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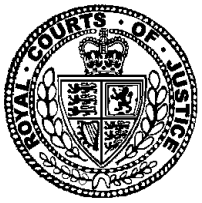

Neutral Citation Number: [2021] EWHC 794 (TCC)

Claim No: HT-2018-000118

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

Date: 31 March 2021

B e f o r e :
MR JUSTICE WAKSMAN

BALFOUR BEATTY REGIONAL CONSTRUCTION LIMITED

Claimant

- and -

VAN ELLE LIMITED

Defendant

Adam Constable QC and Matthew Finn (instructed by Burges Salmon LLP, Solicitors) for the Claimant
Vincent Moran QC and Paul Bury (instructed by DAC Beachcroft LLP, Solicitors) for the Defendant

APPROVED JUDGMENT

Hearing dates: 23-25 February 2021

INTRODUCTION

1. This is my judgment following a trial of preliminary issues between the Claimant, Balfour Beatty Regional Construction Limited ("BB") and the Defendant, Van Elle Limited ("VE"). At the time of the events with which I am concerned, BB was known as Mansell Construction Services Limited. I shall nonetheless refer to it throughout as BB.

2. The preliminary issues arise in this way: BB was engaged as main contractor for a construction project at a site at Wincomblee Road, Walker Riverside, Newcastle upon Tyne ("the Site"). The Site adjoined the north side of the River Tyne. The owner of the Site was a company originally known as Duco Limited which then changed its name to Technip Umbilicals Limited ("Technip"). It engaged BB to design and construct a sub-sea cable manufacturing facility at the Site. It is common ground that this facility comprised a building which housed a Vertical Helix Assembly Machine ("VHAM") together with an overhead crane, mechanical and electrical services and, among other structures external to the VHAM Building, two carousels, being the North and South Carousels respectively. The carousels were structures which sat on platforms and their function was to store the cables produced by the VHAM until such time as they were ready to be deployed to specially designed shipping vessels. Those vessels would then transport the cables from the Site to their intended destination.

3. The structures to be built by BB required a considerable amount of foundational piling.

4. It is common ground that BB engaged VE to undertake the relevant piling work which included piling for the VHAM Building and the North and South Carousels, as well as other structures. It is further common ground that those piling works were carried out by VE between about 15 June 2012 and 15 August 2013. It is further common ground that the agreed total price for those works once completed, was £1.239m. There were some further works in early 2014 in the form of contiguous wall piling. It is yet further common ground that all of the foundational piling was required to be of a type known as Continuous Flight Auger ("CFA"). This refers to the piling method which involves injection of concrete through the rig's screw as it returns to the surface, having drilled down to the required depth. The first piling to be done was in relation to the North Carousel, followed by the VHAM Building.

5. Shortly after installation, excessive settlement was discovered at the North Carousel piling. BB agreed with Technip that in the first instance, the former would remediate the settlement without prejudice to the question of liability. This involved the dismantlement or removal of the North Carousel itself which had already been installed by then, removing the relevant piling work, replacing it and then reinstating the North Carousel, along with associated works. Technip has intimated a claim against BB for what might be described as business interruption losses as a result of the settlement and the remedial works.

6. BB in turn intimated a claim against VE to recover the remedial costs and obtain an indemnity against any liability established against it by Technip for further losses.

7. VE has denied liability for a number of reasons. However, one of the defences raised is this:

   (1) Although, following completion of the piling work, both parties signed a formal sub-contract based on a modified version of the 2011 edition of the JCT Design and Build Sub-Contract ("the Sub-Contract"), the Sub-Contract did not govern the parties' rights and obligations in relation to the North Carousel piling;

(2) Instead, the contract governing that piling was constituted by a written quotation from VE dated 28 May 2012 and accepted by BB by its conduct in providing a piling platform to VE and permitting it to start work at that part of the Site; I refer to this alleged contract as "the 28 May Contract";

(3) The 28 May Contract (unlike the Sub-Contract) incorporated VE's standard terms and conditions "the Terms and Conditions";

(4) By operation of Clauses 6.6 and/or 6.7 thereof, any liability on the part of VE to BB, if established, would be significantly limited so far as recoverable losses were concerned.

8. For its part, BB denies that there was the 28 May Contract and contends that the North Carousel piling works were included in the Sub-Contract. Further, to the extent that there had been any prior contract governing the North Carousel piling works only, this was in any event superseded and replaced by the Sub-Contract. Finally, if (contrary to its case) the North Carousel works were governed by the 28 May Contract and no other, BB contends that Clauses 6.6 and 6.7, properly construed, are of much more limited effect than that contended for by VE.

9. By a Deed executed between the parties on or about 12 September 2019, they agreed to have resolved, in the first instance, the issues which I have outlined above. On 9 October 2019 BB had served its Particulars of Claim, and a Defence was served on 5 December 2019. A Re-Amended Reply was served on 15 September 2020. Those statements of case are essentially limited to these initial preliminary issues.

THE PRELIMINARY ISSUES AS FORMULATED

10. The agreed Preliminary issues are as follows:

(1) **Preliminary Issue 1**

1. Is the sub-contract subject to:

a. Terms agreed in or around November [2013], which superseded any prior contractual relationship as may have existed between the parties (as BB contends)? or

b. VE's standard terms and conditions ("VE's TCs") (as VE contends).

(2) **Preliminary Issue 2 (which only falls to be determined if the Court concludes that the sub-contract is subject to VE's TCs)**

2A. What is the proper construction of Clause 6.6 of VE's TCs? In particular, as a matter of contractual construction, if a defect and/or failure is caused by negligence, is clause 6.6 of VE's TCs:

(1) not engaged (as BB contends)? Or

(2) potentially engaged (as VE contends)?

2B. What is the proper construction of Clause 6.7 of VE's TCs? In particular:

(1) Does "the cost of replacing piles or carrying out alternative remedial work such as underpinning, the cost of repairing damage to any building":

(a) encompass all costs reasonably and properly incurred or to be incurred in connection with the replacement of piles and/or alternative remedial and/or mitigation work and/or the repair of damage to buildings, e.g.:

(i) in investigating, surveying and analysing the defects and/or damage in question;

(ii) in devising appropriate replacement, remediation, mitigation and/or repair solutions in respect of such defects and/or damage; and

(iii) in executing the appropriate replacement, remediation, mitigation and/or repair solutions in respect of such defects and/or damage, (as BB contends)?

Or

(b) Does that phrase not extend to include such costs as it is limited to the specific and direct cost of pile replacement, alternative remedial work and repairing damage to any building (as VE contends)?

(2) Does "removal and alternative accommodation costs during the carrying out of such remedial work to the extent and for such period as is strictly necessary due to such remedial works rendering the building or the part of it in respect of which such costs are claimed incapable of beneficial occupation" encompass:

i. all costs reasonably and properly incurred or to be incurred as a consequence of the negligence, default and/or breach, in:

removing products, labour and/or machinery from the site to alternative manufacturing and/or storage facilities, and/or returning such products, labour and/or machinery to the site as appropriate; and

renting and/or operating alternative manufacturing and/or storage facilities necessary to serve the purpose which the buildings at the Site were intended to serve (as BB contends)?

Or

ii. does that phrase not extend to include such costs as it is limited to removal and accommodation costs associated with providing alternative accommodation for personnel only (as VE contends)?

(3) Where clause 6.7 of VE's TCs refers to "cost" and "costs", do those terms

(a) exclude (as VE contends); or

(b) potentially include (as BB contends) cost / costs incurred or to be incurred by BB as a result of costs incurred or to be incurred by a third party and claimed from BB, where those costs are incurred or to be incurred for matters which it is determined pursuant to issues 2A(1) and (2) would properly be recoverable if BB directly incurred the cost/costs itself?

11. It follows from what I have said above that if I find Preliminary Issue 1 in favour of BB, Preliminary Issue 2 does not arise.

THE EVIDENCE

12. Most of the salient evidence is to be found, as expected, in the contemporaneous documents. Moreover the relevance (and admissibility) of any witness statement ("WS") is constrained by the nature of the exercise which I am to undertake (see below).

13. That said, I heard from the following witnesses:

(1) For BB,

(a) Richard Harm, a Senior Quantity Surveyor employed by BB at the time; and

(b) John Blyth, a Senior Contract Manager employed by BB at the time;

(2) for VE,

(a) Michael Hughes, Regional Director at VE at the time, and

(b) Peter Handley, Divisional Director at VE until 2012 and then its Business Improvement Director.

14. It is not necessary in this case to say much about the relative reliability of the witnesses, where relevant. All of them were generally dong their best to assist the Court. I would however record that for the most part BB's witnesses continued, in oral evidence to confirm BB's case, whereas VE's witnesses made a number of significant factual concessions. Where those concessions go, I discuss below.

15. VE also adduced evidence in the form of WSs from Helen Lees, a secretary at VE and Michael Mason, VE's Managing Director. In the event, BB decided not to cross-examine either witness whose WSs thereby stood as their evidence in chief, although their contents were not admitted as such by BB. In the event, they were essentially irrelevant save as to the sending of a letter dated 11 June 2012, referred to in context below.

16. There is also a Schedule of Agreed and Not Agreed Facts dated 16 December 2020, although not referred to much in the course of the trial.

SUBMISSIONS

17. Apart from oral submissions, I was provided with detailed written opening submissions dated 17 February, in the usual way, along with a schedule of invoices prepared by BB, but commented on by VE. In oral closing submissions Mr Moran QC handed up a speaking note, accompanied by three appendices, and Mr Constable QC handed up a summary of key evidential references. I have read and taken into account all of these documents. However, it is not necessary for me to refer to every single point made by either side. I have however dealt with all of the key points relevant to the issues which I have to decide.

THE ESSENTIAL CHRONOLOGY AND THE KEY DOCUMENTS

Events prior to 15 May 2012

18. I intend first to set out the essential chronology which will enable the key documents and events to be introduced.

19. VE is a specialist piling contractor. Apart from the costs of mobilising on a particular site, which includes hiring the drilling rig, testing and matters of that kind, its charges are based essentially on rates per pile. Those rates will depend on pile diameter and depth with supplementary rates for set-up costs, increasing the pile length and other elements like the de-bonding foam which is also applied on a per pile basis. The size of the piles will depend on the loading which they have to bear from the structure above them and which they are to support, along with ground conditions and matters of that kind. There need to be clear plans or drawings showing the precise location of the relevant structures and where the piles should be drilled. That requires input from structural engineers.

20. The main contract, between BB and Technip, was to be in the form of the 2011 edition of the JCT Design and Build Contract ("the Main Contract"). When BB first contacted VE about the piling,

the Main Contract had not yet been signed, but there was considerable pressure from Technip to get the work started.

21. On 12 January 2012, Mr Blyth emailed a number of plans to Mr Hughes. He was looking for costing and programme information by 23 January. The plans sent included Plan SKF 01 which was the VHAM Building itself, Drawing 100, which was South Carousel and Drawing 103, which was the North Carousel. The latter was less detailed than the former as can be seen when comparing the two. Plan SKF 02 was of the whole site with the location of the South Carousel at the bottom left hatched purple area and the North Carousel at the bottom right hatched purple area. Although shown there as occupying a larger area, in the event, the North Carousel would be the same size as the South Carousel (36 m). On 20 January, Mr Blyth provided some further details for the VHAM Building and asked Mr Hughes to cost for the North and South Carousel as well, on the basis of Drawings 100 and 103.

22. On 28 January, Mr Hughes sent a budget estimate and design for pricing at what was described in the subject header of the email as "Industrial Building North East". The documents he sent were an annotated version of SKF 02 (but no annotation at the location of the North Carousel) and a large number of other workings generated by VE and headed with "Job Number" 120216. The covering letter, dated 28 December 2012 (but which should have read 28 January 2012) stated, among other things, as follows:

> "Our estimate is based upon the installation of 450 mm and 600 mm diameter piles at lengths between 17 m and 22 m. We have enclosed our tender designs for your information and comment. The estimate is for the piling shown on Drawing Nos 100B, 300 and 301 and outlined in the attached schedule.
>
> There is insufficient information to assess accurately the quantity of piles required for the areas shown on NC021625-SKF 02 but based upon the piles allowed in the estimate and the areas of these locations indicates an average piling cost of circa £100.00/m^2".

23. It is common ground that this quotation (or Bill of Quantity as VE tended to call its quotations) was pricing for the VHAM Building and South Carousel, with a rate only for North Carousel for the reasons given in the letter. That involved installing 379 piles of 450 mm or 600 mm diameters, with a works duration of 8 weeks and a total cost of £388,703.50.

24. On 29 February 2012, BB sent an invitation to tender to VE, although no formal reply was received. However, on 20 March, VE produced a "revised estimate". There were two essential differences between this and the estimate of 28 January. First, VE added in the estimated costs of a contiguous piled wall. In the event this was not proceeded with as part of the main piling works although it then resurfaced as a separate piece of work in early 2014. Secondly, the actual pricing was now for the VHAM Building only. The covering letter contained the same references to size and depth of piles but then said:

> "we have only allowed for the bearing piles shown on drawings 300 and 301 and not made any further assessment of the other piling requirements as we did in our previous budget estimate."

25. The total price now for the VHAM Building was £342,676.00 with a further £79,855.50 for the contiguous piled wall, with separate breakdowns for each. The former estimate was later amended with fixed prices put in, to reflect the "rate only" section on the de-bonding foam, mobile testing and subsequent testing. This produced a new figure of £363,600. I shall refer to that document as the "20 March Quotation" and that figure as the "20 March Figure".

15 May Meeting

26. On 15 May, there was a meeting between Mr Harm, Mr Blyth, Mr Hesler (a Contract Manager at BB) and Mr Langford (a Site Manager at BB), Mr Hughes, and Mr Little of Shadbolts Consulting Engineers ("Shadbolts"). Minutes of that meeting, together with certain other information were embodied in a document produced by BB called the Sub-Contract Management Plan ("the Management Plan"). It contains a number of important elements. BB described the project as "Newcaflex Development" under number 30/00357. I now set out relevant extracts:

> "**1.0 DESCRIPTION OF THE PROJECT**
> The construction of a 60m single storey industrial unit comprising of a two storey office block and a 10m deep tunnel together with foundations to accommodate a Vertical Helical Alignment Machine, together with a new access road, bases for 2no.36m carousels and a carousel F together with specialist foundations housing machine rails.
> **1.1 Scope of Subcontract Works**
> Subcontract Works include the design, supply, installation and supervision of the CFA Piling Works.
>
> **1.5.2 Subcontract Programme**
> **Area Commencement Duration**
> Vham Building perimeter 11/6/12 3 wks
> Vham Building - Internal 20/8/12 3 wks
>
> The above dates are based on the earliest commencement date of 11th June 2012
>
> **1.5.5 Approximate Start Date**
>
> Van Elle works are to commence between 11th and 25th June 2012
>
> **5.7 Account Settlement**
> Final Account is to be submitted by Van Elle within 1 month of completion of the subcontract works together with all necessary supporting documentation.
>
> **7.19** Mansell advised that due to the Vham tunnel construction running through the building the intended programme was to commence on the building footprint then move onto the internal piles as far as possible. This is dependant on the working space required to construct the tunnel. The remainder of the piles within the building would have to be completed once the tunnel is constructed and the area backfilled. John Blyth advised that rather than let the piling rig leave site and then have to pay to remobilise it was Mansell preference to rework the programme to try and keep the rig working by carrying out the piling to the carousel bases and the machine rails. These areas have not yet been fully designed or costed Mansell/Shadbolts are to focus on the North Carousel and the machine rails at the North end of the building and forward details of these to Van Elle for costing. The initial thoughts were that the loadings would be generally the same as the building for which we already have rates per pile. R.Harm confirmed that the order was being placed on the building only and that if we are to work in the external areas this will be treat as variations and instructed accordingly."

27. Paragraph 7.19 has been the subject of much comment and debate at trial. However, on a fair reading, it was clearly contemplating a situation where the VHAM Building piling work could not be undertaken all in one go, as it were. There would have to be a break in piling operations there, and the idea was that the rig already present on site could be used in the intervening period for piling at the North Carousel location.

28. It is common ground that following the meeting of 15 May, it became apparent that because of delays with the tunnelling for the VHAM Building, it would not be possible to start with piling work there at all. Instead, piling would commence at the North Carousel location. There was no logistical difficulty in doing this because the VHAM Building and North Carousel sites would use piling of the same size, and the same rig could be used for each.

29. In his evidence, Mr Harm suggested that it had always been intended to "sandwich" the North Carousel works in between the VHAM Building works and that the 15 May meeting decided then to commence the North Carousel works. I do not think that is correct - the sequence is as set out above, but I do not think anything turns on this mistaken recollection.

30. However, there still needed to be further detail for the proposed piling at the North Carousel. This was provided by plan 2137/320 prepared for Technip by Shadbolts. Among other things, it provided the location for a total of 99 piles.

31. Between 22 and 28 May, there were various discussions between Mr Harm and Mr Hughes. I will refer to them briefly later on although in the end, as I find it, not much turns on them.

Events of 28 May – 1 June 2012

32. On 28 May itself, Mr Hughes sent to Mr Harm two separate emails. The first, timed at 8.59 a.m., said this:

> "… You were going to sort out a limited order/LOI so we could confirm rig and start ordering materials, what is current position…"

33. The second email said this:

> "…Please find attached bill of quantity for 36 m Carousel. I have left the mobilisation in but this can be omitted if the piling just carries on from one section to the next with one rig. I've included for de-bonding foam up to 1 m…"

34. Part of the standard footer to this email stated:

> "No binding contract will result from this email until an officer, on behalf of the company, signs a written document."

35. That email enclosed a Quotation dated 28 May which referred to "Job Number…120216 - 36m Carousel Bearing Piles". The total sum quoted was £74,344.50 for the installation of 99 piles with diameters of 450 mm and up to 19 m long, and associated costs. It also included the same rig mobilisation cost of £7,150 as had appeared in the 20 March Quotation. As the covering email made clear, whichever work started first, there would only have been one mobilisation cost. I shall refer to this as "the 28 May Quotation ".

36. It is common ground that there was no written communication from BB in relation to the 28 May Quotation, whether accepting it or otherwise, and VE does not allege that there was.

37. On 30 May, there was a Site Meeting. VE's Pre-Start Meeting Checklist for that meeting refers to "Contract No 120216". It also refers to 549 piles of 450 mm diameter and 120 piles of 600 mm diameter. It is plain from these numbers that this would encompass more than just the VHAM and North Carousel Works. The provisional start date given was the week commencing 11 June. The checklist was countersigned by Mr Hesler for BB.

38. The fact that (as is common ground) the first piling work to be done was for the North Carousel is also reflected in VE's Combined Method and Risk for CFA Piling document dated 1 June 2012. This stated in terms that the scope of the works was:

> "To install 450 mm dia and 600 mm dia CFA Board piles to a maximum depth of 22.0 mm. The piling is to commence on the North Carousel on 450 mm dia augers, pile quantity 99 no. The follow-on sequence is to be determined by pile availability on the remaining building.
>
> Equipment required (Phase 1)
>
> Soilmec SF50 piling rig…"

39. On 30 May and 1 June, there were email exchanges about data which BB needed, in order to provide the piling mat for the North Carousel works.

The LOI

40. Then, on 1 June 2012, BB sent the LOI to VE. It is necessary to refer to various parts of it and I do so, compendiously, here:

> **"Newcaflex Development**
>
> 1. We have been instructed to start work on Newcaflex Development.. by our employer Duco Ltd under a letter dated 1st May 2012.
> 2. It is anticipated that the Main Contract will be placed using JCT Design and Build Contract 2011, as amended by the Schedule of Modifications agreed between ourselves and our Client
> 3. It is our intention to place a formal sub-contract with yon to carry out the design, supply, installation and supervision of the CFA Piling Works.
> 4. The results of our negotiations to date are comprised in the following documents and understandings. In this letter we will refer to them as the " Proposed Sub-Contract"…
> 4.2. Sub-Contract Management Plan [ie the 15 May Meeting Note]
> 4.3. Mansell Sub-Contract Conditions, which will be the JCT Design and Build Sub-Contract 2011, incorporating Mansell Amendments…
> 4.5 Van Elle Limited schedule of numbered documents [which is appended to the LOI]
> 4,6. Van Elle Limited Contract Analysis [This is the 20 March Quotation]
> 4.7 Programme of works as detailed with Van Elle Limited – summary of works 3000357 CFA Piling.
> 4.8 The Mansell Safety, Quality & Environmental Policy Statements…
> 5. ln the event of any discrepancy arising, the documents: listed above shall be reviewed and applied in that order of priority,
> 6. You have indicated that, in order to meet the above timetable, you must commence design and mobilisation now and that you are not happy to do this without formal commitment from us. Accordingly, we are issuing this enabling works contract to you.
> 7. This letter is not intended to bring the Proposed Sub-Contract into effect but does create a legal contract between us to the extent set out below.
> 8. We confirm that we will pay you in accordance with the Proposed Sub-Contract for all work properly (and not prematurely) carried out by you in relation to the above items of work which you agree to commence and carry out in accordance with the Proposed Sub-Contract including the placing of orders for materials etc. Where the Proposed Sub-Contract does not contain relevant prices we will pay you a fair and reasonable sum in respect of the items in question.
> 13. Under no circumstances will be liable under this enabling works contract to pay you more than £363,600 exclusive of VAT in total and this sum is subject to set-off in respect of your breach of contract causing us loss under the Main Contract.
> 16. If and when the Proposed Sub-Contract is executed, its terms and conditions shall supersede this enabling works contract and govern any of your completed work respectively…"

41. Paragraph 6 is, on any objective basis, a clear reference back to VE's need for some formal contractual commitment from BB to start work, as reflected in its first email of 28 May. I discuss this in more detail below. It is also plain (and VE does not contend otherwise) that the LOI did not itself incorporate VE's Terms and Conditions, nor would the contemplated formal Sub-Contract, once it was executed.

42. There is then appended the list of numbered documents which would be annexed to the Sub-Contract. Item 4 thereof is, again, the Management Plan. Item 5 covered the drawings relating to the VHAM Building only. Item 6 is a reference, again, to the 20 March Quotation. Item 12 is a

Schedule of Valuation Dates on BB headed paper with a reference to the "Newcaflex Development" contract with contract number 30/00357. This document shows VE's Application for Payment Dates running from 27 May 2012 to 16 December 2012 and final dates for payments in respect thereof from 6 July 2012 to 25 January 2013. In other words, the works were contemplated to take around 6 months. There is no basis for reading this as not encompassing all of the piling works intended to be undertaken by VE pursuant to the contemplated Sub-Contract. Items 17 to 41 are all references to documents dealing with different aspects of the entire site i.e. not just the location of the North Carousel or VHAM Building. In particular, there are geotechnical documents dealing with ground conditions and the like, all highly relevant to the piling operations and specification of the piles etc.

43. The LOI was posted to VE on 1 June 2012, which was a Friday. By Wednesday 6 June, it appears that it had not yet been received by VE, because Mr Hughes emailed Mr Harm to ask if the "order for the piling" which he understood had been signed, was "on the way so I can pass on to our contracts division so they can get on ordering the materials". Mr Harm confirmed by his reply that it had been posted on the Friday. The date on the "Received" stamp on the copy before me is 7 June.

44. Once received by VE, it was the subject of some email communications between Mr Waghorn, VE's Contracts Engineer and Mr Hughes on 8 June. Thus, in his email, Mr Waghorn refers to paragraph 13 of the LOI being limited to £363,000, whereas the estimate had quoted a value of £420,000. He asked Mr Hughes to work out how BB had got to this figure where VE had information only for a select area on the Site at present. Mr Hughes responded that the £363,000 was based on the first estimate he submitted with the addition of de-bonding foam and static tests. He added this:

> "The number of piles are going to change as the design develops which is why he has based it on this and as the piles are installed we will invoice against the rates shown. The Carousel piles are at the same rate as the 450 mm diameter piles shown on the bill. There are 99 No so the 204 No shown on the bill more than covers… 6 and 7 are outlining reasons for the LOI… .13 means we will have to monitor how works are progressing and if.-Contract is not issued get a further letter upping the £363k if the value of the work starts to approach this figure… Once the design is complete I can price again to get the figure clearer."

VE's letter of 11 June

45. In its letter dated 11 June, signed by Mr Handley, VE responded to the LOI. It included the following passages:

> "We acknowledge receipt of your letter of intent dated 1 June 2012 accepting our quotation 120216 Rev A dated 20 March 2012 and confirm the provisional start date of the week commencing 11th June 2012.
>
> Your letter dated 1 June 2012 will serve as an interim agreement and neither party will be bound by the including sub-contract until such time as it is executed by each party.…
>
> Please ensure that our record sheets are agreed and signed on site as this document will form the basis of the remeasure for the final account with the terms of our contract…
>
> Please note, your order is accepted on behalf of Van Elle Ltd in accordance with the Terms and Conditions of our quotation dated (see overleaf)…"

46. At this stage, I observe that on the face of it, the letter of 11 June was expressed to be entirely general in its terms i.e. it reads like a document pertaining to all of the piling works to be done, not just some of them. There is also a reference to a provisional start date of the week commencing 11 June. This reference has been the subject of some debate which I will deal with below. But one thing is clear; as everyone knew by that stage, the works which were intended to start first were the North Carousel piling works, as indeed they actually did, on 15 June, as we shall see. The

reference to remeasurement is important because, at the end of the day, VE would be paid according to the actual number of piles sunk, not the amount initially estimated.

47. Originally, there was an issue as to whether BB had received the 11 June letter. However, given that the WSs of Ms Lees and Mr Mason dealing with its sending was not challenged in cross-examination, I proceed upon the basis that it was duly sent and received. In the event, little if anything was made of this potential issue by BB in closing.

Commencement of the Works

48. On Monday 11 June, it seems that the start date was now thought to be the following day; see the email from Mr Hesler to Mr Waghorn which requested details of the piling design "for the Newcaflex Development".

49. On 12 June, Mr Hughes emailed Mr Hesler as follows:

> "Andy has just sent me a copy of the Pile layout and loads for the 36 meter Carousel (North Carousel) is this the one we are starting on. The design and price we have given is based on 99 No piles with loads of 750kN compression and 50kN lateral loads.… The drawing shows 95 No piles of which only 19 No have loads of 750kN or less… The rig is programmed to arrive tomorrow and there will be only a small number of piles that can be installed at up to 750kN compression and 50kN lateral…"

50. On 13 June, Mr Hughes wrote as follows to Mr Hesler, Mr Blyth and Mr Harm among others:

> "Following receipt of revised pile loads yesterday for the Carousel please find attached revised calculations and pile schedule… We are carrying out settlement calculations but would anticipate a settlement of up to 5 mm at working load. Please confirm that this is acceptable prior to the works commencing today."

51. On 14 June, Mr Langford of BB wrote to Mr Harm and Mr Blyth, among others, referring to various matters concerning the piling mat. On 15 June, Mr Little of Shadbolts emailed Mr Langford, Mr Hughes, Mr Hesler and Mr Harm with various drawings pertaining to the North Carousel piling. At that point, it seems that the piling was thought to be commencing that day. In the event, it started on 15 June.

VE's Invoices

52. In the case of the all invoices submitted by VE to BB, it seems that they were paid, or very substantially paid, without any real issues arising over the amounts claimed or the work done.

53. The first invoice is dated 30 June. It referred to "Contract No 120216" and "contract name-Industrial Building - North East." It then said this:

> "for works completed at the above address up to 30 June 2012 in accordance with our quotation dated 20 March 2012 and your letter of intent dated 1 June 2012-see attached breakdown".

54. The gross value of work was £86,514 exclusive of VAT and this sum was then broken down on a separate page headed "Interim Invoice". This referred, among other things, to set up at 96 pile locations, installation of 86 450 mm piles and 7 600mm diameter piles. It is common ground that the work charged for on this invoice related exclusively to the North Carousel.

55. On 2 July 2012, VE sent a revised estimate for the piles for the VHAM Building. The attached Quotation referred to 179 piles of 450/600 mm diameter at a re-measurable price of £234,486.00, with an anticipated work duration of 5 weeks.

56. The second invoice is dated 31 July and its rubric is exactly the same as for the first. The cost of the further work done, net of VAT, was £204,341.87. The gross valuation of work done (i.e. on the first and second invoices) was £290,855.87. The attached breakdown stated the cost for the piling of the VHAM Building to include setup for 134 piles and installation of 129 piles. The cost was £191,776.87. The breakdown here was expressed to be in accordance with the quotation of 2 July. On the following page, the cost of "Carousel Building" (i.e. North Carousel works) was stated as £99,079. This was said to be in accordance with the 20 March Quotation. Of this sum, £12,565 was in respect of work to North Carousel subsequent to that charged for in the first invoice. So here, most of the work done was on the VHAM Building. The breakdown referred to "Industrial building, North East" and the "Job no." was 120216.

57. The third invoice is dated 20 August 2012. Its rubric is, again, the same as for the first two invoices. The rubric in the breakdown is the same as for the second invoice. In essence, another £48,690.40 worth of work (net of VAT) had been done in connection with the VHAM Building. The gross valuation (net of VAT) was now £339,546.01.

58. The 4th invoice had the same reference to "Contract Name" and "Contract No" as the earlier ones. However, it was then described as "Testing Works" and the further sum claimed, net of VAT, was £18,978. The 5th invoice, dated 27 September 2012 was for a further amount of £915.50, again in respect of testing.

59. The 6th invoice dated 17 October 2012 was for an additional £35,582.38 in respect of the VHAM Building. This brought the gross valuation up to £395,021.89. The description of the works on this invoice was:

> "Piling works carried out at the above site in accordance with our quotation 120216 VHAM Visit 2 dated 2 October 2012 and your email dated 3 October 2012…"

60. The 7th invoice, dated 30 October 2012 was for a further £1,428 in respect of testing works. The gross valuation was now £396,44.89.

61. Pausing here, on 20 November 2012, Mr Waghorn emailed Mr Hesler about various aspects of the works going forward, which included some further works relating to "Carousel", the VHAM and Building and Roller North and South foundations. He then said this:

> "The main reason for Van Elle not being in a position previously to definitively advise on availability is that current projects which were uncertain in duration have been expanded in scope and are therefore demanding resources until the end of December…
>
> In addition, due to both the scope contained in the original sub contract, which included a contract sum of £393,600 [this should be £363,600] with Van Elle having exceeded this already (£396k) and the alteration to access, rig requirements and logistics, it is also required to offer further costings for these works…
>
> Please can you advise on Mansell reaction to the above anticipated availability and I will continue to finalise costing and designs."

62. A little later the same day, Mr Waghorn emailed Mr Blyth, among others. He made reference to further piling work and said they were working to particular drawings which included for VHAM and North Carousel.

63. On 23 November, Mr Blyth responded, seeking mobilisation on site on 3 December. Also on 23 November, VE sent a further quotation reference to the drawings mentioned in Mr Waghorn's email of 22 November. This set out a quotation of £540,465.00 including all the work done so far.

64. In addition, and on or around 23 November, BB sent to VE the Sub-Contract with a price of £363,600 (i.e. the 20 March Figure, as in the LOI). I will deal with its terms below.

65. Invoice 8 is dated 30 December 2012. The "Contract No" was stated as before although the Contract Name, for some reason, was changed to Wincomblee Road, Newcastle, being the address of the Site. It then refers to a quotation dated 2 December, rather than that dated 23 November, to which I have referred. However, I doubt that much turns on this because this invoice is for an additional £135,445.85 of works making a gross valuation of £531,895.74, similar to the 23 November Quotation.

66. It is not necessary to refer in detail to the remaining 9 invoices, dated between 31 January and 15 August 2013. The gross valuation stated in the last invoice was £1,249,255.32. These invoices covered the work for all of the remaining piling on the Site, including some additional work for the North and South Carousels. It is not in dispute that as at late 2013, it was thought that all of the work was done. In fact, the contiguous wall piling, a further item which had been earlier excluded, came back into the picture in early 2014. It was subsequently executed but it can be ignored for present purposes.

The Sub-Contract

67. By 8 October 2013, Mr Waghorn of VE had signed the Sub-Contract and sent it back to Mr Harm that day. It contained some manuscript additions made by VE to which I shall refer below.

68. On 15 October, Mr Harm confirmed to Mr Waghorn that "the account is agreed at £1,239,000", and that he was processing a payment (of the balance owed) by 28 October 2013. He added that he would not issue a Final Account for signature just then in case the further phase (i.e. the Contiguous Wall Piling) was instructed (as it was, in early 2014). Mr Waghorn in turn agreed to this later the same day using the subject heading "Final Account". The figure of £1.239m was therefore about £10,000 less than the Gross Valuation of £1.249m shown in Invoice 17.

69. According to BB's internal contract slip, Mr Harm approved the Sub-Contract for signature, stating that the "Van Elle handwritten notes within the Sub-Contract [are] accepted". Mr Blyth's note of 1 November 2013 stated that he wanted to discuss it prior to signature. On 15 November, the Regional Contracts Manager approved it and it was signed on 13 December.

70. The relevant printed provisions of the Sub-Contract included the following:

    (1) On the front sheet, BB's contract number of 300 0357/11 is given and the date is 23 November 2012 which is when the Sub-Contract was sent to VE;

    (2) The works which are the subject matter of the Sub-Contract are then described as follows:

> "the provision of all necessary services in order to undertake and complete the design, supply and installation of the CFA Piling Works inclusive of all necessary supervision, all in accordance with the following:"

(3) The Price is stated to be £363,600;

(4) The "Works" (i.e. the Main Contract works) are described as:

> "The design and construction of a metal clad steel framed new build VHAM building, complete with overhead crane, mechanical and electrical services, together with associated external works."

(5) The "Sub-Contract Works" are described as:

> "The provision of all necessary services and supervision to undertake the design, supply and installation of the CFA Piling Works."

(6) The "Sub-Contract Sum" is then stated to be £363,600 exclusive of VAT;

(7) Underneath the section just referred to and on the same page, appear 3 manuscript notes as follows:

> "* ORIGINAL SUB- CONTRACT SUM TO BE CONSIDERED IN ADDITION TO ALL FURTHER WORKS UNDERTAKEN
>
> * DURATION OF WORKS TO BE ASSESSED IN RELATION TO ALL FURTHER WORKS UNDERTAKEN
>
> * AS PER ORIGINAL ORDER ACCEPTANCE DATED 11.06.12 NO ALLOWANCE WAS MADE FOR LAD'S"

(8) Condition 4 stated that the Sub-Contract Works would be carried out in accordance with the provisions of this Deed, the Sub-Contract Conditions which were expressly incorporated and the numbered documents listed in Appendix 1 which were also expressly incorporated;

(9) Under Condition 8, the documents referred to in the Sub-Contract included:

> "1. The provision of this Deed
>
> 2. Mansell's Safety, quality and environmental Policy Statement…
>
> 4. Sub- contract the Pre-contract Meeting Minutes/subcontract Management Plan [i.e. the 15 May meeting Note]…"

(10) At Appendix 1, the sub-contract works were described as:

> "CFA Piling ("the Sub-Contract Works")… As part of metal clad in steel framed new build Vham building complete with overhead crane, mechanical and electrical services, together with associated external works ("the Main Contract Works")…"

(11) Article 3A described the "Sub-Contract Sum and Final Sub-Contract Sum" as £363,600 exclusive of VAT;

(12) Part 5.1 under the heading "Program", said that the period required for the preparation of all necessary drawings etc was detailed within document 4 CM-AG-02-10 Management Plan dated 15 May 2012. Part 5.6 stated that the period required for the carrying out of the Sub-Contract Works was 6 weeks. There was then a further manuscript addition from VE which stated:

> "FOR ORIGINAL ORDER VALUE AND SCOPE";

(13) By part 17, the Numbered Documents were identified. The list is the same as that in the LOI save that a new final item 43 was added described as the "Van Elle Enabling Order 1.6.12" which is the LOI; that list is repeated at the end of the Sub-Contract but here,

against item 6 "contract sum build up ref 30/00357 van Elle" VE made another manuscript addition which said:

> "+ FOLLOW-ON BILLS OF QUANTITIES"

finally, against Item 43, VE added in manuscript:

> "WARRANTY TO BE REVIEWED/NEGOTIATED SEPARATELY".

PRELIMINARY ISSUE 1

The Critical Issues

Relevant legal principles

71. The relevant principles of law need to be identified as against the background of what the key issues actually are.

72. Both parties agree that the Sub-Contract exists as a written agreement. The only question is whether it encompasses the North Carousel works or not. If it does, VE accepts that its own Terms and Conditions are not incorporated within it. The issue is therefore one of contractual interpretation.

73. The relevant overarching legal principle is that stated in paragraph 21 of BB's written opening and is not in dispute. It is that the contract must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. The unitary exercise of contractual interpretation involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. The court may take into account the existing factual matrix but may not take account of any subjective interpretation on the part of one or both parties.

74. There is a qualification to this and I adopt here the formulation of it, articulated by Mr Moran QC in his oral reply submissions on Day 3:

> "A shared common subjective understanding of parties as to the meaning of a term, the issue of construction, is potentially admissible to the issue the court has to consider of what the proper construction of the term is. But…if X on its face is X, then no amount of what party A says to party B… or what party A thought internally or what party B thought internally can turn X into Y."

75. This is a reference to what is sometimes referred to as the "private dictionary" exception to the non-admissibility of subjective intent. Whether this point actually arises on the facts of this case, I deal with below. However, I should add for the sake of completeness that there is no plea of rectification or estoppel by convention here.

76. However, part (though only part) of VE's case as to why the Sub-Contract did not include the North Carousel works is because it contends that there already was a contract for those works which existed independently of and prior to the Sub-Contract - indeed independent of any contract created by the LOI and acceptance thereof. Whatever else the LOI did, VE says that it did not itself include the North Carousel works. VE's iteration of the contract for the North Carousel Works (ie the 28 May Contract) is based on the 28 May Quotation constituting the offer which was accepted by BB's conduct in permitting VE to start the North Carousel works and providing the piling mat. If there was such a contract then VE argues that, quite apart from anything else, it makes it less

likely, objectively, that it would have been replaced retrospectively by another contract i.e. the Sub-Contract even though this was possible as a matter of law.

77. Accordingly, VE's case also involves questions of contract formation, so far as the 28 May Contract is concerned. As with contractual interpretation, the Court must consider objectively whether the alleged contract has been formed. The subjective intent of the parties, even if shared, is irrelevant. But in the context of contractual formation, subsequent events can be taken into account in ascertaining whether and if so what contract was made.

78. As to the LOI, this was never executed as a written agreement as such. Nonetheless, both parties have proceeded as if it was, for the purpose of interpreting any particular provisions within it which are in issue. That makes sense here, especially because on any view, it was objectively intended to be replaced by the Sub-Contract in the fullness of time.

Where to begin

79. There is force in BB's contention that the correct chronological starting point is late 2013 when the Sub-Contract had been executed by both sides. Any prior matters are relevant provided they constitute part of the objective background. For its part, VE contends that the only correct starting point is the beginning of the parties dealings since this will inform the Court's view of the eventual Sub-Contract and in any event, the court has to look at the earlier period in order to decide whether there was the 28 May Contract and/or what the scope of the LOI was. Both sides, therefore, accuse each other of looking down the wrong end of the telescope.

80. It seems to me that since the history of the parties dealings is clearly relevant, it makes sense, simply as a matter of logic and chronology, to start at the beginning even though the ultimate analysis is by reference to the position which had been reached by the time the Sub-Contract was executed.

Analysis

General Background Matters

81. VE (now) agrees with BB that the common intention at the outset was that the parties' dealings in respect of all of the piling works would be governed by one sub-contract. That is hardly surprising where, on any view, the intended works to be carried out by the nominated piling sub-contractor were to supply and install the foundational piling for the buildings and structures which were themselves the subject of the Main Contract. It is not as if, for example, the cost of the piling would in principle differ as between locations. The only question was the diameter and length of the relevant piles. The actual cost of the piling was referable in essence only to the size of the piles, leaving aside matters like obstructions found in the ground which would require additional work, and testing. The proof of that principle of "measured work" can be seen from the invoices. The common intention for a single contract can also be derived from the fact that BB was seeking pricing for (at least) the VHAM Building and the North and South Carousels - the only reason it did not get a priced quote in the early stages for the North Carousel was because there was not sufficient detailed information as to the piling specification.

82. Nor is it VE's case that some subsequent event occurred which meant that there was now good commercial reason for having separate contracts for the piling. Nor is it said, for example, that it was important for the contract for the North Carousel works to have the Terms and Conditions

incorporated, whereas this was not necessary for other works. That would, in any event, be illogical.

83. VE's case is that it just so happened, essentially fortuitously, that as matters and unfolded and as a matter of law, a separate contract for the North Carousel emerged which remained sacrosanct and which incorporated the Terms and Conditions which are now invoked against BB on its substantive claim.

84. To be added to this is the fact (now accepted by VE) that the parties operated as if there was one contract, in terms of invoicing and gross valuation of work, all the way through. Further, both sides used one job or project number only and, more importantly, only one contract number. The latter, objectively, cannot be dismissed as mere surplusage or administrative formality. As it happens, Mr Hughes, in evidence, agreed that a single contract number would not be used for multiple contracts.

The 20 March Quotation

85. It is not in dispute that this was for the VHAM Building originally thought to be the first recipient of piling. This is the "contract sum build up" which was one of the numbered documents in the LOI and then in the Sub-Contract in the total sum, as amended, of £363,600, the 20 March Figure. But the fact that it is all about uniform rates for piles of a particular size, regardless of location, is proved by Invoice 1 which is concerned with the North Carousel works and which uses the rates from the 20 March Quotation. Indeed, if one looks carefully at the (cumulative) breakdown on Invoice 2 and compares it with the 20 March Quotation, it has reproduced the terms of the latter almost exactly, and simply puts in a zero where a particular item is not used, instead of omitting it. See, for example, the 600 mm X 17m piles and the tension bars.

The Management Plan

86. This document is a numbered document for both the LOI and the Sub-Contract. But as an agreed document, it is also an important background fact. Paragraph 7.19 (set out above) stated the likelihood (as it proved to be) that the rates would apply regardless of location and it was thought that even the same pile dimensions would apply across the VHAM Building and the North Carousel because the loading (which determines pile size) would generally be the same. At that point, because of the tunnelling works for the VHAM Building which would cause a hiatus in the piling works, the intention was that piling could be undertaken in the intervening period at the North Carousel using the pile rig already on site. On that footing, the notion that there should be separate contracts, much less (on VE's case) contracts with different underlying terms and conditions, makes very little sense. That it was not intended that there should be more than one contract is shown at the end of paragraph 7.19 which refers to one order, for the VHAM Building (originally thought to go first altogether) and work in the external areas would be treated as variations thereto.

87. This is supported by paragraph 5.7 which, as Mr Hughes accepted, contemplated a series of interim valuations, culminating in a final account. In addition, paragraph 1.1 shows the origin of the definition of the Sub-Contract works. They are stated in general terms but they cannot refer to anything other than the piling work required for the Main Contract works. Here, of course, the works involved in the Main Contract other than the VHAM Building are set out specifically. The reference later on in paragraph 7.19 to works in the "external areas" clearly, connotes the non-

VHAM Building piling works (as described in the Main Contract definition). This is important when one comes to consider later documents that referred to external works.

88. It is correct that the Sub-Contract programme refers only to the VHAM Building and a period of 6 weeks. However, both sides accept that as at 15 May, the intention was to have a sub-contract to cover all the piling work.

The need for a commitment from BB before VE started work

89. It is plain from the documents that VE wanted a contractual commitment from BB to pay for the works, before VE commenced them. That is reflected in the reference in paragraph 7.19 of the 15 May meeting Note to BB placing an order. It is also reflected in the first email from Mr Hughes on 28 May referred to at paragraph 32 above. The words are quite clear. VE wanted a limited order or an LOI.

90. The 28 May email which followed was obviously a quotation for the North Carousel piling, now that sufficient information on matters like loading had been supplied - see, for example, Mr Blyth's email of 22 May. But it is plain that this could not itself constitute the "limited order/LOI" because it emanated from VE not BB.

91. The next question is what works the contractual commitment was needed for. There can be no doubt about that. It was for the North Carousel works which were going to start first. Everyone knew by then that no initial piling would be at the VHAM Building. No witness suggested otherwise and anyway it is plain from the documents. These include the VE "Combined Method and Risk for CFA Piling" document of 1 June set out at paragraph 38 above.

92. It follows that whatever commitment was given by BB would have to cover, and render BB liable for, the cost of the North Carousel piling.

93. There can further be no doubt that the LOI, as sent, was, or purported to be the very limited order/LOI which VE had requested before it would start work. Its importance to VE is emphasised by the fact that VE was chasing for it in the days leading up to the week commencing 11 June when it was thought that the work would start. The LOI was the only communication from BB which could amount to a contractual commitment (or, more precisely, the offer to make one).

94. In my judgment, VE's acceptance letter of 11 June plainly saw the LOI as the relevant commitment in respect of the North Carousel works. That is because (a) they were the works now to go first, as agreed and (b) the provisional start date of the week commencing 11 June was for those works only. It is said that I should not place too much emphasis on the start date, but in my judgment, it is highly relevant as to what works both parties were talking about.

95. On that basis, and objectively, BB was, by the LOI purporting to offer to pay for the works which necessarily included the North Carousel works whatever else they might include and VE was purporting, by its letter of 11 June 2012 to accept that offer.

96. I should add that what is plain from the above is that the issue of a contractual commitment was important for both sides. The "comfort" sought cannot be dismissed as just a vague assurance of no real significance, as VE appeared to suggest.

97. On this issue of contractual "comfort", there was some subjective witness evidence, and the discussion in closing argument about the admissibility and effect (if any) of such evidence. Paragraph 11 of Mr Handley's WS reads as follows, after he referred to the existence of the 28 May Quotation and confirmation that VE was to start with the North Carousel:

> "As such from my point of view I was comfortable that the North Carousel Piling Works were already covered by the VE quotation dated 28 May 2012 and did not form part of the works covered under the LOI."

98. Strictly, that is irrelevant to the objective question of contract formation. In fact, in cross-examination, Mr Handley accepted fairly quickly that what VE needed was a commitment of some sort from BB, accepting their quotation. He agreed that he had never seen any such acceptance and then said that the LOI gave him comfort at the time. That, of course, would support BB's case. He maintained that position in re-examination.

99. Equally, in cross-examination, Mr Hughes agreed (eventually) that the LOI was intended to give VE comfort in respect of the North Carousel works. And on the basis that this was what BB's representatives thought they were doing, Mr Constable QC said that this understanding as to the nature and identity of the comfort sort was admissible on the issue of whether the LOI was in fact giving that contractual comfort (as opposed to the 28 May Quotation and/or any acceptance thereof by conduct).

100. It is true that the emergence of this evidence was to some extent made likely by what Mr Handley had said in paragraph 11 of his witness statement, and no objection was taken to his cross-examination (and that of Mr Hughes) on the point. Nonetheless, I think that Mr Moran QC is technically correct to say that even if heralded earlier, a submission based on this evidence is not really of the "private dictionary" variety permissible in the exercise of contractual interpretation, and to which I made reference in paragraphs 74 - 75 above. So it is not admissible on the "comfort" issue, save perhaps to underline the fairly obvious point that in relation to an intended sub-contract of this size, one would normally expect commercial parties to require some clear communication of contractual commitment before the start of work. Where there is to be a formal sub-contract executed at some point in the future and after the work has started, a LOI is a classic example of such a commitment in the meantime. But all of that is plain from the documents discussed above anyway. Accordingly, this particular witness evidence does not take the matter any further and I do not rely upon it for the purpose of concluding as I have done, above.

The 28 May Contract

101. The question is then whether, nonetheless, the documents which were the LOI and the acceptance letter (" the LOI Contract") did no such thing. That is allied to VE's suggested alternative, as far as the North Carousel works were concerned, which is that the 28 May Contract was constituted by the sending of the 28 May Quotation then accepted by conduct. I turn to deal with that contention before returning to the scope of the LOI Contract.

102. It is, of course, legally possible for there to have been a separate contract for the North Carousel works constituted as alleged by VE. However, in my judgment, in the circumstances here, that is completely unrealistic, objectively speaking, for the reasons set out below.

103. First, the relevant documents show that the kind of contractual assurance which VE was seeking was a written, communication from BB - hence the reference to the "limited order/LOI". That this was a serious requirement, indeed a condition precedent to the commencement of work by VE is

shown by the later emails asking where the document was. Objectively then, from the documents passing between the parties, no other form of acceptance, for example impliedly by conduct, would do.

104. Furthermore, if the 28 May Quotation was the written element of the contract, one would expect it to be referred to in Invoices 1 and 2 which dealt with the North Carousel works. But it never was. As already noted, the quotation which was referred to was the 20 March Quotation. As already noted, this was in fact prepared for the VHAM Building piling works but as it was essentially a question of rates for measured work, it sufficed equally as a reference point for the North Carousel works. While the invoices post-dated the 28 May Quotation and the LOI, they are admissible on the contract formation question as to whether the 28 May Contract ever came into existence.

105. Yet further, the first two invoices made reference to the LOI; again, this is inconsistent with VE's case as to the 28 May Quotation being the relevant contractual document. In fact, as Mr Hughes accepted in cross examination and re-examination, the 28 May Quotation was out of date by the time the work commenced because of a change to the piling specification for the North Carousel.

106. Next, the invoices were clearly drawn on the basis of one overall contract with interim valuations produced on each invoice as well as the overall group gross valuation. That is consistent with VE's reference to number 120216. Initially, this was referred to as a "project" number. But then, in the Pre-Start Meeting Check List it was referred to as the "Contract Number" and in that way in the first 2 invoices. Of course, it could be said (and was said by VE) that read objectively, this could be seen as no more than an administrative term with no legal significance. However, I disagree, these are relatively sophisticated contracting parties and I see no reason not to give that term, as used by VE here, its ordinary meaning.

107. Nor do the facts of a separate quotation for the North Carousel piling and separate drawings necessarily entail a separate contract. If it were otherwise, that could be said about each piece of work undertaken by VE where there was a separate quote and where there were separate drawings, all the way through (see in particular, paragraphs 59, 63, 65 and 66 above). But it is not VE's case that overall and prior to the Sub-Contract there was simply a series of separate contracts (see below).

108. Mr Moran QC reminded me that even if the parties had started out intending there to be one contract only, they might (almost accidentally as it were) have ended up with one contract for the North Carousel and another contract or contracts for the other piling work. I see that, but it is no answer to the objective analysis above which does not depend on subjective intent, anyway.

109. I would add that I am entitled to take into account, on the question of contract formation in relation to the 28 May Contract, the fact that it is plain from (at least) the first three invoices that the parties thought they were working under the umbrella of a single contract. That points against the existence of the 28 May Contract. This is permissible post-contract evidence. But even without it, my conclusion would have been the same.

110. I should add that in VE's original case, reliance was placed upon the evidence of Mr Hughes at paragraphs 50-52, 59 and 60 of his WS. Here he suggested that he and Mr Harm had actually agreed that there would be a separate contract for the North Carousel works. This was responded to by Mr Harm at paragraph 2.3 of his second WS. He accepted that he would have spoken to Mr Hughes on the telephone between 22 and 27 May in relation to the piling works and that at this

stage they had been discussing the sequence of them and the possibility of carrying out the North Carousel piling first, which was a change from the original plan. However, he said that at no point did they discuss BB placing a limited order for the North Carousel works that was somehow discrete and separate from the VHAM Building works. He did not consider or treat the North Carousel works as a separate package and did not issue a separate or discreet order for those works. In cross-examination Mr Harm again accepted that he had a number of conversations with Mr Hughes between 22 and 28 May but said he did not specifically remember their content.

111. As for Mr Hughes, in cross-examination he said he could not remember the precise words or language used in those conversations. He said that they were probably limited to the design and what was happening on the order. He thought he probably said he would send a quote just for the North Carousel if that made life any easier for BB and they could just give VE the limited order or LOI just for the North Carousel, to get it started.

112. None of that evidence is very clear, and any suggestion of some oral agreement about a single contract was, understandably, not pressed by VE in closing. In any event, the reliability of Mr Hughes' recollection here, to the extent that it is relevant, is undermined by his effective change of evidence on the significance of the 28 May Contract and LOI, as set out above in paragraphs 98 and 99 above. In my judgements, the conversations of 22-28 May do not take the matter any further.

113. Of course, if, in truth, there was no other contractual candidate for the North Carousel works than the 28 May Contract, one might have to revisit that. However, this outcome plainly does not arise. Accordingly, on the basis that on the face of things, there was not the 28 May contract, one returns to the LOI.

114. I should add that BB took a point that, by reason of the words in the covering email's footer, referred to in paragraph 34 above, the 28 May Contract could not have arisen by reason of an acceptance of conduct on the part of BB anyway. Rather, there had to be a signed written document from an officer of VE and there was not. Having regard to what I have said above, it is not strictly necessary for me to decide this point. However, I would just observe that in my view, this was a requirement which could be waived and in any event, it purported to govern a purported contract arising from the email itself not some underlying document supplied with it.

115. If, for example, (which is not this case) the quotation was positively accepted in writing by BB (and, for example, this was the only work to be done) and thereafter the work proceeded, it would be very hard to conclude that no contract arose at all. Perhaps the same would obtain if there was a "pure" acceptance by conduct of the quotation by BB in some clear way, although the notion that they would not also have been some positively expressed assent to the quotation is highly unrealistic. But in any event, that is not this case and I say no more about the matter.

The LOI

116. It follows from everything I have said above, including VE's pressing for the limited order/LOI before it would start work, and its response of 11 June, that both parties, objectively, must have intended that contract to encompass the North Carousel works. It is important to note that VE does <u>not</u> say that the LOI did not (with the acceptance letter of 11 June) become a contract. Rather it says that it was a contract that did not include the North Carousel works. I now turn to consider the LOI itself.

117. It was of course clear by 1 June, whatever else might be the case, that the piling works to be undertaken would be those required for the Main Works for which (as both parties knew) BB was the main contractor. Second, by that date, neither side was contemplating any contractor to carry out the relevant piling works other than VE. Both parties had in fact worked together on earlier jobs and (although it does not matter) BB must have been aware of VE's piling rates and found them to be acceptable. In the end, of course, those rates were set out in the 20 March Quotation.

118. Against that background, I refer to the relevant detailed provisions of the LOI which are set out at paragraphs 40-42 above. As to paragraph 3 of the LOI, and in the context of the Main Works referred to in paragraph 2 of the LOI, "the design, supply installation and supervision of the CFA Piling Works" plainly means the CFA piling necessary for the Main Works. No other interpretation makes sense. VE submits that it is a wholly vague expression; for example, it might refer to some of the required piling but not all of it. I do not accept that. The Main Works referred to in paragraph 2 set the scene for the contemplated single piling Sub-Contract. That contemplated Sub-Contract then sets the scene for the LOI which, like most LOI's of this kind, provides a contractually binding means of payment until the expected Sub-Contract is executed which then replaces it. Thus far, therefore, paragraphs 2 and 3 of the LOI should be interpreted to include the North Carousel works, not exclude them. They also reflect, in my view, the reference to the Main and Sub-Contract Works described in paragraphs 1.0 and 1.1 of the Management Plan.

119. In addition, paragraph 8 of the LOI stated BB's intention to pay VE for "the above items of work". VE contends that this must be a reference back to the various documents in paragraph 4. I do not agree. It must surely be a reference back to the description of the Sub-Contract works at paragraph 3. For reasons already given (a) this is not a meaningless description and (b) it clearly encompasses all relevant piling works for the Main Works. So the reference in paragraph 8 assists BB, not VE.

120. Paragraph 4.2 is a reference to the Management Plan. That contemplated that the North Carousel works would be done at least prior to the completion of the VHAM Building piling works. While there is a reference to the "original order" being for the VHAM Building works only, it will be recalled that piling work in the external areas would be "treated as variations and instructed accordingly". In other words, again, it was intended that there would be one Sub-Contract only. At that point, of course, having regard to prior correspondence, there was insufficient information to enable BB to instruct VE to go ahead on the North Carousel works. This was no more than a timing point and the necessary information had been provided by 1 June. Indeed, it is what enabled VE to provide the 28 May Quotation even if that did not itself become a contractual document.

121. Paragraph 4.5 of the LOI is a reference to the schedule of numbered documents which appears later and I will deal with them below.

122. The VE Contract Sum Analysis at paragraph 4.6 is the 20 March Quotation in the total sum of £363,600 referred to therein. This reference, in a sense, is the high point of VE's case as to the scope of the LOI because it contends that this must then tie the LOI to the VHAM Building and nothing else. This contention is allied to paragraph 13 of the LOI. The formulation there is a familiar way for LOIs to impose a financial ceiling on the contractual commitment pending the making of the Sub-Contract, which can be increased by consent. VE's contention here, read in a vacuum, has some force. However it must in fact be analysed in the context of other matters including the factual background.

123. First, there is paragraph 6, explaining the basis for the LOI. Although it refers only to design and mobilisation activity on the part of VE, neither side suggests that VE wanted a contractual commitment only to cover these items at which point it would stop. It therefore must cover the contemplated works to be commenced first which, by 1 June and indeed for some time before, both parties knew to be the North Carousel works.

124. The next question is whether, bearing that in mind, the reference to £363,600 deriving as it did from the 20 March Quotation can be meaningfully understood to cover works other than to the Main Building. In my judgment, it plainly can. It would cover more than the North Carousel works although, it is true, it would not be sufficient, on the face of earlier quotes, to cover both the North Carousel and the VHAM Building. This is not, however, an insurmountable obstacle because increases could be (and were in fact) sought. At this point, it is also worth remembering that at the end of the day, this is all about measured piling according to consistently applied rates. That supports the notion that the £363,600 can (and should) be seen as a contractual maximum which could be increased and which does not inevitably point to the LOI's scope by reference to particular works and not others, even if the 20 March Quotation was at the time intended to capture the VHAM Building works. Yet further, the object of the clear need for an enabling order to get the works started supports the notion of the £363,600 being little more (by then) than a contractual maximum.

125. I agree that the LOI could have been worded more clearly so as to express this amount as an initial sum to cover both the North Carousel and the VHAM Building works with the provision for increases as necessary. But as against all the other factors noted above, I do not regard this absence as a "trump card", as it were, on the issue of interpretation.

126. At this point, I should refer again to what might be described as the evidence of the subjective intention of the parties and for present purposes the exchange between Mr Hughes and Mr Waghorn on 8 June referred to at paragraph 44 above. Mr Hughes' oral evidence, both in cross-examination and in re-examination was to the same effect as that exchange. Mr Harm said much the same thing in paragraph 7.8 of his WS. Although some reliance was placed upon it by BB, it does seem to me to be inadmissible on the question of what paragraph 13 of the LOI, with its reference to £363,600 was meant to cover, which is a matter of interpretation, unless, once more, it is to be viewed as admissible shared understanding of the "private dictionary" variety. Here, it might arguably fall within that concept. However, it is not pleaded as such, as Mr Moran QC pointed out and it could have been, since the evidence of the email exchange of 8 June had obviously been available to BB for some time. Both because of that and because, without extended argument, its true admissibility is not beyond doubt, I have proceeded on the basis that this is inadmissible evidence. In fact, and as with the "comfort" issue, the relevant objective evidence is clear enough anyway.

127. I then turn to the numbered documents intended to be appended to the contemplated Sub-Contract and provided at the time of the LOI on a disc. Item 3 is the Management Plan and item 6 is the 20 March Quotation, both considered above.

128. Item 5 refers to the drawings for the VHAM Building. Those are the only drawings supplied. That is of course a point in favour of saying that the scope of the LOI works is limited to the VHAM Building. But, as with the £363,600, it comes up against the fact that only the LOI was intended to be treated as the contractual commitment to enable the North Carousel works to start. It is not suggested that by 1 June, there were not in fact the relevant drawings and other information

required for the North Carousel works because there were, subject to some minor points resolved in the week commencing 11 June. Moreover, the £363,600 would plainly be enough to cover the cost of the North Carousel works themselves estimated at only £74,334.

129. Item 12 is a Schedule of Valuation Dates. They cover a seven-month period. That makes no sense if the LOI is limited to the VHAM Building since no-one suggests that it would take that long.

130. There is also a very large number of documents dealing with ground conditions, site surveys etc. They cover the entire Site and to that extent could be said to indicate a contract for everything. That said, I do not think that they add very much because if the parties had wanted to (or did make) more than one contract, they would just use the relevant parts as appropriate.

131. As for the 11 June letter from VE, it does make specific reference to the 20 March Quotation (as does the LOI) but for reasons already given, that is not determinative of the question of scope. The reference to a start date of the week commencing 11 June is of some importance as I have already noted because it makes quite clear that the works in question were to start then. The only works to start then were the North Carousel works. Mr Moran QC suggested that the reference to the start-date could hardly be sufficient to displace the 20 March Quotation and the figure of £363,600 for the purposes of determining scope. He also relied upon his cross-examination of Mr Harm about the 11 June letter's reference to a "provisional date" and what had been said about such date at the 15 May Meeting. However, I do not think any of that really assists VE here. In my view, the immediate factual context of the LOI and 11 June letter which includes what works were to be started is very important, and provides the lens through which, as it were, the £363,600 figure should be examined. After all, it is not said that £363,600 as a figure is wrong as such, rather it is to be viewed as a maximum. That is in fact how it is referred to in paragraph 13.

132. I should add that in the end, VE said that the LOI should be regarded as covering all the work done prior to the execution of the Sub-Contract (and not merely the VHAM Building), save for the North Carousel works. The further work done was to be treated as a variation to the LOI (as the Management Plan had contemplated) as opposed to the formation of “lots of little contracts” for each of the other works. This approach taken by VE is important because it means that VE accepts that the scope of the LOI was not to be limited to what VE claims is implied by the language of the LOI, in particular the reference to £363,600 or the limited drawings supplied. But if so, then, as a matter of principle, this would encompass the North Carousel works as well, subject only to the 28 May Contract argument, which I have rejected.

133. Mr Moran QC submits that if one asked the parties on 15 June what was the document setting out the work they were about to start, they would obviously say the 28 May Quotation. Leaving to one side, whether this would not also constitute inadmissible subjective intention, the point is not a good one anyway. Obviously, if one asked the parties what works they were doing, they would say the North Carousel works and if asked what the pricing was, they might well have referred to the 28 May Quotation which applied the usual rates to the North Carousel (albeit that it was later altered). Mr Moran QC also refers to Mr Harm's evidence at Day 1/162, 164, to show that the 28 May Quotation was "internally accepted/agreed". See also his evidence at Day 2/20-21. I am not sure that Mr Harm was going that far, but in any event, this is not the point. The real question is (if the parties were asked) what document contained BB's contractual commitment to pay for such works. On the evidence already discussed, it was, and could only be the LOI.

134. For all those reasons, in my view, the LOI was quite capable of including and did include the North Carousel works and therefore it is not as if there was a contractual need for some other contract like the 28 May Contract which in any event I have found did not exist.

135. Had there never been the Sub-Contract an interesting point might have arisen (on BB's case) as to whether the LOI itself was subject to the Terms and Conditions which were referred to in its letter of 11 June. However, the point does not arise because neither side claims that the LOI was the operative contract for the North Carousel at (or by) the end of the day. VE said it never was, and BB says it was superseded by the Sub- Contract

The Sub-Contract

Introduction

136. If indeed the LOI, as a contract, included the North Carousel works, there is no basis not to conclude also that the Sub-Contract included them and I did not understand VE to be arguing otherwise.

137. However, BB contends that even if the LOI did not cover the North Carousel works and the 28 May Contract did, this does not mean that the Sub-Contract did not replace it.

The factual matrix for the Sub-Contract

138. This of course is much more substantial than for the LOI because the Sub-Contract was not made until December 2013.

139. First, the invoice history is one continuum of accumulating valuations. There is no reference to the 28 May Quotation in Invoices 1 and 2. Instead there is a reference to the 20 March Quotation. Second, Invoices 1-3 all refer to the LOI. That is consistent with a perception by both parties that the North Carousel works were carried out under that contractual umbrella. That, of course, cannot assist on the interpretation of the LOI itself, as it would be post-contractual, but it can and does form part of the factual matrix for the Sub-Contract.

140. Next, I consider the position as at 20 November 2012. By then, Invoices 4-7 had been issued. None make reference to the LOI or the 20 March Quotation. However, Invoices 4, 5 and 7 were all for testing in relatively modest amounts. Invoice 6 was for more piling in the sum of £35,582.38 and it referred to a quotation of 3 October. The gross valuation in Invoice 7 was for £396,449.89. All these (and future) invoices continue to refer to "Contract No 120216".

141. The email exchanges of 20-23 November, between the parties makes plain that both saw the £363,600 as not defining the scope of the works but rather as a cap on the LOI, now exceeded. The way that VE proposed to deal with this, so as to have further financial cover, in the event, was to issue the quotation of 23 November, following communications about the correct drawings to be used. That quotation came to £540,465. Also on 23 November, as already noted, BB sent a copy of the Sub-Contract to VE for signature.

142. VE then proceeded to carry out further works and continued to invoice as before, with each invoice stating the gross valuation. Invoices 8-10 made reference to VE's quotation of 12 December 2012.

I do not seem to have it but it must have been a variant of the 23 November Quotation. Invoices 11 and 12, dated 28 February and 31 March 2013, were for testing. Invoices 13 and 14 referred to a 7 May 2013 quotation. Invoices 15 and 16 were for testing and invoice 17 simply referred to quoted rates. As already noted, the gross valuation was £1.24m. On 8 October 2013, VE sent the Sub-Contract back to BB, signed. On 15 October it agreed the total valuation in the slightly reduced figure of £1.239 million.

143. All of this is substantial factual matrix evidence in favour of BB's case.

Terms of the Sub-Contract including the Manuscript Additions

144. The number on the Sub-Contract was 300 0357/11, being the project and contract number used by BB. I have set out the salient provisions in paragraph 70 above. The price was, as previously, £363,600. Since, by then, all of the relevant piling works had been carried out, it is even clearer than it was in relation to the LOI that the description of the Sub-Contract Works given in paragraph 3 of the Sub-Contract must be to all of it.

145. Some parts of the Sub-Contract are worded as if it was entirely executory. Thus, for example, the anticipated commencement of the Sub-Contract works was given as between 18-22 June 2012. In fact, of course, and as the parties had agreed, and the LOI specifically contemplated, it would apply retrospectively. And the reference to that starting date at least ties the commencement of the Sub-Contract Works to the North Carousel works. Again, the duration of the works was said to be 6 weeks. On any view, that was not correct (and is qualified by VE later in the Sub-Contract document). But again, insofar as it had any relevance, it would logically cover the period from commencement which would thereby encompass the North Carousel works.

146. As for the expression "associated external works" in the definition of "Works", this clearly meant works outside of but on the same site as the VHAM Building. A similar phrase was used in the Management Plan (external areas) and was clearly seen there to be encompassing other structures which required piling other than the VHAM Building. Accordingly, if external works did not include the North and South Carousel etc then the Main Contract did not include them, which would be absurd. VE rely here on the evidence given by Mr Harm at Day 1/131-132, who referred to BB's main works as including lighting and landscaping and that he understood the expression "external works" in a building contract to mean works of that kind to the curtilage of the building. However, (a) this was put to him out of context and (b) it is a matter of subjective intent anyway. It cannot possibly affect the conclusion that here, the expression meant works outside of, but on the same site as, the VHAM Building.

147. One then turns to the Sub-Contract Sum of £363,600. Of course, by now, the sums claimed and paid had far exceeded it. Moreover it did not represent work solely on the VHAM Building (as per the 20 March Quotation) because that building work itself had changed and in fact cost somewhat more. It was by now an irrelevant figure. VE is correct to say that there was nothing to stop the parties by then changing the Sub-Contract Sum to represent the total value of the work done by that stage i.e. £1.239m, if that is what was intended. It would have obviously have been clearer and better if they had done so. However, I do not accept that the agreed final sum was simply another piece of administration, of no real significance for the Sub-Contract. Moreover, at this point, one has to consider the manuscript amendments from VE.

148. As to the first, "Original sub-contract sum to be considered in addition to or further works undertaken", the commercial aim behind that amendment is obvious. Although VE had in fact been paid considerably more than £363,600 and although the gross valuation was now agreed at £1.239 million, if left unqualified, £363,600 looked like the total sum payable under this contract. Of course, if the Sub-Contract was in truth limited to (for example) the particular VHAM Building works in that precise sum and there were other contracts to cover all the other works (which is VE's case) the sub- contract sum of £363,600 would be entirely innocuous and require no amendment. The amendment which was provided was plainly meant to qualify this sum so that the cost of the other works was also to be covered. Any other interpretation makes no sense. Both parties agree, thus far. The actual wording is a little odd, but in my view the sense is that there were the costs of other works "in addition to" the original contract sum - rather than the original contract sum being "in addition to" the further works, which would suggest that the works contemplated by the £363,600 came later than the "further works".

149. The issue then is what "further works undertaken" means. BB says that it means the works not covered by the £363,600 and/or any works which might otherwise not be deemed to be within the terms of the Sub-Contract. Effectively, then, BB is interpreting "further" as "other".

150. However, VE does not accept this. Rather, it says that the manuscript addition is a reference to all works done from some date going forwards. That makes little sense in the abstract. However, VE says that here it must mean a date on or after the sending of the draft Sub-Contract on 23 November 2012, i.e. all works done after then. That is a very arbitrary date in my view, and makes no sense. It is convenient for VE's case because (assuming the Sub-Contract did not otherwise include the North Carousel works) it would then exclude those works because they were done before 23 November 2012. In fact, that is not altogether correct because there was a modest amount of further piling for the North Carousel - see Invoices 9 and 10 and the 7 piles referred to in the 23 November 2012 Quotation. On that footing, a part (admittedly a small part but it could be important if this was defectively executed) was in the Sub-Contract whereas the rest was not. Further, if the Sub-Contract happened to have been sent out, say, 3 or 4 months later, it would mean (on VE's case) that yet further works would be excluded from its ambit for no good reason.

151. Moreover, this timing point assumes what it seeks to prove, which is that the Sub-Contract did not cover pre-November 2012 works because there was no need to do so - because the North Carousel works were all subject to a pre-existing contract. But if that is right, then there was no need for the Sub-Contract to cover any of the work done pursuant to the LOI since that was a pre-existing contract as well. The riposte to that may be that the LOI-governed work is different because that was only the VHAM Building which, on VE's analysis, was truly within the Sub-Contract. But that is only a partial answer because, as already noted, VE also contended that work other than for the North Carousel and the VHAM Building when done, was covered by extensions to the LOI. And if that is not right, such other work must have been done at the time according to some other free-standing contracts. In truth, the notion that there was no need for the Sub-Contract to cover the North Carousel works because they had their own separate 28 May Contract is fundamentally flawed. That is because the clear and objective intention of both parties was that the Sub-Contract should end up as being the only contract.

152. The key point is that there is no commercial or other basis for implying this temporal criterion so as to read down the word "further" in the manuscript addition. It does not need to have such an artificial analysis applied to it, in order to "save it" as it were. The word "further" can easily be

read as "other" especially in the context of a manuscript amendment as opposed to some detailed contractual clause drafted by lawyers.

153. One then turns to the second manuscript amendment where again there is a reference to "all further works undertaken". Again, VE's temporal qualification to the word "further" makes no sense here either. One would have to read the single period of works of 6 weeks stated in the Sub-Contract as running up to, say, mid July, and then starting again in November. There is no basis for that.

154. If one reads these first two manuscript qualifications together they clearly mean that, for the avoidance of doubt, as it were, (a) £363,600 is only part of the price for the whole works which was by then agreed, and (b) 6 weeks is the duration of works for only part and not all of the works.

155. Finally, here, there is the manuscript amendment to make clear that there is no provision for liquidated damages.

156. Staying with the manuscript amendments at this stage, the 20 March Quotation referred to at item 6 of the numbered documents is then qualified so as to include "follow-on bills of quantities". Here, it does make sense to introduce a temporal element but not as from 23 November; rather, as from 20 March 2012 so as to encompass all further quotations in relation to work done. However, that does not help VE because on that basis, the 28 May Quotation would be included as well.

157. In my judgment, these manuscript amendments make clear, if it was needed, that the Sub-Contract was intended to apply to all the piling work done by VE in relation to this Main Contract. As such, it included all of the North Carousel piling. I should add that it is common ground that the manuscript amendments were made by Mr Waghorn. He did not appear as a witness for VE and if all he was going to say was what his subjective intention was, it would not be admissible. However, while hardly determinative, it can at least be said that the author was someone who was perfectly well aware of the entire factual context.

158. I now deal with some other provisions in the Sub-Contract:

(1) Paragraph 4 refers to the obligation to carry out the Sub-Contract Works; as already found, this covers all relevant piling;

(2) The specified documents under paragraph 8 do not assist VE;

(3) The description of Sub-Contract Works in Appendix 1 again is to all piling works; I have already dealt above with the Main Works definition and the interpretation of external areas;

(4) Article 3A refers to the Sub-Contract And Final Sub-Contract Sum of £363,600 - but that figure was qualified, as explained above;

(5) Likewise, the programme period of 6 weeks referred to in paragraph 4.6 is qualified by the manuscript addition;

(6) As for the key numbered documents, I have already analysed them in the context of the LOI and there is no need to repeat that analysis here. The point is that overall, they do not assist VE.

159. I should add that as the works progressed, it is clear that there were no formal variations to the LOI. However, they were instructed and the point is that in the end, as I find it, they were treated as a variation to, or part of one single contract.

Conclusion on Preliminary Issue 1

160. It follows from the above that my answer to Preliminary Issue 1 (as reformulated by me to make its sense clear) is that:

(1) The contract which governs the North Carousel works is the written Sub-Contract referred to above, signed by VE on or about 8 October 2013 and by BB on or around 13 December 2013;

(2) The Terms and Conditions are not contained within that contract and therefore do not govern the claim in respect of the North Carousel works.

161. I should record that, had the contract governing the North Carousel works been (and remained) the 28 May Contract, Mr Constable QC in the end accepted that if so, the Terms and Conditions would have been incorporated within it. He was right to make that concession, in my view.

PRELIMINARY ISSUE 2

162. It follows from my conclusion in relation to Preliminary Issue 1 that Preliminary Issue 2 (set out at paragraph 10(2) above) does not arise for consideration. However, I would make below the following (non-binding) observations about them.

163. Clause 6.6 of the Terms and Conditions provides:

> "Where any valid claim in respect of the Works and Materials which is based on any defect in the quality of the Works or condition of the materials or the failure to meet specification is notified to the Company in accordance with these conditions the Company shall be entitled to repair the Works or replace the Materials (or such part as the Company shall determine) free of charge or at the Company's sole discretion refund the Customer the invoice price (or a proportionate part thereof) but the Company shall have no further liability to the Customer".

164. Clause 6.7 of the TCs provides:

> "The liability of the Company for negligence or other default or breach of contract shall (except in the case of death or personal injury) be limited to the [a] cost of replacing piles or carrying out alternative remedial work such as underpinning, [b] the cost of repairing damage to any building to the extent that such damage was solely due to such negligence or breach of contract by the Company and [c] removal and alternative accommodation costs during the carrying out of such remedial work to the extent and for such period as is strictly necessary due to such remedial work rendering the building or part of it in respect of which costs are claimed incapable of beneficial occupation. For the avoidance of doubt the Company shall (save in relation to death or personal injury) have no further liability or other liability under this or any other contract or at common law and in particular (but without prejudice to the generality of the foregoing) the Company shall have no liability for [d] loss of profits, loss of business opportunities, liquidated damages payable to any person or the fact that no such liquidated damages became payable costs due to the delaying of any other construction or other works or any other losses of any kind save as clearly and specifically identified in the first sentence of this condition 6.7."

(letters in square brackets added - referred to below as limbs [a], [b] [c] and [d] respectively).

Preliminary Issue 2A

165. As for Preliminary Issue 2A and Clause 6.6, the only stated issue is whether it is potentially engaged or not engaged at all. That sparse formulation rather glosses over the underlying question which is the ambit of this provision as against Clause 6.7. That arises because on the face of it, the provisions appear actually inconsistent with each other.

166. For obvious reasons, however, neither side submitted that the result of this inconsistency was that one or other clause should be entirely disregarded. Both sides sought to advance an interpretation

of both that would allow them comfortably to co-exist. However, in my view, neither side's submissions here clearly enabled that to happen.

167. In my view, it is strongly arguable (but I do not make any firm conclusion or finding) as follows:

(1) The "any valid claim" referred to in Clause 6.6 uses the precise language employed in Clause 6.1 which itself gives a 10-year contractual warranty in respect of correspondence with specification and freedom from defects in materials and workmanship ("the Warranty");

(2) The Warranty is made subject to a number of conditions and qualifications in Clauses 6.2-6.5; Clause 6.4 imposes a time limit for the notification of any such claim;

(3) Accordingly, any claim other than one pursuant to the Warranty is not governed by Clause 6.6; I suspect that the use of the word "valid" in Clause 6.6 is referring, among other things, to a claim under the Warranty which does not fall foul of any of the qualifications and conditions and which is timeously made;

(4) In the case of non-consumers, Clause 6.3 purports to exclude any other contractual claim;

(5) That then leaves Clause 6.7 to apply to any claim in negligence and (at least in the case of consumers) some other breach of contract;

(6) If (as seems likely) BB is not to be regarded as a consumer for these purposes, there might arise a question as to whether the exclusion of all contractual remedies other than the Warranty was itself subject to any statutory control.

168. However, none of these points were argued before me, at least not in the way expressed above.

169. Accordingly, the better course (had Preliminary Issue 2A arisen) would have been to leave that issue now to trial. Doing so would not have materially increased the costs for either side.

Preliminary Issue 2B

170. That being so, it seems to me that had Preliminary Issue 2B (the scope of Clause 6.7) arisen, it would then have been best decided finally, at trial, also. In that regard, I take VE's point that it may be difficult to do so in something of a vacuum, at this stage, and in the absence of the detail of the loss claims as formulated.

171. That said, because the issue was argued (principally in the written submissions with little oral elaboration) and the parties had agreed to ventilate the issue at this stage, I will say what I can about it.

Issue 2B (1)

172. I agree with BB that the phrase in limb [a] does in principle cover more than just the "direct costs" of replacement piling as contended for by VE. In fact I am not sure that the phrase direct costs here (as opposed to non-direct costs) is as simple to apply as VE contends, once one gets beyond the cost of the piles themselves. I agree that the costs covered by limb [a], as with [b] and [c], must be clearly and specifically identified, as required by the last sentence of Clause 6.7. But that does not alter the fact that true cost of replacing the piling may go very much further than the cost of the piles or of actually sinking them, once the site is prepared and cleared to enable this. In many cases, the subject-matter of the negligence may only be discovered once the buildings or structures

which the piles support have been erected. That is inherent in the nature of piling as foundational work which usually has to be done before any other building work. Work may have to be done to such buildings or structures or (as is allegedly the case here) the structure may need to be removed in its entirety. What limb [a] connotes, in my judgment are the costs of the things that have to be done in order to replace the piles. Provided that this is the object of the exercise in incurring such costs, and they are reasonably and properly incurred (as BB accepts they must be in its formulation) they are *prima facie* recoverable under limb [a]. Thus in principle such costs may include the costs of investigating and designing how to replace the defective piling and the cost of removing anything (including the structure above them) which would otherwise prevent the new piling from going ahead. In that regard, I do not agree that such costs could only have been recovered if there were additional words in limb [a] such as "the cost of investigation" or "the cost of dismantling or removing the building".

173. VE is right to say that covering such costs might turn out to be very expensive for it (or its insurers). But if VE wanted to limit its financial exposure it could have put in a financial limit. It chose not to. I am not prepared to read into limb [a] some narrow construction simply in order to achieve something like the same effect as a financial limit, as VE suggests.

174. Although not by any means determinative, there is something of a pointer in favour of BB's construction that the costs which BB claims are covered, are clearly not on any view, consequential losses, or the kind of losses excluded by limb [d].

175. On the face of it, limb [a] would *appear* to cover the costs argued for by BB in paragraph 2B (1) (a) of Preliminary Issue 2. I cannot be sure that all such costs would be covered because it is possible that some mitigation costs might be more akin to providing other ways to enable Technip to keep its operations going, as a consequence of the re-piling works, rather than a cost of doing those works.

Issue 2B (2)

176. Here I favour VE's interpretation of limb [b] in principle. In my view, it is directed to the removal and accommodation of people, whether in a domestic or commercial context. Such costs may occur where the building above the piles is a house or an office. That is the sense of "beneficial occupation" in my view. I do not consider that it extends to the costs of removing and re-siting for continued operations elsewhere, any structures sitting on the piles falling outside that description, as the North Carousel itself would appear to be.

Issue 2B (3)

177. Here, I agree in principle with BB. If it became liable to Technip for the costs of replacing the piling or repairs to a building which would have been covered by limb [a] if BB had itself done or commissioned the work, I cannot see that it makes any difference if it has in effect paid for those works by indemnifying Technip for the cost of them, should it be found liable to do so. Otherwise recoverability turns on the fortuitous question as to whether the sub-contractor or the main contractor paid for them, which seems artificial to me.

178. If, on the other hand, BB is made liable to Technip for costs which fall outside limb [a] or are, for example costs excluded by limb [d] then equally, the fact that BB has a liability to Technip effectively for the cost of VE's negligence will not make them recoverable as against VE.

179. Beyond making those observations, I do not intend to go.

OVERALL CONCLUSION

180. In the event, BB succeeds on Preliminary Issue 1 and Preliminary Issue 2 does not arise.

181. I am very grateful to Counsel for their assistance and submissions.