complies with either the philosophy or the terms of the HGCRA and, for that separate reason, the whole of Clause 4, or at least Clause 4.9 is unenforceable and should be replaced by relevant parts of the Scheme. In the pleadings, BN had focussed particularly on s.110 HGCRA whereas, in opening and closing written submissions, it also relied on s.110A(1) and s.111. On behalf of Everwarm, Mr Quirk objected to this development, contending that the respects in which the clause was said to be non-compliant with the HGRCA should have been pleaded and cannot now be pursued. As I indicated during argument, matters of law of this sort which arise out of the HGCRA are routinely debated during the course of Part 8 trials without full pleadings but on the basis of written skeleton arguments provided one or two days before the hearing. In my judgment, it would have been wrong to preclude BN from arguing issues of law simply because they had not been fully pleaded. Mr Quirk had sufficient notice of the legal issues from BN's written submissions and was able to deal with them at the trial.

135. Section 110 of the HGCRA is in the following terms:

> *"Every construction contract shall -*
>
> *(a) provide an adequate mechanism for determining what payments become due under the contract, and when, and*
>
> *(b) provide for a final date for payment in relation to any sum which becomes due.*
>
> *The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment."*

136. One of the criticisms of Clause 4.9 made by Ms Piercy was that there was no requirement for the Assessments themselves to be provided to BN nor were there any temporal limits as to when they can be carried out (at least in the interim payment period). The combined effect, it was said, was that the whole of the payment regime could be undermined because Everwarm could determine the value of the works at any time and then demand repayments from BN without providing any explanation as to the basis for them. Insofar as these were submissions going to the alleged inadequacy of the mechanism for payment pursuant to s.110, I reject them. As to the provision of the Assessments, I would regard it as implicit that an Assessment itself (as distinct from mere notice of its outcome) would have to be given to BN if Everwarm was to rely on it. The clause would be unworkable without this so it is necessary to imply a term to that effect. As regards timing, the parties expressly agreed that Everwarm should be entitled to carry out the Assessment at any time and specifically contemplated that this could include a period between Valuation Dates. I see no difficulty with this. Parties are free to decide the frequency of occasions on which a payment (other than a final payment) pursuant to a construction contract may be made. It follows that the lack of any express requirement to provide an explanation as to the basis of the Assessment does not mean the payment mechanism is inadequate. On a proper construction, the requirement to do so is implicit.

137. Section 110A(1) HGCRA provides:

> *"A construction contract shall, in relation to every payment provided for by the contract—*
>
> *(a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or*
>
> *(b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date."*

138. The Everwarm standard terms undoubtedly comply with this requirement as regards interim payments: see Clause 4.3.6. In respect of the final payment, the same clause applies: see Clause 4.8. But BN submits, in my judgment rightly, that contrary to s.110A(1)(a) there is no equivalent provision for the giving of notice by the payer in response to any claim for payment based on Clause 4.9 as a result of an Assessment. Mr Quirk sought to suggest that Clause 4.9 was nonetheless compliant

with the requirements of s.110A(1)(b) because there was no prohibition on the payment notice being served on or before the payment due date and that the letters enclosing the Assessments were also the payee's payment notices required pursuant to s.110A(1)(b). In my view, this analysis cannot be correct. The demand for payment derived from the Assessment is what gives rise to the claim for payment in the first place and it cannot also serve as the payee's notice in respect of it. In any event, Clause 4.9 does not contain a provision which requires such a notice to be sent no later than five days after the payment due date. In my judgment, these subcontracts do not therefore contain a provision which complies with s.110A(1). I should add that, irrespective of this deficiency, a further difficulty is that, on Everwarm's construction, a compliant notice is one which sets out the amount considered to be due and the basis of the calculation of that amount. If Clause 4.9 does not contain such a requirement then that would be an additional deficiency.

139. Ms Piercy's submission was that the regime of notices was fundamental to the machinery of the payment provisions. She said the whole point of the Act was to create a regime in which each party knew what was going to be paid and the basis for it. In reliance on *Adam Architecture Ltd v Halsbury Homes Ltd* [2017] EWCA Civ 1735 at [47] she contended that the requirements for notices were part and parcel of the adequate mechanism for determining what payments become due and when so that, if the requirement for notices was not fulfilled, section 110 had not been complied with, such that s.110(3), which imports the relevant provisions of the Scheme[5], was engaged. She also relies on s.110(1D) which provides:

> *"The requirement in subsection (1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction contract provides for the date on which a payment becomes due to be determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract."*

140. As I have said, Ms Piercy was right to submit that Everwarm's terms and conditions plainly do not provide for any notice to be given in respect of any payment due pursuant to Clause 4.9. Whilst I agree that the regime of notices is fundamental to the payment system to which the HGCRA gives rise, I do not accept the link to s.110 which Ms Piercy seeks to make.

141. In *Adam Architecture*, Jackson LJ said at [47]:

> *"There is an important distinction between sections 109 to 110A on the one hand and sections 110B to 111 on the other hand. Sections 109, 110 and 110A set out what a contract must say. If the contract does not comply, then the relevant provisions of the Scheme are incorporated into the offending contract. Sections 110B to 111, by contrast, do not dictate what the contract must*

[5] In this context, it is the Scheme for Construction Contracts (England and Wales) Regulations 1998 which apply: see Clause 14 of the terms and conditions. The English Scheme is also referred to in Clause 8.1.

> *say. Instead those two sections set out, in somewhat convoluted language, what the parties may or must do in certain situations."*

142. Inevitably, I agree with that. But I do not consider it supports the proposition that, in order for a construction contract to have an adequate mechanism for determining what sums are due and when, the construction contract must provide for every payment to be subject to the service of a notice. That is not what Jackson LJ said.

143. If the construction contract does not comply with the requirements of the HGCRA, that does not inevitably render the express contractual provisions unenforceable. In a case where the construction contract does not comply with s.110A(1), the remedy is provided for in the Scheme by virtue of s.110A(5). Paragraph 9 of the Scheme sets out a mandatory notice regime for notice and is imported where the provision for such notice is lacking.

144. The importation of paragraph 9 does not render any of the express wording in Clause 4.9 redundant. Nor does it require it to be overridden. The regime for the giving of a notice is simply imported where it was otherwise missing. In my view, this has nothing whatever to do with the adequacy of the mechanism for determining what payments become due and when pursuant to s.110. In this respect, s.110(3) has no application and is irrelevant. The fact that the Scheme provides a remedy for any deficiency resulting from non-compliance with s.110A(1) is a powerful indicator that the same deficiency cannot also amount to a lack of adequate mechanism within the meaning of s.110. I therefore reject Ms Piercy's submission that the two are connected in the way she suggests.

145. Ms Piercy's second point is that where an Assessment has been made pursuant to Clause 4.9 there is no entitlement to challenge that assessment or even to pay less than the sum which has been assessed. Mr Quirk submitted that, in such a case, paragraph 9 of the Scheme could be deployed. Ms Piercy submitted that paragraph 9 is only relevant if there is already an adequate mechanism for determining what payments are due and when. I do not accept the submission on behalf of BN that there is no entitlement to challenge a Clause 4.9 Assessment. In my view, paragraph 9 is entirely apt to be implied where the contract contains no provision for the giving of notice. I agree that paragraph 9 presupposes that there is an adequate mechanism for determining what payments are due and when, in the sense that that entirely separate question is addressed by s.110(1). Either the contract complies with that requirement or the Scheme imports the applicable provisions to resolve it: see *Bennett (Construction) Ltd v CIMC MBS Ltd* [2019] EWCA Civ 1515 at [54]. One way or another, there will therefore be an adequate mechanism within the contract for determining what payments are due and when. This has nothing whatever to do with the separate requirements in respect of the giving of notices.

146. Pursuant to paragraph 9 of the Scheme, the payer in respect of the payment provided for in the contract (which in the context of Clause 4.9 must be BN) must, not later than five days from the payment due date, give a notice to the payee (Everwarm) specifying the sum it considers to be due at the payment due date, the work to which the payment relates and the basis on which that sum is calculated. The due date for a payment pursuant to Clause 4.9 is 7 days from the provision of the Assessment and the demand for payment. The notice procedure provided by

paragraph 9 therefore enables BN as payer to challenge the Assessment. If BN had done so by serving a timely notice, it would be the notified sum pursuant to s.111 even if that had been less than the amount assessed by Everwarm. Any dispute over that amount could then be resolved in adjudication (or litigation). The right to serve a pay less notice is provided by s.111 irrespective of the contractual provisions.

147. Ms Piercy also contended that Clause 4.9 offended s.111 because it requires a payment to be made which is not a notified sum. She says that Clause 4.9 does not give rise to a notified sum. In my view, that is not correct. It may be that her submission in this respect is based on the notion that the demand enclosing the Assessment itself purports to be the notice of payment whereas, as I have said, in my view what it does is to identify and give rise to the sum which is allegedly due for payment. The notice regime which establishes the notified sum then follows once the Assessment has been provided.

148. Though not strictly material to this topic, there was some discussion about the final date for payment in respect of a sum due pursuant to a Clause 4.9 Assessment. Mr Quirk originally contended that both the due date and the final date were 7 days from the provision of the Assessment. I do not agree. In my view, and as Mr Quirk submitted in the alternative, Clause 4.9 fails to provide for a final date for payment. That is not in compliance with s.110(1)(b) and, by virtue of s.110(3), paragraph 8 of the Scheme imports a final date which is 17 days from the due date. That enables BN to establish the date by which it can serve a valid pay less notice in response to an Assessment.

149. Ms Piercy's submission was that the right to carry out an Assessment pursuant to Clause 4.9 could be deployed in a manner which undermined the purpose of the interim payment provisions. She postulated a situation in which Everwarm might have failed to serve a pay less notice in response to a valid payment notice from BN in respect of an interim application, rendering the sum applied for due, and then sought to claw back any overpayment pursuant to Clause 4.9. Ms Piercy contended that the importing of payment notice provisions into Clause 4.9 would thereby enable Everwarm to flout the notice regime contained in the standard terms in respect of interim payments. In support of this she cited the decision of Coulson J in *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd* [2008] EWHC 3029 at [71]-[72]. I consider those paragraphs are dealing with a different situation entirely. In that case the question was whether the provision which entitled Modus to liquidated damages could be used to deny payment in circumstances where it had failed to serve a withholding notice. Clause 4.9 is not being prayed in aid in the same way. This clause simply provides the facility for other occasions upon which a certain type of interim payment, namely an overpayment, could be made in between interim payments flowing to the subcontractor. It does not undermine the regime for those interim payments flowing to the subcontractor which would still have to be notified and the notified sum would have to be paid in the usual way.

150. However complex it might prove to be in practice, I therefore see no conceptual difficulty with this. The Assessment would have to take account of the value of work done at the selected assessment date which, necessarily, would be later than and different from the date used for the interim applications from BN. If BN was dissatisfied with the subsequent Assessment, it would be able to serve a notice in

compliance with the time limit set out in paragraph 9 of the Scheme and/or a pay less notice pursuant to s.111. In just the same way as adjudicators and Courts give effect to and enforce interim payments in the order in which they occur, I see no reason why the same could not happen where an Assessment follows an interim payment.

151. I do not follow, still less accept, Ms Piercy's point on s.110(1D) in the context of Clause 4.9. In that context, BN is the payer and the person to whom the payment is due is Everwarm. Clause 4.9 does not provide for the date on which a payment is due pursuant to that provision to be determined by reference to a giving of notice to Everwarm. It seems to me that Ms Piercy's submissions have assumed that, for the purposes of the HGCRA, the payer should always be regarded as Everwarm. In that context, she relies on *Balfour Beatty Construction Northern Ltd v Modus Corovest (Blackpool) Ltd* [2008] EWHC 3029 at [106] – [109]. That case was decided before the new notice regime was introduced. There is now a statutory definition of "payer" and "payee" for the purposes of the notice provisions: see section 110A(6). In that context, I conclude that the identity of the payer depends on the particular payment provided for by the construction contract. In Clause 4.9, BN is the payer.

152. I should also make clear that even if I had concluded that Clause 4.9 impacted upon the adequacy of the payment mechanism such that it could not stand, I would not have struck out the entirety of Clause 4, as Ms Piercy invited me to do. She submitted that because Clause 4.9 sat within a series of sub-clauses all dealing with payment, the entirety of those sub-clauses was undermined and should fall together. Her submission was that it would amount to cherry-picking to enforce some parts of the payment provisions and not enforce other parts and that Clause 4.9 undermined the whole of the regime in Clause 4. I reject those submissions. The remainder of the interim payment provisions within Clause 4 were fully understandable, self-contained (in the sense that they do not refer to or depend upon Clause 4.9) and statutorily compliant. The HGCRA contemplates piecemeal incorporation of payment provisions only to the extent that this is necessary to achieve what is required by the Act: see *Bennett (Construction) Ltd v CIMC MBS Ltd* [2019] EWCA Civ 1515 at [52] and [54]. If, on this assumption, effect could not have been given to Clause 4.9, it would not have impacted in any way upon the adequacy of the remainder of the payment provisions in Clause 4. They were perfectly workable.

153. In summary, I would not conclude that Clause 4.9 is unenforceable by reason of the HGCRA. It merely requires the importation of some specific elements of the Scheme as set out above.

154. I now turn to the Unfair Contract Terms Act 1977 ("UCTA"). Section 3 provides:

> *"(1) This section applies as between contracting parties where one of them deals on the other's written standard terms of business.*
>
> *(2) As against that party, the other cannot by reference to any contract term –*
>
> *(a) when himself in breach of contract, exclude or restrict any liability of his in respect of the breach; or*

> *(b) claim to be entitled –*
>
> > *(i) to render a contractual performance substantially different from that which was reasonably expected of him, or*
> >
> > *(ii) in respect of the whole or any part of his contractual obligation, to render no performance at all, except in so far as (in any of the cases mentioned above in this subsection) the contract term satisfies the requirement of reasonableness."*

155. On behalf of BN, Ms Piercy submits that Everwarm cannot claim to be entitled, pursuant to Clause 4.9, to render performance substantially different from that which was reasonably expected of it, unless the clause satisfies the requirement of reasonableness. Summarising briefly, she submitted that BN was entitled to expect that it would be paid the value of its subcontract works at the interim and final payment dates provided for in Clause 4; that the payments would be subject to the exchange of notices which would identify what sums were being paid and the basis for the calculation of those sums; and that in the event of any dispute as to those sums, the dispute could be determined by the court or by an adjudicator. She suggested that, on the construction of Clause 4.9 advanced by Everwarm, Everwarm can carry out an Assessment without reference to BN as to when it would be carried out; without any requirement as to how it had been carried out; without carrying it out in a manner which was not arbitrary, capricious or irrational; without the giving of notice; and without the facility to have the Assessment subjected to review by adjudication or a court.

156. In response, Mr Quirk submits that Clause 4.9 is simply part of the agreed contractual bargain. He points out that Clause 4.9 merely permits the recovery of overpayments and does not interfere either with the interim payment regime or the Final Account procedure.

157. Whatever Everwarm may, in the past, have contended is the true construction and effect of Clause 4.9, I have already decided those matters which are of significance in the preceding part of this judgment. In short:

(a) Everwarm is entitled to carry out an Assessment at any time of its choosing because that is what the subcontract expressly says;

(b) By virtue of an implied term, any Assessment would have to be provided with the demand for payment based on that Assessment;

(c) There is an express term that an Assessment would be performed in accordance with the terms of Clause 4.9 and an implied term that an Assessment would be performed in a manner which was not arbitrary, capricious or irrational;

(d) The regime whereby BN can serve a payment notice in response to the demand for payment is imported by virtue of the Scheme. BN can also serve a pay less notice pursuant to the HGCRA;

(e) Any dispute arising out of the demand based on the Assessment can be decided by an adjudicator or court, provided that BN serves timely notices;

(f) The interim payment regime sits alongside and is unaffected by any implementation of Clause 4.9. The implementation of the Final Account procedure is similarly unaffected.

158. Most of these features comprise the conventional content of a construction contract. In my judgment, there is no basis for saying that Clause 4.9 entitles Everwarm to render a performance substantially different from that which is expected of it. Both the *Braganza* type implied term and the combined system of notices and adjudication are sufficient controls to ensure that Everwarm cannot, unilaterally, carry out an Assessment and make a demand for payment which bears no relation to the value of the works undertaken by BN.

159. I therefore reject the submission that Clause 4.9 is contrary to UCTA.

160. I can summarise my conclusions on Clause 4.9 as follows:

(a) When carrying out the Assessment pursuant to Clause 4.9, Everwarm had an express duty to do so in accordance with the terms of Clause 4.9 and an implied duty not to do so arbitrarily, capriciously or irrationally;

(b) On the facts of this case, in respect of the Clause 4.9 subcontracts, Everwarm did not perform the Assessments in accordance with the express and implied terms;

(c) Accordingly, the claims in respect of the Clause 4.9 subcontracts fail;

(d) Clause 4.9 does not offend the principles enshrined within HGCRA and is not unenforceable for that reason. However, to make it effective it is necessary to import requirements for the provision of a payment notice and a final date for payment;

(e) Clause 4.9 is not unenforceable by reason of UCTA.

161. Since Everwarm's claim in this action is solely based on Clause 4.9, that claim must be and is hereby dismissed. It follows that the claim for interest pursuant to the Late Payment Act also fails and is dismissed.

BN's Counterclaims

162. As I have already mentioned, by multiple letters dated 25 May 2017, BN issued requests for the release of retentions on 35 of the subcontracts. After giving the reference to the particular subcontract order, each of the letters stated as follows:

> *"I refer to my previous correspondence concerning the above contract.*
>
> *In line with the terms of the contract the retention held against our works, as detailed in the attached invoice is now due. I would be grateful if you could arrange for payment of this retention immediately."*

163. Subsequently, BN wrote multiple letters dated 20 July 2017. Each of the letters stated as follows:

> *"We refer to your letter dated 21st June 2017 headed 'Notice of Assessment of Value of Sub-Contract Works' re the above sub-contract. We understand this to be purported 'Discretionary Assessment' pursuant to clause 4.9 of the relevant sub-contract conditions.*
>
> *Firstly, to the extent that said letter does constitute a valid Discretionary Assessment, which his not admitted, we write to advise that we disagree with the content of the assessment. Our position on the true value of the sub-contract works undertaken by our company is as per the attached document. In addition we also attach our assessment of the final account values of all those sub-contracts where agreed values have not thus far been achieved. You will see that we consider that we are due an aggregate debt of £1,986,717.59 inclusive of VAT on all of those sub-contracts. In addition we should advise that we do not consider that the terms of the sub-contract entitle you to retain and set-off monies allegedly overpaid on other sub-contracts as against monies due to ourselves insofar as the above sub-contract is concerned.*
>
> *Finally, should at any point in the future it be suggested by you that your letter of 21st June 2017 is in fact a notice issued by your company pursuant to clause 4.6 of the sub-contract, which is denied, then for the avoidance of doubt kindly also take this letter as advising you of our dissent as to your value of the final account. Our assessment of the value of the final account is as per the said attached document".*

164. Attached to each letter was a one-page document. For present purposes, it suffices to set out the terms of the document relating to RANDCHA although, as I understand it, the same format was used for each subcontract.

> ***Statement of Final Account***
>
> ***Project: Randcha EW15016***
> ***Subcontractor BN Rendering***
> *Unit 2, Linburn Business Park, Brown Street, Coatbridge ML5 4AS*
>
> ***Contractor Everwarm Limited***

3 Inchcorse Place, Whitehill Industrial Estate, Bathgate EH48 2EE

Completion Date 21 September 2014

Final Invoice Value	*£378,118.84*
Additional Work	*£0.00*
(not included in Final Invoice sum)	
Total Works Undertaken	*£378,118.84*
Everwarm Payment Total	*£362,000.00*
Outstanding Balance	*£16,118.84*
Retention Held by Everwarm	*£0.00*
Total Remaining to be Paid (net)	*£16,118.84*
Add Vat 20%	*£3,223.77*
Total Remaining to be Paid (gross)	*£19,342.61*
Amount Due Now	*£19,342.61*

165. The letters sought to give notice of a number of things concurrently. For example, they were intended as a notice of dissent pursuant to Clause 4.6, if relevant. But I am satisfied that they also amounted, in themselves, to a claim made by BN for payment due in respect of each of the Final Accounts. That is because the Attachments referred to the "Amount Due Now" in respect thereof.

Final Accounts

166. It is convenient to address BN's counterclaim in respect of the Final Accounts first, given that those accounts generally included for the release of retention[6]. To the extent necessary I will then consider the claims for retention. For the purposes of this trial, the contention is that in each case the letter and attachment dated 20 July 2017 was an application for payment in respect of which Everwarm served neither a payment notice nor pay less notice. Accordingly, BN claims payment of the amount applied for on what is, colloquially, known as a "smash and grab" basis[7]. This case was put by BN on the basis that, whether the regime was that set out in Clauses 4.4, 4.12 and 4.13 of the Rev 7 and/or 8 terms and conditions or pursuant to the Scheme for those subcontracts for which there was insufficient provision for the date of a final payment, the outcome was the same: there was no notice in response and the sum claimed is therefore the sum which is due.

167. The statutory provisions which arise in this context are to be found in s.110A, 110B and s.111. As is well known, s.110A (which I have already cited) makes provision for what a contract should contain and, in default, makes provision for the application of the Scheme. In contrast, s.111 is of direct effect. The relevant provisions are as follows:

[6] In some cases, where the balance of retention was still not due at the date of these letters, there is a difference between the Final Account value and the sum claimed as due.

[7] In *M Davenport Builders Ltd v Greer* [2019] BLR 241 at [8] to [10] it was more formally described by Stuart-Smith J as a claim for payment by the "short" or "contractual" route.

"110A Payment notices: contractual requirements

(1) A construction contract shall, in relation to every payment provided for by the contract—

(a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or

(b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.

(2) A notice complies with this subsection if it specifies—

(a) in a case where the notice is given by the payer—
(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and
(ii) the basis on which that sum is calculated;

(b) in a case where the notice is given by a specified person—

(i) the sum that the payer or the specified person considers to be or to have been due at the payment due date in respect of the payment, and
(ii) the basis on which that sum is calculated.

(3) A notice complies with this subsection if it specifies—

(a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and

(b) the basis on which that sum is calculated.

(4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero.

(5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.

(6) In this and the following sections, in relation to any payment provided for by a construction contract—

"payee" means the person to whom the payment is due;
"payer" means the person from whom the payment is due;
"payment due date" means the date provided for by the contract as the date on which the payment is due;
"specified person" means a person specified in or determined in accordance with the provisions of the contract.

110B Payment notices: payee's notice in default of payer's notice

(1) This section applies in a case where, in relation to any payment provided for by a construction contract—

(a) the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but

(b) notice is not given as so required.

(2) Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the date on which the notice referred to in subsection (1)(a) was required by the contract to be given.

(3) Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given.

(4) If—

(a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (1)(a) is required by the contract to be given, to notify the payer or a specified person of—

(i) the sum that the payee considers will become due on the payment due date in respect of the payment, and
(ii) the basis on which that sum is calculated, and

(b) the payee gives such notification in accordance with the contract,

that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection).

111 Requirement to pay notified sum

(1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.

(2) For the purposes of this section, the "notified sum" in relation to any payment provided for by a construction contract means—

(a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

(c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.

(3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.

(4) A notice under subsection (3) must specify—

(a) the sum that the payer considers to be due on the date the notice is served, and

(b) the basis on which that sum is calculated.

It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.

(5) A notice under subsection (3)—

(a) must be given not later than the prescribed period before the final date for payment, and

(b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.

(6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).

(7) In subsection (5), "prescribed period" means—

(a) such period as the parties may agree, or

(b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts….."

168. Everwarm has defended this claim for payment in respect of the Final Accounts in a number of different ways. Most of these related specifically to the Final Accounts arising pursuant to the written subcontracts that are subject to the Rev 7 or Rev 8 terms and conditions. I deal with those points below as they arise. More generally, in written closings, it was also contended that in all cases the sums claimed were "unsubstantiated, undocumented and wrong" for various reasons. It was also said that the letters of 20 July 2017 and attachments thereto lacked sufficient breakdown or supporting detail to be compliant notices and that, if Everwarm's own letters of 21 June 2017 were to be criticised by BN in that respect, as they were, the same criticisms must equally apply to BN's letters.

169. During closing submissions during the trial, a further point was developed by Everwarm in answer to BN's counterclaim based on Everwarm's failure to respond to BN's Final Account notices. This was to the effect that: (a) Everwarm's Assessments were themselves Final Account valuations made in accordance with the terms of the applicable written subcontracts; and (b) its letters of 20 June 2017 were therefore capable of being relied on as relevant notices from Everwarm, of which cognisance had to be taken when considering BN's own claim for payment based on a failure to serve proper notices in answer to BN's Final Account notices served on 20 July 2017. On any view this point was not pleaded or even canvassed in opening and its introduction plainly took BN and the Court by some surprise. Both orally and in her written further submissions, Ms Piercy invited me to disregard this new point because it had not been pleaded. She contended that, if the argument had been pleaded, evidence could have been adduced in relation to it. Alternatively, witnesses from Everwarm could have been cross examined. Neither at the time nor since has Everwarm applied to amend its pleadings to reflect the argument advanced.

170. Initially, it seemed to me that the impact of this further argument was purely legal and involved the proper interpretation of documents. For that reason, I allowed both parties to make submissions in writing which reflected the new argument, without determining that it was permissible for Everwarm to have raised it. However, as those written submissions have developed, so too has the context in which Everwarm has sought to deploy this new point. Perceiving its toe to be in the door, Everwarm subsequently contended that another effect of treating Everwarm's Assessments as Final Account valuations is that Everwarm can rely on them in exercising a right of set off against BN's claims for retention. On any view, this further development has not been pleaded.

171. I have come to the conclusion that it would be wrong to now allow Everwarm to argue that its Assessments should be treated as Final Accounts, for whatever purpose that argument may be deployed. The point has not been pleaded and it has now become clear that its ramifications stray well beyond arguments about payment notices. From first to last, Everwarm's pleaded case was firmly founded on Clause 4.9 alone. I am satisfied that BN might have taken a different approach to the way in which it had conducted the trial if had known that Everwarm was going to contend that it had actually sent Final Accounts valuations pursuant to Clause 4.6, not Assessments pursuant to Clause 4.9.

172. I therefore return to consideration of BN's counterclaim in respect of the Final Accounts without taking account of the latter point.

173. Since the counterclaim in respect of the Final Accounts is based on each of the subcontracts, which are subject to different regimes, I must deal with them separately even though, during submissions, most of the focus was on those subcontracts governed by the regime in Rev 7 or Rev 8. The three categories of case are:

(a) The RANDCHA subcontract, subject to the 2013 terms;

(b) The oral subcontracts, not subject to any written terms;

(c) The written subcontracts, subject to the terms in Rev 7 or Rev 8.

RANDCHA

174. Everwarm's case was that the 2013 terms were sufficient to comply with the HGCRA and there was, therefore, no warrant for implying any provision from the Scheme. It submitted that both a due and final date are provided for in Clause 13.2 and 13.3 and that there is no other part of the 2013 terms (i.e. including Clause 13.9) which offends s.110(1D). BN's case was that, in respect of Clause 13.9, the clause did not comply with the HGCRA because the date on which the payment becomes due depends on the "ascertainment" being provided by Everwarm to BN. I agree. Clause 13.9 states that the sum is due 30 days from the ascertainment which Everwarm is required to carry out. If Everwarm (the contracting party, not a third party) never produced an ascertainment, it could thereby prevent the sum ever becoming due. This is contrary to s.110(1D), as Ms Piercy submitted. It is true that Clauses 13.2 and 13.3 provide both a due date and a final date which are self-standing but those are for interim payments whereas Clause 13.9 is concerned with the final (account) payment. It follows that, as regards the final payment, the RANDCHA subcontract does not comply with s.110(1)(a). It is necessary to import the relevant provision from Part II of the Scottish Scheme by virtue of s.110(3). The 2013 terms were subject to Scottish law.

175. Paragraph 3 of the Scheme applies but that merely directs that the relevant provisions of paragraphs 4 to 7 apply. I should point out that, wherever BN said the Scheme applied, BN pleaded reliance on paragraph 6 thereof. In his own submissions on behalf of Everwarm. Mr Quirk also assumed it would be paragraph 6 that applied. The drafting of the paragraphs is not easy to follow but, in fact, paragraph 6 is concerned with contracts where the duration of the work is or is expected to be less than 45 days. None of the subcontracts in this case fell into that category. Accordingly, I consider that it is paragraph 5 of the Scheme which applies.

176. This provides:

> *"The final payment payable under a relevant construction contract, namely the payment of an amount equal to the difference (if any) between:*
>
> *(a) the contract price; and*
> *(b) the aggregate of any instalment or stage or periodic payments which have become due under the contract,*
>
> *shall become due on –*
>
> *(i) the expiry of 30 days following completion of the work; or*
>
> *(ii) the making of a claim by the payee,*
>
> *whichever is the later."*

177. Clause 13.9 also provides a final date for payment but that, too, is based on the ascertainment to be undertaken by Everwarm. It is not workable to have a final date for payment which is also computed by reference to the date of the ascertainment in circumstances where the due date is not so referable. Accordingly, it seems to me that paragraph 8(2) of the Scheme applies. That makes the final date 17 days from the date that the payment becomes due. In this context Mr Quirk had submitted that there

was no need to import the Scheme because the courts expect parties to adopt business common sense in respect of arrangements for invoicing and payment: see *Bennett (Construction) Ltd v CIMC MBS Ltd* [2019] EWCA Civ 1515 at [42]. That was a case in which the final date for payment was completely absent. In this case, the parties had agreed a date but it was not workable for the reasons I have given.

178. Mr Nemeth's evidence is that the work was completed in September 2014, which evidence I accept. He says a claim for payment was made in November 2014 but does not exhibit the email itself and I was not taken to it. Instead, for these proceedings, BN relies on the Statement of Final Account attached to the (template) letter of 20 July 2017. I must therefore consider whether this is a claim for payment made by the payee pursuant to paragraph 5 of the Scheme. In that context, I note in passing that RANDCHA is not one of those subcontracts in respect of which Everwarm claimed to be the payee.

179. In my view, as regards paragraph 5 of the Scheme, it was a claim by the payee. The letter of 20 July 2017 said that the attached document assessed the value. The attached document asserted that the amount "remaining to be paid" was £16,118.84 such that the amount "now due" including VAT was £19,342.61.

180. On behalf of Everwarm, Mr Quirk has objected that insufficient detail was provided with the letters, of which this was one. In my judgment, he is right to do so. I conclude that the claim for payment did not comply with Clause 13.9 because it did not provide a "final detailed statement of the value of the Subcontract Works".

181. As sent, the claim was not, in any sense, detailed. It was limited to one-page. Within the Statement of Final Account, no detail was given as to the "Final Invoice Value" of £378,118.84, which, in this context, is the critical figure. It was simply and singly expressed as a lump sum from which previous payments were deducted. That was the sole information which BN provided with the Statement.

182. Whether it is sufficient to refer to a lump sum in this context will depend on the pricing terms of the contract and other surrounding circumstances For example, in the case of a lump sum price contract, it may suffice simply to give the lump sum and deduct previous payments because there is nothing else that can be stated in order to specify the basis on which the sum is calculated. But in this case the sum which is due in respect of the final payment is necessarily based on a detailed measure of the relevant properties to which the applicable rate (or rates) is applied. On the face of the notice, none of that information was given here.

183. Ms Piercy submitted that the "Final Invoice Value" was intended and should be construed as a reference to another document and that incorporation by reference is permitted in payment notices: *S&T(UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ at [53] to [56]. She says that there is no complaint that Everwarm did not understand the valuation or that the reference to the final invoice was ambiguous. I accept that, in principle, incorporation of one document by reference into a notice is permissible. That was established in *S&T* at [53]. But, as the Court of Appeal confirmed, it is a question of fact and degree whether the purported notice achieved the requisite degree of specificity. In this case, it is not clear and obvious that the brief words "Final Invoice Value" were intended to incorporate another document by

reference. They could simply mean that the given figure was the Final Invoice Value. But even if it were intended as a reference to an earlier document, I am not aware of any document meeting that description. I was not taken to one although, in her written closing submissions, Ms Piercy refers to final invoices having been sent for each project. No date of the Final Invoice is identified in the Statement of Final Account relied on as a notice. Mr Nemeth's witness statement describes BN as having submitted a "Final Valuation" by email on 24 November 2014 (to which I was not taken) but does not give evidence about having sent a Final Invoice. If the reference to "Final Invoice Value" was a misdescription for whatever it was that was sent on 24 November 2014 (well over two years earlier) then, in my judgment, the reference was insufficiently described for it to have been plain and obvious to the recipient to what the notice was referring. In *S&T*, the document expressly incorporated by reference was correctly identified, dated and recent, having been sent only five days earlier. In the present case, it was not even obvious that incorporation by reference was intended but, even if it was, the document sought to be incorporated was, it appears, incorrectly described, undated and was generated, not days or weeks before, but years earlier. It may be assumed that such documents would not be readily to hand. I am not satisfied that a reasonable recipient standing in the shoes of Everwarm, required to respond with despatch, would reasonably have understood what it was that was being referred to by the "Final Invoice Value". It is true that Everwarm did not submit specific subjective evidence that it did not understand the reference to a Final Invoice but that is not the point. The question of whether a notice contains the requisite degree of specificity, when viewed as a whole, must be determined on an objective basis, whatever may have been the subjective understanding of the recipient. Reading the letter and Statement of Final Account in its context, I am not satisfied that this notice amounted to a detailed statement of the value of the Subcontract Works.

184. I should add that, in the context of his submissions as to the specificity of information given Everwarm's own letters of 21 June 2017, where the boot was on the other foot, Mr Quirk submitted that there should be no micro-management by the Court when considering whether a notice sufficiently set out the basis of the calculation. He submitted that the requirement for specificity should not be stringently enforced in a manner of which payers might frequently fall foul. I do not accept this characterisation is correct or, indeed, appropriate. In *S&T*, it was concluded that the sufficiency of information required for a notice was a question of fact and degree: [53]. That is the single and only test which must be applied by Courts and adjudicators to the facts before them. Beyond that, it would not be helpful to prescribe any degree of stringency that should be applied in a given case.

185. The consequence of my earlier conclusion is that, pursuant to s.110B(4)(b), BN has failed to give notification in accordance with the contract to the extent it relies on the letter of 20 July 2017 and the one-page attachment thereto. Leaving aside the contractual term, but for the same reason, I conclude that the basis on which the sum is calculated has not been specified. The sum has been stated but the basis for it has not.

186. In those circumstances and on the evidential material to which my attention has been drawn, I am unable to conclude in respect of the final payment that there has been a notified sum by BN for the purposes of s.111(1).

187. The claim for this item therefore fails.

The oral subcontracts

188. Everwarm's case was that the 2103 terms applied but I have rejected that. I have earlier set out the basic payment terms which apply to these subcontracts.

189. As regards the final payment, I am satisfied that the subcontracts do not comply with s.110. Accordingly, paragraph 5 of the Scottish Scheme applies. Again, no problem arises in respect of the due date. I am content to accept the evidence of Mr Nemeth that completion of the works in each case has long since passed. Accordingly, the final payment is due upon the making of a claim by the payee which came later than 30 days following completion. Mr Nemeth says that a Final Valuation was submitted by email at around the completion of the works. However, for the purposes of these proceedings, BN relies in each case solely on the one-page Statement of Final Account attached to the template letter of 20 July 2017. For the reasons given above in respect of RANDCHA, I conclude that the letters and attachments of 20 July 2017 are claims made by the payee.

190. It then becomes relevant to consider the question of notification. The fact that BN has made a claim as payee does not necessarily mean that it has given requisite notice to enable it to rely on s.111. BN's case supposes that a payment notice should have been provided by Everwarm by 25 July 2017 pursuant to s.110A(1)(a) and that, in the absence thereof, the Final Accounts became payment notices pursuant to s.110B(4) on which reliance can be placed for the purposes of s.111[8].

191. These oral subcontracts did not contain an express term which complied with s.110A(1)(a). Accordingly, by virtue of s.110A(5) the Scottish Scheme applies. This imports paragraph 9 which requires a payer to give a notice not later than 5 days after the due date.

192. In my judgment, a flaw in BN's case is that, as regards the final payment, these subcontracts do not contain a term which permits or requires BN to notify Everwarm before the date of the notice in paragraph 9 (not later than 5 days after the due date) of the sum it considers to be due and the basis on which that sum is calculated. It follows that s.110B(4) does not apply. The purpose of this section is to allow a contractually compliant payment application to stand as a payee's notice, which would otherwise come after the due date, provided it contains the same amount of information as would be required by any other notice i.e. it identifies both the sum considered to be due and the basis for the calculation. Not only was there no contractual provision in these subcontracts to that effect in respect of the final payment but, also, the one-page document which was attached to the letters of 20 July 2017 did not fulfil the requirement of identifying the basis of the calculation. As explained above, a lump sum was simply identified from which the previous payment was then deducted. Insofar as BN seeks to rely on further specificity having been

[8] Paragraph 13.3 of BN's written submissions dated 30 August 2019. That this was BN's case had not been apparent hitherto.

provided in some other, earlier document incorporated by reference, I reject it for the same reasons as those I have given earlier in respect of RANDCHA.

193. I accept that, in response to the Final Account claims, Everwarm did not provide a payer's notice pursuant to paragraph 9 of the Scheme. However, in order to rely on s.111, BN then had to serve a notice of its own pursuant to s.110B(2) but it did not do so. Had it been able to rely on s.110B(4), that would have sufficed, but it could not do so for the reasons I have given. A notice pursuant to s.110B(2) would have required BN to specify the sum considered to be due and the basis for the calculation.

194. In those circumstances and on the evidential material to which my attention has been drawn, I am unable to conclude that, in respect of the final payments, there has been a notified sum by BN for the purposes of s.111(1) in respect of the oral subcontracts.

195. The claim for these sums therefore fails.

196. As I have earlier mentioned, in respect of a number of oral subcontracts, Everwarm belatedly raised an alternative, un-pleaded, argument that in respect of the Final Accounts it was the payee so that, far from looking at BN's Final Account notices to see whether Everwarm had responded to them in time, I should be looking at Everwarm's prior notices, sent in the form of the Assessments on 21 June 2017, to see if BN replied to them in time. I have concluded that Everwarm is not entitled to make this point. However, had it been material to do so, I would have concluded that Everwarm's notices did not sufficiently set out the basis for the calculation of the sum claimed since there was no explanation at all as to how the sum stated therein had been calculated. For example, there was no explanation given as to the expression "Method of Measurement" with the consequence that the sum deducted by reason thereof could not have been understood. The basis of the T&T reduction was never explained to BN at the time. Whether the lack of specificity was the only difficulty facing Everwarm with this argument is not a matter I need consider any further.

197. For clarity, it was no part of BN's own case that Everwarm's letters of 21 June 2017 amounted to a claim by Everwarm as payee (in respect of those subcontracts where Everwarm contended it was the payee) so that BN's letters of 20 July 2017 would have constituted valid payment notices in response thereto. The only basis upon which BN claimed payment was that its own letters were the payee's claim.

The written subcontracts subject to Rev 7 or Rev 8

198. I have already set out the applicable terms in respect of those subcontracts to which Rev 7 applied. The regime is similar in respect of Rev 8 but, since it is directly applicable to some of the subcontracts presently under consideration, I will also set out the Final Account provisions in Rev 8.

> *"**Final Account***
>
> *4.4 Within 3 months of the date of completion of the Sub-Contract Works the Sub-Contractor shall submit an account representing the total value of the Sub-Contract Works carried out by the Sub-Contractor and*

calculated in accordance with the Sub-Contract for ascertainment of the value of the Sub-Contract Works by the Company. The Company shall notify the Sub-Contractor of its ascertainment of the value of the Sub-Contract Works within 3 months of receipt of the Sub-Contractor's account representing the value of the Sub-Contract Works.

4.5 The Sub-Contractor's account shall contain such details as the Company may reasonably require in order to properly ascertain the value of the Sub-Contract Works and calculate the final payment.

4.6 If the Sub-Contractor fails to submit an account within 3 months of the date of completion of the Sub-Contract Works the Company may within 6 months of the date of completion of the Sub-Contract Works value the Sub-Contract Works from the information then in its possession and notify such valuation to the Sub-Contractor and if the Sub-Contractor does not dissent from the Company's valuation within 1 month of its submission to the Sub-Contractor the Company's valuation shall have effect in any proceedings under or arising out of or in connection with the Sub-Contract as conclusive evidence that any necessary effect has been given to all the terms of this agreement which require an amount to be added to or subtracted from the Sub-Contract Sum and that all and only such extensions of the Period for Completion as are due under clause 2.5 have been given.

4.7 Any interim payments paid or due to be paid to the Sub-Contractor by the Company under clause 4.3, or otherwise, shall be deducted from the Company's ascertained value of the Sub-Contract Works under clause 4.4 or from the Company's valuation of the Sub-Contract Works under clause 4.6 as applicable and any balance shall be the final payment due to the Sub-Contractor from the Company or the final payment due to the Company from the Sub-Contractor as appropriate.

4.8 The due date for payment of the Final Account shall be the date being 14 calendar days after the issue of the Final Account by the Company to the Sub-Contractor written and payment thereafter will be dealt with in accordance with clause 4.3.6 to 4.3.12".

199. BN's contention is that the Rev 7 and Rev 8 terms do not set out a workable regime in respect of the final payment. In particular, it is pleaded that there is no final date for payment such as is required by s.110(1)(b) HGCRA[9]. In fact, Clause 4.3.7 provides for a final date for payment. No submissions were made as to why that provision was insufficient. Be that as it may, I did not understand BN to be contending that the whole of the regime in respect of the Final Account (Clause 4.4 and following) was non-compliant such that it should be entirely replaced. If that was BN's contention, I do not accept it. I have already rejected the submission that, by reason of Clause 4.9, the whole of Clause 4 should be ousted in favour of the Scheme.

200. It is appropriate to deal with the notice point next. In this case, Clause 4.5 of both Rev 7 and Rev 8 requires the provision by BN of sufficient details relating to the account as may reasonably be required to properly ascertain the value of the works.

[9] Paragraph 23 of the Amended Defence and Counterclaim.

Assuming, for present purposes, that this provision is sufficient to comply with s.110B(4)(a), I am satisfied that, for the purposes of s.111, BN has not given notice in accordance with that contractual requirement by relying on the one-page attachments to its template letters of 20 July 2017. That is because they do not provide sufficient details to properly ascertain the value of the works. The value of the works is simply stated as a lump sum and I am not persuaded that this lack of specificity can be rescued by reliance on the "Final Invoice Value". If the Final Account regime does not comply with the statutory requirements, the outcome is the same because the Scheme imposes a requirement for the payee to have specified the sum it considers to be due and the basis upon which that sum is calculated. For the same reasons as I have given above, based on the evidence before the Court, the one-page Statements of Final Accounts, including the words "Final Invoice Value", do not specify the basis on which the sum due has been calculated. It follows that, at no stage, has BN provided a notice on which to found a claim pursuant to s.111 that the notified sum was that contended for by BN.

201. The claim for these sums therefore fails.

202. It follows that the additional points made by Everwarm in response to these Final Account claims do not strictly arise. I will mention two of them for completeness, albeit briefly. It is said that the Final Account claims were issued too late by reference to the terms of the written subcontracts and cannot now be relied on. I reject that submission. Contracts frequently provide a date by which a contractor should submit its Final Account but rarely is the time of that submission made a condition of the contractor's entitlement to make a claim. Whether it is a condition depends on the proper construction of the particular provision in question. I accept Ms Piercy's submission that Clause 4.4, properly construed, does not suggest that a failure by BN to submit an account within 3 months means that it loses its entitlement to do so forever. In this case, the effect of a failure by BN to make its application within 3 months is that the regime in Clause 4.6 can be deployed by Everwarm. There would, of course, be no incentive to use this regime at all if, on a proper construction of the provision, BN had already forfeited the right to make a Final Account claim forever. Pursuant to Clause 4.6, Everwarm has a further 3 months in which to take action. But if Everwarm also fails to do so within the time, I see no reason why BN could not submit its own application for the final payment thereafter. It is not realistic to suppose that the regime for the final payment in these subcontracts simply disappears into a black hole. Indeed, Ms Piercy is right to say that, if that was the conclusion, it would not be an adequate mechanism for determining when the final payment became due.

203. Everwarm also submitted that the Final Accounts were issued too late because they post-dated the Assessments made pursuant to Clause 4.9, where applicable. I reject that submission for two reasons. Firstly, because I have concluded that the Assessments made by Everwarm did not comply with Clause 4.9. Secondly, because any Assessment properly made in accordance with Clause 4.9 would only be a holding, or interim, position and was therefore always subject to the Final Account regime.

204. Leaving aside the pleading objection which I have upheld, Everwarm's letters of 21 June 2019 could not have sufficed as notices because they did not specify the basis upon which the sum identified had been calculated.

205. However, for the reasons given earlier, BN's Final Account counterclaim based on an absence of notices from Everwarm fails. Mr Quirk had contended that if sums were due from Everwarm to BN by reason of Everwarm's failure to serve the requisite notices, I should not order payment in circumstances where those claims depended, at least in part, on BN's claim for payment in respect of ingoes based on the Agreed Method if (as I have done) I reject the claim made on that basis as part of this judgment. He suggested that it would give rise to a huge, unwarranted windfall if I were to allow the counterclaim on such a basis. In such a case, he invited me to award nothing on the counterclaim at this stage, leaving it to BN to pursue its alternative counterclaim based on a true value at the following stage of these proceedings. Had it been material, I would not have accepted this submission. If Everwarm has not served the appropriate notices, the consequence flows from s.111: the notified sum must be paid. Everwarm's remedy is to pay the notified sum first, and thereafter, if it wishes, to claim reimbursement pursuant to a true value exercise, whether by adjudication or in Court: see *S&T(UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2446. In this case, all that has happened is that I have finally determined that the method of calculating the true value of one aspect of BN's Final Account claim on a given subcontract was not that which was used when computing what became the notified sum of that given subcontract. That does not relieve Everwarm of its obligation to pay the whole of the notified sum in the meantime. At this stage no exercise has yet been undertaken to identify the impact that my decision on ingoes would have on the amount claimed.

Retention

206. On the basis that BN's Final Account claim does not succeed, it alternatively claims payment pursuant to the Retention Schedule attached to its written closing submissions, in the total sum of £406,015.90 plus VAT.

207. Once again, it is necessary to address retention in the three categories into which these subcontracts fall namely:

(a) The RANDCHA subcontract, subject to the 2013 terms;

(b) The oral subcontracts, not subject to any written terms;

(c) The written subcontracts, subject to the terms in Rev 7 or Rev 8.

RANDCHA

208. No claim is made for the release of retention in respect of this subcontract.

The oral subcontracts

209. Retention is claimed in the sum of £352,858.11[10] plus VAT. BN puts its case in two ways: firstly, that it is substantively entitled to the release of retention in respect of these subcontracts, sufficient time having elapsed and a demand having been made; secondly, that it claimed release of retention pursuant to notices served pursuant to the HGCRA in respect of which Everwarm failed to respond, so that Everwarm is obliged to pay the sum claimed in any event.

210. It is appropriate to begin with the first of these alternatives since this will establish whether BN has a substantive entitlement to payment in respect of retention. A decision based on the second alternative, if in BN's favour, would simply be an interim position which may prove to be unnecessary.

211. As set out above, these subcontracts were subject to a regime of retention in the sum of 2.5% to be withheld for a period of 12 months from completion of the work contained in the relevant subcontracts. On the expiry of the 12 month period, the retention monies fell due. It is right to record that both parties raised a number of other points in connection with the claim for retention monies. These were largely dependent on the prior question as to whether there was a contractual term about retention at all and, if so, what it was, but, if not, whether monies purportedly deducted as retention should be paid anyway. These points all fall away in light of my earlier findings.

212. In the case of each subcontract, Mr Nemeth's witness statement sets out the relevant date upon which BN says the works were complete in respect of each subcontract save for those four sites at which works were suspended prior to completion. Save as to those four sites, I accept his evidence that the works were complete on the dates he gives. Indeed, the evidence was not challenged in this respect.

213. It is agreed by both Mr Stirling of Everwarm and Mr Nemeth that in March 2017 works were suspended on four sites: Peterhead[11], Kirkcaldy, Irvine and Tweedbank. Thereafter, BN's works never resumed. There is a minor dispute about the precise date of suspension which I need not resolve. Two of these four sites, Irvine (Phase 2) and Aberdeen, are within the category of oral subcontracts presently under consideration. Everwarm's case is that BN is not entitled to recover retention in respect of any site which was never completed by BN. Whilst the witness statements on both sides dealt with the narrative about suspension, very little was made of it either at trial or in the subsequent submissions of the parties. I must therefore do the best I can with what I have. It is common ground that Everwarm wrote letters dated 14 March 2017 alleging in respect of each subcontract that the withdrawal of labour was a breach of contract. BN did not reply. Thereafter, neither party sought to terminate any of the subcontracts. Nor has either side alleged or purported to accept a repudiatory breach of them. The subcontracts appear to have just fizzled out by mutual agreement.

[10] Appendix 2 to BN's Closing Submissions dated 30 August: £244,577.54 (Aberdeenshire); £103,341.49 (2015 contracts up to 21 December 2015); £1,928.88 (St. Andrews Primary) and £3,010.20 (Milton).
[11] This is a sub site within the Aberdeenshire subcontract.

214. I reject Everwarm's case that the failure to complete the works on Irvine means that BN is now no longer entitled to claim retention in respect of that subcontract. In light of the mutual agreement, the parties must be taken to have agreed that retention would be released no later than 12 months from the date upon which, by common agreement, works on that subcontract would not resume. BN has taken the date of 9 March 2018 which it says is one year after the suspension. That is too early. In my judgment, the mutual agreement should be taken to have been reached at a later date than March 2017 because that is merely when the suspension first occurred. In this context, it is relevant to note that T&T's Assessments allowed for the release of BN's retention on all sites, including the four which had been the subject of suspension. These Assessments were sent on 21 June 2017. By then it was clear to both parties that Everwarm was not expecting BN to complete the works on the four sites and BN was not expecting to carry them out. Indeed, Everwarm may already have completed them in the meantime. I therefore conclude that retentions on Irvine and Aberdeen were due for release no later than 21 June 2018.

215. It follows that pursuant to the terms of the oral subcontracts BN was entitled to payment in respect of retention 12 months from each of the completion dates stated by Mr Nemeth. Those are the dates on which the sums were due to BN. Those dates are reflected in Appendix 2 to BN's Closing Submissions dated 30 August 2019 save that, in respect of Irvine and Aberdeen, I would adopt 21 June 2018 as the due date.

216. I am satisfied that, after those dates, BN has subsequently made demands for payment of those sums and that Everwarm has failed to pay them. It is not necessary to spell out when those demands were made.

217. Everwarm takes a point that BN's pleaded claim for retention is either based on the Rev 7 or Rev 8 terms (which necessarily do not apply in the context of the oral subcontracts) or is based on the application of paragraph 6 of the English or Scottish Schemes (the latter applying in this context). Everwarm then explained why, on its case, the claim based on paragraph 6 of the Scheme is not maintainable. BN's submissions did not develop the case based on the application of the Scheme but took the position that retention was due anyway because sufficient time had passed since completion of the works. BN was right not to rest its case on paragraph 6 of the Scheme. The Scheme is only engaged to the extent that the parties have failed to agree an adequate mechanism for determining when the retention payment became due. In this case they had agreed an adequate mechanism, namely 12 months from completion of the work. Even if the Scheme had applied, the relevant provision would have been paragraph 7. But, as I have said, BN's case that the retention was due anyway was correct.

218. It therefore comes to this: should I refuse to allow BN's claim for retention monies, which has been substantively established, because of a pleading point? In my judgment that would be the wrong approach in this context. Whatever may have been the pleaded basis of the claim, Everwarm has had a full opportunity to address the substantive case on retention, namely whether the retention sums were due and, if so, when they were due and I have considered and rejected each of the various points it has raised. In addition, in a letter dated 26 April 2019, to which I shall subsequently refer, Everwarm admitted that each of these retention sums were due. For that reason,

it would be quite wrong to disallow BN from recovering the sums because the legal basis had not been fully set out in the pleadings.

219. I deal separately with the question of set off.

220. In respect of the oral subcontracts, it therefore follows that, subject to set off addressed below, Everwarm has no defence to this claim for the release of retention and BN is entitled to payment in respect of retention in the sum of £352,858.11 plus VAT.

221. In the circumstances, it is unnecessary for me to determine whether BN also had a claim based on Everwarm's failure to comply with the payment notice regime.

The written subcontracts subject to Rev 7 or Rev 8

222. Retention is claimed in the sum of £53,157.79[12] plus VAT. As before, BN puts its case in two ways: firstly, that it is substantively entitled to the release of retention in respect of these subcontracts, sufficient time having elapsed and a demand having been made; secondly, that it claimed release of retention pursuant to notices served pursuant to the HGCRA in respect of which Everwarm failed to respond, so that Everwarm is obliged to pay the sum claimed in any event. My approach is therefore the same: I will deal with the substantive entitlement first as the notice-based claim may not arise.

223. In this case, the parties had agreed standard written terms for the release of retention. The terms in Rev 7 and Rev 8 are identical and provide as follows:

> *"4.11 The Company may deduct from any interim payment due to the Sub-Contractor a sum equivalent to 5% (or such other amount as may be identified in the Order) of each such payment by way of retention.*
>
> *4.12 No earlier than six months after the completion of the Sub-Contract works (or such other period as may be identified in the Order) the Sub-Contractor may make a written request for release of one half of the retention. The due date for payment of such amount shall be the date or receipt by the Company of the written request and payment thereafter will be dealt with in accordance with clause 4.3.4 to 4.3.12. The Company may, at its discretion release these monies earlier.*
>
> *4.13 No earlier than twenty four months after the completion of the Sub-Contract works (or other such period as may be identified In the Order) and subject to the agreement of the Company that any defects in the Sub-Contract Works have been completed to their satisfaction and In accordance with clause 2.7, the Sub-Contractor shall make a written request for release of the second half of the retention. The due date for payment of such amount shall be the date or receipt by the Company of the written request and payment thereafter will be dealt with in*

[12] Appendix 2 to BN's Closing Submissions dated 30 August: £58,096.87 (21 December 2015 – 2016 contracts) less £1,928.88 (St. Andrews Primary) and £3,010.20 (Milton).

> *accordance with clauses 4.3.4 to 4.3.12. The Company may, at its discretion, release these monies earlier."*

224. The pleadings in respect of retention pursuant to the written subcontracts are limited but I understand BN's case to be that each written subcontract order made specific provision for the release of a single amount of retention (at 5%) 12 months from completion of the subcontract works, since they all specified a Defects Liability Period of 12 months.

225. It is therefore necessary to reconcile this specific agreement with the general provisions in Clauses 4.12 and 4.13 since those clauses assume release of retention in two tranches at six months and twenty-four months respectively unless, in each case, different periods are specified in the Order. Everwarm's case was the demands for payment of retention made on 25 May 2017 were premature by reference to those periods. BN responds that those periods did not apply.

226. It is not possible to reconcile the single date on the Order with the general regime for retention release in two tranches. I therefore conclude that the specific regime agreed on the face of the Order should prevail over the general regime for release in two tranches as set out in Clauses 4.12 and 4.13. The agreement was therefore broadly the same as that which applied to the oral subcontracts, namely release in one tranche 12 months from completion of the subcontract works.

227. However, there remains one further question of construction which did not arise in respect of the oral subcontracts. In both Clauses 4.12 and 4.13, the parties agreed that the release of retention would be the subject of a written request and, thereafter, dealt with in accordance with Clause 4.3.4 to Clause 4.3.12. I must therefore decide whether the agreement to have only one tranche of retention, to be released 12 months from completion, also displaced the provisions for the making of a written application for release triggering a regime for payment pursuant to those sub-clauses. In my judgment, the parties did not intend to displace this aspect of the written agreements. Looking at the clauses, the parties plainly intended those requirements to be applied in respect of the whole of the sums retained. The fact that the parties have provided for only one tranche should not detract from that principle. Maintaining that principle does not conflict with the specific agreement to have only a single release date for retention.

228. I am satisfied that these written agreements contained an adequate mechanism for determining when the retention was due for release which means that the Scheme, which in this case would be the English Scheme, does not apply.

229. Turning to the evidence, once again I accept Mr Nemeth's evidence as to the dates for completion. Subject to the making of an application, the sums were due 12 months from that date.

230. As regards those written subcontracts in respect of which the works were suspended and never completed, namely Kirkcaldy and Tweedbank, my conclusions are the same as those set out above. Subject to the making of an application, those sums were due no later than 12 months from 21 June 2017.

231. Written demands were made by BN on 25 May 2017 (though not in respect of all subcontracts) but most of those were premature because 12 months had not elapsed since the relevant subcontract works were completed. The applications for Easthall Park HA and Dalmuir HA were appropriate from a time perspective and are sufficient to comply with Clause 4.3.4.

232. BN also relies on its Final Account notices sent on 20 July 2017 as applications for payment in respect of the release of retention which, if correct, would only additionally capture Haliburton Waverley since that was the only further one which had fallen due in the meantime. But the Final Account notices were not, in substance, form or intent, applications for payment in respect of the release of retention. The covering letter made no reference to retention. Retention as an item was merely subsumed in the overall total contained in the attachment which, for reasons I have given earlier, did not constitute a valid notice in respect of the total sum claimed.

233. BN also relies on its Defence and Counterclaim dated 7 March 2019 as a demand for payment of the release of retention. By this date, sufficient time had elapsed to entitle BN to demand the entire release of retention. Whilst I am content to accept that a pleading could stand at common law as a demand for an unpaid debt, I reject the suggestion that it could stand as written a notice served in compliance with the subcontract terms and, particularly, one which was intended to trigger the process in Clause 4.3.4 onwards.

234. Lastly, BN relies on the letter sent by its solicitors on 15 April 2019. It is unnecessary to set out the content of this letter. Suffice it to say that, in my judgment, it constituted a clear and unequivocal demand for payment of retention which it said had by then fallen due pursuant to each of the subcontracts. I conclude that, as regards the written subcontracts presently under consideration, it was sufficient to crystallise the due date and stand as a valid application for payment made pursuant to the relevant contractual provisions.

235. Once again, the letter from Everwarm's solicitors dated 26 April 2019 admitted that retention was due in the sums claimed, subject only to a defence of set off. That reaffirms the conclusions I have already reached.

236. In respect of the written subcontracts, it therefore follows that, subject to set off, Everwarm has no defence to this claim for the release of retention and BN is entitled to payment in respect of retention in the sum of £53,157.79 plus VAT.

Set-off

237. Against the claims for £352,858.11 and £53,157.79 (totalling £406,015.90) Everwarm has belatedly contended that it is entitled to rely on its letter in response to that of 15 April 2019, dated 26 April 2019, in which it asserted a right of set off under the terms of the Rev 7 and Rev 8 conditions.

238. That letter asserted a right of set off pursuant to Clauses 4.14[13] and 4.15 (although not distinguishing between the terms in Rev 7 and 8). Of course, this letter was written at the time when Everwarm's case was the standard terms applied to all of the subcontracts. That is no longer its case. Now, though, it contends that the scope of these contractual provisions is sufficiently broad that they provide Everwarm with the right to set off cross claims against sums otherwise due to BN pursuant to separate, oral, subcontracts which do not themselves contain such provisions.

239. As I have earlier mentioned, the letter of 26 April 2019 is also material because it lists the retention sums which, for the first time, it otherwise admits to be due to BN, namely £406,015. That is the amount which I had earlier found to be due to BN. It continues:

> *"By our calculation, the total sum of our client's overpayments exceed the total sum of the sums due to your clients on the sites listed above. In light of the above, our client does not accept your client's position as set out in your letter of 15 April 2019 and accordingly our client will not be making payment of any sums at this stage for the reasons set out above."*

240. Curiously, the letter ends:

> *"This letter is without prejudice to and under reservations of our client's rights and pleads and neither the letter (nor any copy of it) nor its contents may be produced, exhibited, referred to or founded upon in any court action or in any other proceedings except (a) with our client's express written consent or (b) at our client's instance."*

241. Unsurprisingly in light of this ending, BN never mentioned this letter and a copy was neither included in the trial bundle nor shown to the Court at the trial. Indeed, until the written closings of 30 August 2019, it was never even referred to by Everwarm.

242. In my judgment, it is simply too late for Everwarm to rely on this letter for the purposes for which it is now being deployed. Nowhere in the pleadings does Everwarm rely on Clauses 4.14 or 4.15. BN objected to Everwarm raising this point at the time it did and I have concluded that such objection is justified. It is true that Everwarm never had the opportunity to serve a pleading in response to BN's belated case that retention was due by virtue of the demand made on 15 April 2019 but that is not a reason to excuse the wholesale failure by Everwarm to rely on a defence of set off in the wider context which it has belatedly sought to do. Instead, it withheld the letter of 26 April 2019, containing the admission in respect of retention, and chose to deploy it only after the trial was over.

243. In any event, without needing to delve too far into the detail of all the subsequent arguments on set off which flowed in the written submissions that followed, it seems

[13] Clause 4.15 in Rev 7 erroneously cross refers to the set off provision in Clause 4.13 but the correct reference should have been to Clause 4.14. The same error is not made in Rev 8. So, although the letter referred to Clause 4.13, I have treated it as a reference to Clause 4.14.

to me that I would have been driven to reject Everwarm's reliance on set off for at least these reasons:

(a) The letter dated 26 April 2019 does not even quantify the overpayments to which reference is made, still less provide the calculation;

(b) The factual background against which this letter was written was one in which Everwarm was focussed entirely on its Clause 4.9 claim. That was the only pleaded basis for the claim in the litigation. As I have earlier explained, at the time when the letter was written, Everwarm was forcefully contending that the effect of Clause 4.9 was to override the Final Account provisions themselves. In the absence of any other elaboration as to the nature of the "overpayments" referred to, the objective reader of this letter would have understood them to mean the sums due to Everwarm following Assessments made pursuant to Clause 4.9 and not to alleged overpayments pursuant to the Final Account provisions, once operated. I have now determined that Everwarm's claim in respect of the Assessments fails. It follows that there was and is nothing to set off on that basis.

(c) To the extent Everwarm now seeks to characterise the "overpayments" as any such balance(s) as may be established as owing to it following a true value analysis of each of the Final Accounts, the short point is that Everwarm has not pleaded any such overpayment(s). It could have done so at any stage by issuing a Counterclaim to BN's Counterclaim but has never done so. At present, the only justiciable issue before the court which remains to be determined within this action is the balance of any sums owing <u>to BN</u> following a true value final accounting exercise. In reality, because it had always focussed entirely on its Clause 4.9 claim, Everwarm has not begun the exercise of computing, still less pleading, the sums which it contends would be owed to it on each subcontract based on the Final Account provisions. Such case as it might have wanted to make arising out of the exercise undertaken by T&T is no longer tenable.

(d) For the same reason, Everwarm cannot rely on a common law right of set off. No liquidated sum has yet been identified which is capable of being set off. The only liquidated sum pleaded by Everwarm is that due in respect of its Clause 4.9 claim which has failed.

244. For these reasons, which are in combination procedural and substantive, I conclude that it is not open to Everwarm to seek to rely on a defence of set off in answer to the claims for retention.

245. It therefore follows that in respect of retention, BN has succeeded in its counterclaim in the total sum of £406,015.90 plus VAT of £81,203.18. There will therefore be judgment for the VAT inclusive sum of £487,219.08.

Decisions on the Issues

246. Returning to the List of Issues, my conclusions are as follows:

(1) Everwarm's standard terms and conditions known as Rev 7 and Rev 8 did not apply to all the Subcontracts. They applied only to the written subcontracts as agreed between the parties and listed earlier. To the extent it is material, the parties have agreed which revision applies to which subcontract. RANDCHA was subject to the 2013 terms. All other oral subcontracts were not subject to any standard terms and conditions.

(2) In respect of the oral subcontracts, there was an implied term that BN was entitled to be paid for additional work at the price or rate, if any, which was agreed at the time. If nothing was agreed, there was an implied term that BN is entitled to be paid a reasonable sum. Other terms are implied by virtue of the HGCRA as identified above. Clause 4.9 was also subject to an implied term that any Assessment would not be undertaken in an arbitrary, capricious or irrational manner.

(3) In respect of the written subcontracts, Clause 4.9 was not void or unenforceable. Nor does the presence of Clause 4.9 render the rest of Clause 4 inapplicable.

(4) There was no agreement in respect of the so-called Agreed Method in respect of windows and doors. The standard method of measurement agreed by the parties (i.e. £/m²) was applicable.

(5) The agreed rates are those set out in the Appendix to this judgment.

(6) Everwarm did not carry out its Clause 4.9 Assessments in accordance with the express and implied terms of the written subcontracts in respect of which Clause 4.9 applied.

(7) Everwarm is not entitled to any sum as a debt due and owing pursuant to Clause 4.9.

(8) Based on its case pursuant to s.111, BN is not entitled to any sum in respect of its final accounts. BN is entitled to the sum of £406,015.90 plus VAT in respect of the release of retention.

247. I therefore dismiss the claim and will give judgment on the Counterclaim in the sum of £406,015.90 plus VAT of £81,203.18.

248. I have not addressed the question of interest at this stage. The parties should seek to agree interest to be added to the judgment sum but, in default of agreement, I will deal with that and any other consequential matters in due course. As foreshadowed, any appropriate directions for the issues raised by paragraphs 57 to 60 of the Amended Defence and Counterclaim will also need to be considered following the hand-down.

APPENDIX

PART 1

Project	Rate/m^2 agreed
Armadale (Phase 1 & 2) (remedial works)	£15.00
SWI – Dunfermline HEEPS	£9.00
	£6.00
Dumbie Dykes	£24.00
	£15.00
SWI – Wellhouse Phase and additionals	£22.00
	£14.00
Halliburton – Waverley Housing EWI	£24.50
SWI – Falkirk Council (GRA – 7598)	£33.00
	£24.00
Dalmuir Housing Association	£24.00

PART 2

Project	Rate/m^2 agreed
Armadale Phase 1 & 2	£24.00
	£18.00
	£12.00
	£9.00
Chapelhall	£21.50
	£9.60
Carntyne	£24.00
	£18.00
	£14.00
	£8.00
Mid Lothian EWI	£18.00
	£13.00
	£24.00
Redcraigs	£24.00
Blackcraigs	£24.00
Stenhousemuir	£24.00
	£18.00
Deans, West Lothian	£26.00
	£24.00
	£18.00
	£14.00
Huntly Terrace PT Glasgow	£25.00
	£24.00
	£10.00

Project	**Rate/m² agreed**
John St Greenock	£9.00
	£6.00
	£10.00
Falkirk 14/15	£24.00
	£15.00
	£14.00
Bardrainney 14/15 HEEPS	£10.00
	£9.00
	£6.00
Ferguslie Park, Paisley	£24.00
	£14.00
Ballingry	£25.50
	£18.00
Aberdeen City Phase 3 15/16	£29.00
	£28.00
	£18.00
Millport	£26.50
Irvine Phase 1 and 2	£24.00
St Andrews Primary	£31.50
	£21.00
	£5.00
SWI – Haghill EWI & IWI Phase 2B	£24.00
	£3.67
Petersburn	£21.50
ABERDEENSHIRE	
Turriff	£27.00 – £29.00
Aboyne	£27.00
Alford	£29.00
Banchory	£28.00
Boddam	£28.00
	£14.00
Caterline	£29.00
Daviot	£29.00
ECHT	£27.00 – £29.00
Ellon	£27.00 - £29.00
	£20.00
	£18.00
Gourdon	£27.00 - £29.00
Huntly	£27.00 - £29.00
Inchmarlo	£28.00
	£18.00
Inscii	£27.00 - £29.00
	£18.00

Project	Rate/m^2 agreed
Inverurie	£29.00
	£22.00
	£18.00
Johnshaven	£28.00 - £29.00
	£18.00
Kemny	£28.00
Kirkton of Skene	£28.00
Lyne of Skene	£29.00
Mac Duff	£29.00
Old Deer	£29.00 - £31.00
Peterhead Phase 1	£28.00
	£27.00
	£18.00
Peterhead Phase 2 and 3	£29.00
Pitmedden	£29.00
	£18.00
PLUMBING ABERDEENSHIRE	
Portlethan	£28.00 - £29.00
	£22.00
	£18.00
	£15.00
St. Combs	£27.00
St. Combs Phase II	£29.00
St. Cyrus	£27.00 - £29.00
Stonehaven	£27.00 - £29.00
Strichen	£29.00
Stuartfield	£29.00
Tarves Phase 1 & 2	£28.00 - £29.00
Torphins	£29.00
Udny Station	£28.00

PART 3

Project	Rate/m^2 agreed
SWI – Southside	£24.00
	£15.00
Tweedbank	£9.50
	£9.00
	£6.00
Fife Kirkcaldy	£24.00
Motherwell HEEPS	£24.00
	£9.00

Project	Rate/m^2 agreed
Kincardine	£29.00
Easthall Park HA	£24.00
Easthall Park Phase II	£22.00
	£3.00

PART 4

Project	Rate/m^2 agreed
Randcha	£24.00
	£21.50
Holytown	£24.00
	£21.50
Kilsyth Heeps	£10.00
	£9.00
	£6.00
Aberdeen City	£27.00 - £29.00
Faifley	£10.00
	£9.00
	£6.00
SWI – Milton 15/16	£25.00
	£24.00
	£15.00