Neutral Citation Number: [2022] EWHC 1418 (TCC)

Case No: HT-2020-000388

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/06/2022

Before :

MARTIN BOWDERY QC
Sitting as a Deputy Judge in the High Court

- -

Between :

MALLINO DEVELOPMENT LIMITED	**Appellant/ Claimant**
- and -	
ESSEX DEMOLITION CONTRACTORS LIMITED	**Respondent/ Defendant**

- -
- -

Jennifer Jones (instructed by **Temple Bright LLP**) for the **Appellant**
Emma Healiss (instructed by **Archor LLP**) for the **Respondent**

Hearing dates: 27 - 28 April and 3 - 4 May 2022

- -

Approved Judgment

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

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MR MARTIN BOWDERY QC

This judgment was handed down remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be 10.30 on 10 June 2022.

This Judgment is set out in the following nine sections.

1) INTRODUCTION

1. These proceedings concern development works at Bodmin Jail in Cornwall. Bodmin Jail was constructed during the 18th century and operated as a prison until 1927 after which it fell into disrepair.

2. The Development Works include:

- The construction of a hotel;

- The construction of a visitor attraction, one part of which is known as the Dark Walk;

- The construction of a hospitality venue.

These proceedings concern the Dark Walk attraction only.

3. The Claimant changed its name to Tudor Hotels Collection Ltd on the 8th March 2022 but both parties have continued to refer to the Claimant as Mallino. Mallino was the developer and employer for the construction of the Dark Walk. The Defendant ("EDC") entered into a contract executed as a Deed dated the 24th April 2018 based upon the JCT Standard Building Contract Without Quantities Form 2016 Edition (The Contract).

4. In the First Recital of the Contract, it was stated that:

> **"the Employer wishes to have the following work carried out:**
>
> **The expansion of existing visitor attraction (new build works only). The Dark Walk Attraction contract consists of constructing a new building to extend the existing visitor attraction. This includes the installation of attraction associated external works and drainage.**
>
> **at**
>
> **Bodmin Jail. Berrycoombe Rd, Bodmin, PL31 2NR ("the Works")**
>
> **and has had drawings and either a specification or work schedules prepared which show and describe the work to be done;"**

5. The Contract Sum was £3,874,017.22. However, the work was broken down into three sections as set out in the Contract Particulars as follows:

"Sixth Recital	**Description of Sections (if any) (If not shown or described in the Specification/Work Schedules or Contract Drawings, state the reference numbers and dates or other identifiers of documents in which they are shown.)**	**Section 1 - Demolition of existing hospital building to ground level** **Section 2 - Excavation works to level 1 formation level**

		Section 3 - All other remaining works
2.3.7	**Sections : Section Sums**	**Section 1 - Demolition of hospital building £329,057.81** **Section 2 - Excavation works: £521,728.18** **Section 3 - Remainder of works: £3,023,231.23**
1.1	**Sections : Dates for Completion Of Sections**	**Section 1 - Demolition of hospital building: 11th May 2018** **Section 2 - Excavation Works: 8th June 2018** **Section 3 - Remainder of Works: 9th April 2019**

6. On the same date the parties entered into a further contract ("The Variation Contract") which at clause 2 headed "Variations of Contract" stated that:

> **"2. Variation of Contract**
>
> **2.1 With the agreement of the Contactor which is hereby given the Employer shall issue tenders for the works comprised in the Development save for the demolition works in respect thereto and shall invite the Contractor to tender for the same.**
>
> **2.2 Following receipt of tenders issued pursuant to the agreement in clause 2.1 above the Employer shall award and enter into a contract for the whole of the works comprised in the Development and the Contract (New Contract).**
>
> **2.3 In the event that the New Contract is awarded to and entered into with the Contractor then the Contract shall be deemed terminated and the Contractor shall proceed with the works under the terms of the New Contract. In which event: all payments made to the Contractor by the Employer under the Contract shall be deemed paid under the New Contract; All works carried out under the Contract shall be deemed carried out under the New Contract; All obligations owed by one party to the other**

under the Contract as at the time of termination shall be deemed owed by such party to the other under the New Contract.

2.4 In the event that the New Contract is awarded to and entered into with a contractor other than the Contractor (New Contractor) then at the option of the Employer, the Employer may by notice in writing served on the Contractor no later than 7 days after entering into the contract with the New Contractor either terminate the Contractor's employment under the Contract or novate the Contract to the New Contractor.

2.5 In the event that the Contract is terminated then: The Employer shall within 21 days pay to the Contractor all sums due under the Contract for the work undertaken by the Contractor together with the Contractor's reasonable costs of demobilisation; The Contractor shall not be entitled to loss of profit or overhead contribution on works not completed under the contract.

2.6 In the event that the Employer novates the Contract then: The novation shall be deemed as if entered into between the Contractor and New Contractor ab initio; The Employer shall procure that the New Contractor accepts the Contract as novated to the New Contractor and is bound to the Contractor in a relationship of main contractor and Trade Contractor and accepts that the terms of the Contract are deemed varied to reflect that relationship with the New Contractor assuming roles within the Contract normally undertaken by the Main Contractor and relieving the Contractor of the roles and obligations under the Contract usually performed by a main contractor; The Contract shall be deemed a trade contract for the demolition works only and not a main contract; the works to be performed under the Contract shall be limited to the demolition works; the obligations of the Contractor for all matters associated with a main contractor shall forthwith cease and be deemed included in the New Contract and the Contractor's role shall be limited to that of a trade contractor with no obligations for matters, without limitation, such as CDM, design, coordination, programming; Not withstanding that the Contract shall be deemed novated ab ignitio [sic], the Employer shall within 21 days of entering into the New Contract pay the Contractor for all work undertaken by the Contractor up to the date of the Employer entering into the New Contract; the Employer guarantees to pay to the Contractor any sum due to the Contractor from the New Contractor which is not paid by reason of the insolvency of the New Contractor."

7. EDC carried out the Section 1 and Section 2 works. However, Mallino proceeded to appoint another contractor PIN-CM to carry out the Section 3 works without inviting EDC to re-tender or indeed without undertaking any competitive re-tendering process at all. This dispute concerns EDC's alleged entitlement to recover its lost profit and overhead contribution suffered as a result of Mallino's breach of clause 2 of the Variation Contract.

8. The dispute has already been the subject of two adjudications. In those adjudications Mallino denied that it had breached its obligations to EDC and denied that EDC was entitled to recover any lost profit or overhead contribution. The Adjudicator found in EDC's favour and awarded EDC a proportion of its claimed losses.

9. In these proceedings, Mallino now admits that it did breach its obligations when it failed to invite EDC to re-tender for the Section 3 works. Notwithstanding that admission, it alleges that the Adjudicator was wrong as a matter of law to award EDC any loss of profit or overheads. In short, Mallino says that EDC's losses should be assessed by reference to Mallino's 'minimum contractual obligation', which would have entitled it to terminate EDC's employment without compensating it for lost profit or overheads. Mallino also says that, even if it had re-tendered the Section 3 works, it would not have selected EDC in any event.

2) CHRONOLOGY OF EVENTS

10. The chronology of events I find relevant to the issues raised in these proceedings is as follows:

25th September 2017	Planning Consent. It was an express condition of this planning consent that no demolition works in the area of the site associated with the former hospital wing shall commence until the Local Planning Authority has been provided satisfactory evidence that a contract for the construction of the replacement building and a timetable for its completion are in place. Reason: In order to ensure part of a heritage asset is not lost unnecessarily in accordance with Policy 24 of the Cornwall Local Plan and paragraph 136 of the National Planning Policy Framework 2012.
November 2017	Kier Construction Limited, who had been engaged by Mallino to provide pre-construction services for the project, appointment was terminated.
20th December 2017	EDC was appointed to carry out enabling works for the project in the sum of £3.2m.
21st December 2017	Invitations to tender inviting lump sum bids for the Dark Walk works from five contractors (Midas, Ikon, Morgan Sindall, Devon Contractors ("Devon") and Dawnus Construction). Twenty one other contractors were asked whether they would be willing to submit a fixed price tender - all refused to do so.
19th January 2018	EDC invited to tender for the Dark Walk works.
9th February 2018	Devon submitted a tender but priced on a reimbursable basis rather than a lump sum basis.
28th February 2018	EDC provided an indicative price of £3.62m

10th April 2018	EDC provided a contract sum analysis of £3.88m and a draft programme for the Dark Walk works.
13th April 2018	EDC provided an updated contract sum analysis in the sum of £3.98m.
20th April 2018	Turner and Townsend ("T&T"), Mallino's project manager, contract administrator and quantity surveyor stated: - **"We are proposing the values for section 1 (demolition) as £329,057.81 and section 2 (excavation) as £546,782.08. In regard to section 3 (the remainder of the works) we are going to put in a figure of £3,023,231.23 giving an overall contract figure of £3,899,071.12. As Michael Corrigan has discussed with Rob Cox, it is envisaged that Essex will only complete section 1 and 2 with the JCT contract then broken by the bespoke contract agreement. ("The Variation Agreement")".** The figure of £2,023,231.23 was agreed as part of an overall re-negotiation sum of £3,874,017.22 for the three sections of work.
24th April 2018	Date of Building Contract created to enable compliance with planning consent.
24th April 2018	Date of Variation Contract created to enable compliance with the planning consent. It is not clear whether the variation contract was shown to Cornwall Council.
8th May 2018 ↓ 10th August 2018	EDC carried out the Section 1 and Section 2 works.
May 2018 ↓ July 2018	Mallino with T&T carried out an open book negotiation with PIN-CM for the Section 3 Works and the work for the hotel.
27th July 2018	Mallino appointed PIN-CM to carry out the Section 3 works for the sum of £3,451,000.58
22nd November 2018	Mallino purported to determine the Building Contract pursuant to Clause 2.4 of the Variation Contract
April 2019	Steven Baker, a Director of EDC, discovered his email account had been hacked and responded by deleting Steve Padmore and Michael Corridon's

email accounts, who both worked on the Bodmin Development for EDC.

March 2020 — Practical Completion of Dark Walk works.

15th April 2020 — The first adjudication decision which determined amongst other matters:

1. The Building Contract and the Variation constituted a single overarching contract.

2. Mallino breached the Variation and in particular Clause 2 thereof by failing to re-tender the Section 3 Works;

3. Mallino's purported termination notice dated 22 November 2019 was ineffective because, in breach of Clause 2.4 of the Variation, it was issued more than 7 days after PIN CM's appointment to carry out the Section 3 Works; and

4 EDC was entitled, in principle, to recover from Mallino the following:

(a) The value of all works carried out by EDC not yet paid, as ascertained in accordance with the Building Contract;

(b) EDC's reasonable costs of demobilisation including additional resources expended in winding down; and

22nd September 2020 — The Second Adjudication Decision which determined amongst other matters:

1. **The sum of £23,392.41 in respect of works carried out under the Building Contract for which it had not been paid;**

2. **The sum of £2,875.29 in respect of its reasonable demobilisation costs, including additional resources expended in winding down; and**

3. **The sum of £151,161.56 for loss of profit and overhead contribution, calculated on a loss of a chance basis, from works that EDC may have secured as a result of a**

successful tender for the Section 3 Works."

8th October 2020	EDC's Part 7 proceedings issued to enforce the Second Adjudication Decision.
22nd October 2020	Mallino commenced their proceedings using the Part 8 procedure seeking to circumvent enforcement of the Second Adjudication Decision.
14th December 2020	Order by Consent that Mallino's claim be managed and tried under the Part 7 procedure. Thereafter Mallino paid EDC £151,161.56 in respect of EDC's loss of profit and overhead contribution claim.
29 April 2021	Malcolm Hepburn, a Director and founder of EDC, discovered his Hotmail account had been hacked and he then closed that email account.
May 2021	The hotel and hospitality venue completed.

3) THE AGREED FACTS

11. Following the transfer to the Part 7 procedure, Mallino did not seek leave to amend its Particulars of Claim and has continued to accept that it is bound by certain findings made in the Adjudicator's Decisions.

12. The following matters remain agreed in these proceedings :

    .1 the Building Contract and the Variation Contract constitute a single overarching contract;

    .2 Mallino breached clause 2 of the Variation Contract when it failed to re-tender its Section 3 Works;

    .3 the purported termination notice dated 22nd November 2019 was ineffective because, in breach of clause 2.4 of the Variation Contract, it was issued more than 7 days after Mallino appointed PIN-CM to undertake the Works;

    .4 EDC was entitled to recover the value of the work carried out but not yet paid and its reasonable demobilisation costs; and

    .5 EDC would have been able to carry out the Section 3 Works if it had been appointed.

13. The fifth proposition is controversial but I accept the submissions on this point advanced by Emma Healiss for the Defendant and find that the fifth proposition is an agreed fact. If I may summarise the position on the pleadings:

    .1 PoC, para. 27 states:

> **"(a) Loss of a chance is not available as a remedy because, on the balance of probabilities, EDC would not have been able to perform the Contract in any event. This is a question of fact and Mallino accepts the Adjudicator's decision is temporarily binding;"**

However, the Adjudicator held that EDC would have been able to carry out the Section 3 works if appointed, see paragraph 5.24 of the Decision in the Second Adjudication where he states:

> **"… I am satisfied that had it been successful in procuring the contract, EDC would have been able to assemble the appropriate resources and skills to perform the contract"**

PoC, para. 27 further states:

> **"(b) There is no loss of a chance as a matter of fact (because EDC would not have been appointed). This is a question of fact and Mallino accepts that the Adjudicator's decision is temporarily binding.**

However, the Adjudicator held that EDC would not have been excluded at the pre-qualification stage, see paragraph 5.20 of the Decision in the Second Adjudication where he states:

> **"I reject the submission that EDC would have been excluded at the pre-qualification stage."**

These are two separate points:

- EDC would not have been able to perform the contract;
- EDC would not have been appointed.

.2 The Reply at paragraph 15 stated the factual allegation "that had Mallino re-tendered the Section 3 Works, EDC would have been awarded the new contract is specifically denied".

However this denial only goes to the second point above, it does not formally challenge the first point.

.3 The Reply at paragraph 17 reiterates that "Mallino accepts that the Adjudicator's decisions are temporarily (not permanently) binding to the extent set out in the Particulars of Claim".

Accordingly, the Adjudicator's finding that EDC would have been able to carry out the Section 3 works is an Agreed Fact.

4) THE FACTUAL EVIDENCE

14. Mallino called two Witnesses of Fact:

Robert Cox, the Chief Executive of Mallino

15. His evidence was that he was a qualified building surveyor but not a quantity surveyor. He started his career at E.C. Harris in 1999 where he worked in the Hotels Team until 2009 when he moved to the role of Head of Hotels at T&T.

16. T&T were the Project Managers, Cost Managers and Quantity Surveyors appointed by Mallino for the Bodmin Jail Development. In the Summer of 2017, Robert Cox was asked to take over the project management responsibilities at Bodmin Jail.

17. As Robert Cox explained in his Witness Statement:

> **"15. In the summer of 2017, I was asked by my Managing Director at T&T to support our Bristol office in the delivery of the Bodmin Jail Hotel Project. At the time T&T Costs Management were appointed as the Quantity Surveyors for Mallino and receiving Project Management support from Phil Toghill of T&T. I became one of the project leads alongside my QS colleague Mark Rogers, with responsibility for achieving Mallino's intended timeframes and budgets for delivery of the whole project."**
>
> **"17. I held the role of project lead for the Bodmin Jail Project at T&T from October 2017 to October 2018, at which point I moved directly to the role of Managing Director at Mallino where I continued my work on the Bodmin Jail Project, now acting as the client rather than one of the client's appointed professional consultants.**
>
> **18. In October 2021, I was promoted to my current role of CEO of Mallino."**

18. I found Robert Cox a difficult witness. He seemed somewhat brisk in his answers. For example, when asked on Day 1, page 119 questions about the Variation Agreement he commented as follows:

> **"Q. The point I'm focussing on at the moment, Mr Cox, is the wording of clause 2.1, which you've agreed was drafted by EDC**
>
> **A. It is, yes.**
>
> **Q. And the proposition I'm putting to you is that it would make no commercial sense for EDC to propose this clause and thereby require its participation in this retender process if it thought it had no prospect of carrying out those works, would it?**
>
> **A. I can only assume it was drafted by a solicitor, not by a contractor."**

This seems a somewhat surprising answer when one would have expected Mallino's Project Manager at least to have read and to have understood the terms of the Variation Contract.

Given the Agreed Facts set out above, Robert Cox clearly did not understand how the Variation Contract was intended to be operated.

Furthermore, Robert Cox appeared in his answers and conduct during his cross-examination to be unnecessarily argumentative and partisan.

Timur Gorman

19. Timur Gorman was born in Russia and attained British Citizenship on the 29th November 2018. As his Witness Statement explains

> **"11. I previously was a major shareholder and CEO of a leading cosmetics company in Russia, called Concern Kalina ("Kalina"). I was the CEO and later the Chairman of Kalina from 1996 to 2011 and my current business-partner and fellow board member at Mallino, Mr Alexander Petrov, was the Chief Financial Officer.**
>
> **12. Kalina was sold to Unilever in 2011, at which point I began the process of moving to the United Kingdom and becoming a British citizen.**
>
> **13. As part of the process of naturalising to the UK, I changed my surname and those of my family by deed poll to 'Gorman' in September 2020. My name at birth was Timur Goriaev (alternatively spelled Goryayev). I note that my witness statement in the adjudication concerning the Dark Walk contract used my former surname Goriaev."**

20. It is clear from his Witness Statement drafted after Mallino had lost two adjudications and after Mallino had agreed for the purposes of these proceedings that:

> **"Mallino breached Clause 2 of the Variation Contract when it failed to re-tender the Section 3 Works."**

that Timur Gorman still does not understand how the Variation Agreement was intended to be operated.

At paragraph 44 of his Witness Statement he states:

> **"44. I understand that it is EDC's position in these proceedings that Mallino failed to carry out re-tendering exercise for the works. Mallino did in fact go through a tender process, which involved several potential companies and lasted for several months and ultimately concluded with the appointment of PIN CM."**

21. If Timur Gorman understood the case advanced by EDC in the two adjudications and in these proceedings that statement would never have been included in his Witness Statement.

22. Like Robert Cox Timur Gorman stated that:

> **"… we never intended for EDC to carry out the construction works. We were aware that they had submitted a price for the purpose of the contract but this was not an attractive proposition for us"**
>
> See paragraph 54 of his Witness Statement.

However I do not accept this evidence. The witnesses may have persuaded themselves to say this because they failed to re-tender the Section 3 Works. However during the

course of two adjudications and these proceedings Mallino's witnesses views regarding EDC have hardened in respect of EDC's competency to carry out the Section 3 Works who I consider would have been a satisfactory contractor for the Section 3 Works if the works had been re-tendered.

23. I consider it unfortunate that Timur Gorman on Day 2, page 39 described EDC as "monkeys" in the course of his evidence. This emerged as follows during his cross examination: -

> **"Q. Okay. I'm just going to ask you my question one more time because I don't think that you answered it, is whether you will accept that if you had been told EDC had plenty of experience to carry out the Dark Walk works and it had submitted a tender substantially cheaper than PIN's, you would have appointed EDC?**
>
> **A. If I would receive recommendation from T& T, that there is a brilliant company with a lot of successful projects, I would consider this company as a potential contractor. EDC as a name popped up several times during this project and not always in a very positive context. A small company, errand company, doing, you know, some chores -- we call such companies "monkeys" normally -- doing small jobs, and I would never consider a handyman to be instructed to build a stately manor it's just not how it works in the real world."**

That description of EDC was odd particularly given during his evidence:

- he would not challenge the statement that no one from Mallino or T&T had asked EDC about their experience in construction; and

- this project was not to construct a stately manor.

As Robert Cox in his Witness Statement stated the Dark Walk:

> **"Was a conventional new build project for a construction contractor to price and ultimately to construct."**

24. For the Defendant only one witness was called for cross-examination.

Stephen Baker

25. Stephen Baker is a director of EDC and had worked in the demolition and construction industry for 46 years and had been a director of EDC since 1998. He maintained in his Witness Statement at paragraph 3.14 to 3.16:

> **"EDC'S PRIOR EXPERIENCE**
>
> **3.14 I understand that Mallino has previously suggested that it had concerns about EDC's alleged lack of experience in undertaking building works and that was a crucial factor in it appointing an alternative contractor to undertake the Section 3 Works.**
>
> **3.15 As confirmed at the start of this witness statement, I have been a director of EDC since 1998. I am therefore able to explain EDC's prior experience in delivering a project like the one at Bodmin Jail.**

> **3.16 Whilst EDC is a specialist demolition contractor, the company also delivers complex building projects. Had EDC been given the opportunity to re-tender the Section 3 Works, I would have worked with the team to ensure that further details of its building experience were included to support the re-tender."**

I found Stephen Baker to be an impressive witness. His answers were clear and concise and he avoided arguing his case or resorting to exaggeration or obfuscation.

With regard to the deleted email accounts I accept Stephen Baker and Malcolm Hepburn's explanation as to why and when these email accounts were closed and I do not draw any adverse inferences because neither EDC or Mallino had access to Steve Padmore, Michael Corridan and Malcolm Hepburn's email accounts.

5) LIST OF AGREED ISSUES

26. The parties have agreed a List of Issues for use at Trial. During the Opening and Closing Oral Submissions little, if no, reference was made to the Agreed List of Issues. I intend to only use this Agreed List of Issues as the broad framework for the remainder of this Judgment.

27. The parties have an agreed introduction to the Agreed List of Issues which states:

> **"This list of issues has been agreed by the parties for use at trial. It is intended to reflect the main issues in the case so as to provide an agenda for the trial of this matter, but is not intended to repeat the pleadings or to constrain the parties' entitlement to raise pleaded issues at trial.**
>
> **Mallino's primary case is that the claim and counterclaim may be determined by resolution of a legal question as to the correct measure of EDC's loss and that, as such, there is no need for the Court to consider the underlying facts. That case is put forward on the basis that, save as expressly put in issue, the Adjudicator's findings are temporarily binding on the parties. If Mallino is correct about this, it says that issues 4 and 6-10 below will ultimately not be relevant. For the avoidance of doubt, EDC does not agree with that analysis. Its case is as per the next paragraph.**
>
> **EDC's case is that, in order to determine the claim and counterclaim, it will be necessary for the Court to consider the factual background. EDC's position is therefore that all issues set out below are relevant and will need to be determined.**
>
> **For the purposes of these proceedings, the following facts are assumed to be correct: (i) the Contract and the Variation are a single overarching contract; (ii) Mallino was in breach of clause 2 of the Variation for failing to tender section 3 of the Works; and (iii) the letter of 22 November 2019 particularised at paragraph 13 of the Particulars of Claim was ineffective as a termination notice."**

28. The Agreed List of Issues is then split into two sections:

- Correct Measure of Loss;

- EDC's Alleged Lost Profit and Overhead Contributions.

"**CORRECT MEASURE OF LOSS**

1. Is EDC entitled to recover profit/fixed overhead contribution for works that it may have secured as a result of a successful tender for section 3 of the Works, as part of a loss of a chance claim or at all?

(POC para 19, 21, 22, 23, 27, 30, 31, 33; Def para 26, 34, 36)

2. What are the principles by which EDC's entitlement (if any) to recover lost profits and/or loss of overheads contribution in respect of the Section 3 Works are to be measured?

(POC para 19, 21, 22, 23, 27, 30, 31, 33; Def para 26, 34, 36)

3. By way of sub-issues to issues 1 and 2 above:

a. Is the correct measure of loss for assessing EDC's claim to assess the minimum contractual obligation that would have been available to Mallino? If so:

i. On a proper construction of clause 2 of the Variation and/or in any event, what was the minimum contractual obligation available to Mallino?

ii. Is clause 2.5 engaged when considering EDC's entitlement to payment?

b. What, if anything, is the relevance of the principles concerning loss of a chance to this analysis?

4. If Mallino is wrong about issue 3 above (i.e. the correct measure of loss is not to assess the minimum contractual obligation that would have been available to Mallino):

a. Is EDC entitled to recover damages for its lost profit and/or overhead contribution in full if it proves that it would have been the successful tenderer on the balance of probabilities?

b. Alternatively, if EDC establishes that it lost a real chance of winning the contract for the Section 3 Works, is it entitled to recover damages that reflect the loss of opportunity in making a profit and contributing to overheads?

c. In the further alternative, is EDC's loss to be measured by reference to what the Court considers, on balance, Mallino would have done had it tendered the Section 3 Works in accordance with Clause 2.1 of the Variation (by reference to the relevant economic and other surrounding circumstances)?

(POC para 33, Def para 36)

5. Is Mallino entitled to the declarations sought at paragraph 34 of the Particulars of Claim (which seek to put into effect, on Mallino's case, the answers to issues 1 and 2 above)

EDC'S ALLEGED LOST PROFIT AND OVERHEAD CONTRIBUTION

6. Had Mallino tendered the Section 3 Works in accordance with Clause 2.1 of the Variation, would EDC have been the successful tenderer on the balance of probability, alternatively did EDC lose a real chance of winning the contract for the Section 3 Works? (Def para 36(3), Rep para 15)

7. What was EDC's loss of profit and/or overhead contribution? (Def para 41; Rep para16,19)

8. If loss of opportunity is the correct measure of lo ss, how is this assessed? (Def para 42; Rep para 16, 20)

9. What if any sums are due to EDC? (Def para 41, 42; Rep para 19, 20)

10. What if any interest is due to EDC? (Def para 43; Rep para 21)

(POC para 34; Def para 37; Rep para 16)"

The Agreed List of Issues somewhat unnecessarily complicates matters. I will concentrate in this Judgment on the following issues:

- The correct measure of loss;
- Would EDC have been appointed for the Section 3 Works;
- EDC's alleged lost profit and overhead contribution.

6) THE CORRECT MEASURE OF LOSS

29. Mallino's case is that:

- EDC's losses are to be measured by reference to the "minimum contractual obligations" principle set out in **Lavarack v. Woods of Colchester Ltd** [1967] 1 Q.B. 278;
- On a proper application of that principle, Mallino would have terminated EDC's appointment under clause 2.4 of the Variation Contract and, accordingly, EDC would not have recovered any loss of profit or overheads by reason of clause 2.5 of the Variation Contract.

30. I accept that where a contract entitles a Defendant to perform in alternative ways or the Defendant has a discretion as to the contractual benefits to be conferred on the Claimant damages are generally to be assessed on the basis that the Defendant would perform in the way most favourable to himself.

31. I also accept as Andrew Burrows points out in "Remedies of Tort, Breach of Contract and Equitable Wrongs":

> **"In applying the usual minimum obligation principle there are two qualifications that must be borne in mind. The first is that, while a particular performance may be the least burdensome to the defendant when judged solely according to the contract, this may not be the basis upon which damages are assessed because the courts judge the defendants least burdensome performance by taking all other potential losses into account, The classic expression of this was in *Lavarack v Woods of Colchester Ltd,* where Diplock LJ said, '.one must not assume that he [the defendant] will cut off his nose to spite his face and so [act] as to reduce his legal obligations to the plaintiff by incurring greater loss in other respects.' The decision in *Bold v Brough, Nicholson and Hall Ltd*[65] is probably best explained on this basis. There the claimant, who had been wrongfully dismissed by the defendant, claimed for the loss of pension rights. Phillimore J held that the claimant should be compensated for this loss even though the defendant had the right to terminate the pension scheme on notice because it was unlikely that it would have taken a step so disastrous to its relations with all its employees solely to defeat a claim by this plaintiff.'**
>
> **The second qualification is that where, on the construction of the contract or by reason of an implied term, the defendant's discretion should be exercised reasonably, damages will be assessed on the basis of the defendant's minimum *reasonable* performance. In *Abrahams v Herbert Reiach Ltd,* the defendants, a firm of publishers, agreed with the claimants, authors of a series of articles on athletics, to publish the articles in a book, paying the authors 4d for every copy of the book sold. The number of copies to be printed and other details regarding the publication were left to the publishers' discretion. They refused to publish the book. In an action for breach of contract, the Court of Appeal seems to have held that damages should be assessed on the basis not that the defendants would have published the minimum number of copies that could be described as a publication, but rather that they would have printed the minimum number that was reasonable in all the circumstances."**

32. However in this case there is a major stumbling block to the application of the minimum obligation principle. The principle in **Lavarack** does not apply in cases such as this case where the contract imposes an obligation on the Claimant and then gives the Claimant a discretion as to how to perform that obligation. This is clear from the following three cases:

Abrahams v. Herbert Reiach Ltd [1922] 1 KB 477 at 480:

> **"… What are the damages to which the respondents are prima facie entitled? The general rule is that stated by Parke B. in *Robinson v. Harman* (1) : "Where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed." Mr. Jowitt contended that this was one of those contracts which may be performed in one of several ways and was analogous to those contracts which provide for alternative methods of performance. If this were so the party complaining of a breach must be content to have the damages assessed by the standard which is the least onerous to the defendant. But in my opinion this**

is not a contract of that kind. In the cases to which we have been referred the contracts provide on the face of them for alternative methods of performance. This contract only imposes one obligation upon the appellants - namely, to publish. The question is what will satisfy that obligation? The appellants have a wide discretion; the time of publication, the number of copies to be printed, the price at which they are to be offered, and the form the book is to take are all left to their judgment. That however does not dispose of the case, because they have repudiated their obligation altogether, and the difficult question we have to decide is in what position the respondents would have stood if the appellants had performed their obligation. To answer this question the Court must come to some conclusion on matters on which there is no evidence; how the appellants would have exercised their discretion; what number of copies they would have published; how many editions would be reasonable. On all these points the parties left the learned judge in a difficult position."

Durham Tees Valley Airport Ltd v. Bmibaby Ltd [2010] EWCA Civ. 485 at 69, 96 and 131:

"69. There was clearly a consensus between the members of the court that, in relation to alternative methods of performance, the claimant will be unable to rely upon the defendant performing the contract in the more onerous of the two or more ways permitted. But that was not the type of contract under consideration in Abrahams and it is not the type of contract which we have to deal with in this case. Where there is only a single obligation to be performed it is clear that the majority view was that an assessment of damages should not, as a matter of law, be limited strictly to what was the minimum level of performance permitted under the contract but should extend to a calculation of how the contract would have been performed at the relevant time had it not been repudiated. This will take into account the likely profitability of the contract and any other relevant facts that would have influenced the method of performance."

"96. The cardinal principle of any assessment of damages for breach of contract is that the innocent party (the claimant) is entitled to be put in the same position as he would have been in if the defendant had not broken the contract. This requires a careful analysis of the contract. Subsidiary general rules have been developed for measuring damages in different types of case, although there may be a need for caution to see that they are not applied mechanistically in particular situations where to do so would defeat the cardinal principle. As the case law shows, there is a wide range of possible permutations which

may affect the right way to assess damages. They include the following, although not every case falls neatly into one of them:

1. **The contract requires the defendant to do X or Y.**

2. **The contract requires the defendant, if he has not done X, to do Y.**

3. **The contract requires D to do X and the claimant has a reasonable expectation that he will do Y.**

4. **The contract requires the defendant to do X and allows him a discretion how he performs the obligation."**

"131. Although in *Lavarack v Woods* Lord Denning was in a minority in his analysis of the contractual position between the parties, he was in my respectful opinion right in his citation of *Abrahams v Reiach* as authority for the proposition that where a contract imposes a single obligation, rather than alternative obligations, compensation is to be based on the probabilities of the case - on the remuneration which the claimant might reasonably be expected to receive - and not on the bare minimum necessary to have amounted to performance of the contract."

British Gas Trading Ltd v. Shell UK Ltd[2019] EWCA Civ 2349 at 68 to 71:

"68. The judge preferred British Gas's submissions on this issue. He cited the decision of this court *in Durham Tees Valley Airport Ltd* v *Bmibaby Ltd* [2010] EWCA Civ 485, [2011] 1 All ER (Comm) 731, a case in which the defendant airline had contracted to base and fly two aircraft from the claimant's airport over a 10 year period but had subsequently repudiated that contract. The defendant argued that the damages for repudiation should be nominal because the contract did not specify the number of flights required or passenger numbers to be carried and that, in the absence of any minimum requirement, the claimant had suffered no loss. That argument was rejected. The Court of Appeal held that when assessing damages, the court had to make an estimate of how the contract would have been performed if it had continued.

69. Patten LJ said:

"79. ... The court, in my view, has to conduct a factual inquiry as to how the contract would have been performed had it not been repudiated. Its performance is the only counter-factual assumption in the exercise. On the basis of that premise, the court has to look at the relevant economic and other surrounding circumstances to decide on the level of performance which the defendant would have adopted. The judge conducting the assessment must assume that the defendant would not have acted outside the terms of the contract and would have performed it in his own interests having regard to the relevant factors prevailing at the time.

But the court is not required to make assumptions that the defaulting party would have acted uncommercially merely in order to spite the claimant. To that extent, the parties are to be assumed to have acted in good faith although with their own commercial interests very much in mind."

70. Toulson LJ agreed and identified a number of possible permutations:

> **"96. The cardinal principle of any assessment of damages for breach of contract is that the innocent party (the claimant) is entitled to be put in the same position as he would have been in if the defendant had not broken the contract. This requires a careful analysis of the contract. Subsidiary general rules have been developed for measuring damages in different types of case, although there may be a need for caution to see that they are not applied mechanistically in particular situations where to do so would defeat the cardinal principle. As the case law shows, there is a wide range of possible permutations which may affect the right way to assess damages. They include the following, although not every case falls neatly into one of them:**
>
> **1. The contract requires the defendant to do X or Y.**
>
> **2. The contract requires the defendant, if he has not done X, to do Y.**
>
> **3. The contract requires D to do X and the claimant has a reasonable expectation that he will do Y.**
>
> **4. The contract requires the defendant to do X and allows him a discretion how he performs the obligation."**

71. The judge considered that the present case, like the *Durham Tees Valley Airport* case, was with Toulson LJ's category 4 and that if, contrary to his views on the first two preliminary issues, the Sellers were indeed under an obligation to track the decline of the Reservoirs by the service of Variation Notices, the case was one in which they had a discretion as to how they would perform. It was therefore necessary, as a matter of fact, to investigate this issue."

33. I find that Mallino is wrong to rely upon **Lavarack** and to contend that the Variation Contract provided Mallino with alternative modes of performance such as:

- appointing EDC;
- appointing another contractor;
- novating the Building Contract.

34. I disagree. Clause 2 of the Variation Contract imposed upon Mallino a mandatory obligation to re-tender the Section 3 works including EDC in that process. Mallino may have had:

- a discretion as to the number of tenderers other than EDC;
- a discretion as to the method of choosing the successful tenderer;
- a discretion as to the terms and obligations of any new contract.

However, Mallino had to re-tender the works and had to include EDC in that re-tendering exercise. Now it is necessary to investigate whether EDC would have been appointed for the Section 3 Works.

7) WOULD EDC HAVE BEEN APPOINTED FOR THE SECTION 3 WORKS?

35. EDC's primary case is that the Court should conclude that EDC would have been the contractor for the rest of the works. In other words EDC should recover the entirety of its Counterclaim without deduction for the loss of a chance/the risk that it would not have won the contract.

36. I consider that on the evidence that goes too far. EDC's success in any re-tendering exercise could not be regarded as a dead certainty on the balance of probabilities. There was always a risk that another contractor might enter the race or that PIN-CM might have produced a more competitive price.

37. As Mallino in their written opening opinion stated that:

> **"The Court is familiar with the principles governing loss of a chance: if the Court finds that the minimum contractual obligations principle does not apply then it will need to consider what might have happened had the retendering exercise anticipated by the variation agreement taken place. If it finds that Mallino might have awarded the contract to EDC then it may award damages in that regard discounted by a percentage to reflect the Court's analysis of the probability of EDC being awarded the work."**

38. The question is a question of causation. As Stuart Smith LJ pointed out in **Allied Maples v Simmons & Simmons** (a firm) [1995] 1 WLR 1602 at 1614.

> **"But, in my judgment, the plaintiff must prove as matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other. I do not think that it is helpful to seek to lay down in percentage terms what the lower and upper ends of the bracket should be.**
>
> **All that the plaintiffs had to show on causation on this aspect of the case is that there was a substantial chance that they would have been successful in negotiating total or partial (by means of a capped liability) protection."**

39. In my judgment the correct approach in the present case is:

In order to establish causation of loss EDC must prove on the balance of probabilities.

- That they would have re-tendered for the Section 3 Works using their existing tenders and tender price;

- That they had a real or substantial chance of their tender being accepted for the Section 3 Works:

40. Taking each point in turn:

- I consider and so find that EDC would have retendered for the works using their existing tender and tender price.

41. That is what Stephen Baker said in his Witness Statement (see paragraph 2.12):

> **"I therefore believe it is highly likely that EDC would have re-tendered the same Section Sum for the Section 3 Works being £3,023,231.23"**

and he maintained that stance when cross-examined. On Day 2 page 94 he was questioned as follows:

> "**Q . Yes? You say there -- you are talking above about PIN's performance, when it comes to quoting, and then you say at 19:**
>
> > **"In contrast, at the time that Mallino ought to have carried out the re-tender exercise , EDC already had a complete tender and could have potentially refined it. EDC had assembled a team to work on its proposals for the building contract which included very experienced commercial managers, project managers, quantity surveyors, planners and a project director ."**
>
> **And you say that this would have ensured that EDC's retender was both competitive and robust.**
>
> **A. Correct ."**

42. I consider and so find that there was a real and substantial chance that Mallino would have appointed EDC for the Section 3 Works. I reach that finding on the basis of the following matters:

.1 There was no evidence that any contractors other than EDC would be prepared to take part in a competitive tender;

.2 On Day 2, Timur Gorman was asked questions about his approach to value for money and the project budgets. At page 17 the following exchange took place :

> **"Q. Yes, but we can see, can't we, throughout all of these documents, that budget is a major consideration and steps are trying to be taken to keep the project within budget?**
>
> **A. Absolutely. I can give you even more amazing fact.**
>
> **Q. Can you just answer the question**
>
> **A. Yes.**
>
> **Q. Yes, is your answer?**
>
> **A. Yes."**

.3 EDC in their Written Opening show how PIN-CM's prices were substantially higher than EDC's.

Description	**EDC Section 3price**	***PIN CM budget costs***	**PIN CM Contract Sum**	**Difference between EDCprice and PINCM Contract Sum**
Section 3 price	**£3,023,231**	***£3,285,298***	**£3,451,001**	**£427,769**
Adjustment for Comparison				
PIN CM OHP shifted to Hotel contract	£0	£0	£150,000	
Omit underpinning provisional sum	£0	-£200,688	Excluded	
Foul water drainage excluded from EDC	£13,382	Incl	Incl	
Surface water drainage excluded from EDC	£35,715	Incl	Incl	
	£3,072,328	***£3,084,611***	**£3,601,001**	**£528,672**

It is clear that EDC's bid would have been some £500,000 less than PIN-CM's bid.

.4 EDC was already working on site and that gave them a competitive advantage over other potential tenderers.

.5 As Robert Cox emphasised in his Witness Statement he had in 2018 a "professional working relationship" with Michael Corridan of EDC;

.6 I find Mallino's case that they would never have appointed EDC for the Dark Wall works unconvincing because the Variation Contract they signed up to envisaged EDC would be involved in any tender process for the Stage 3 works;

.7 The complaints regarding EDC damage to a listed building and the threat of criminal prosecution seems somewhat exaggerated. The email from Cornwall's Senior Development Officer dated 8th February 2018 stated:

> **"Having discussed this at length with the Group Leader for the Historic Environment (Planning) Team, Colin Sellars, it is requested that a detailed specification of how the supports are proposed to be reinstated, is submitted to me for assessment and comment, so that further consideration can be given to an appropriate course of action. Whilst instigating formal enforcement action and/or prosecution proceedings is usually the least preferred option where negotiations and mitigation measures can go some way to alleviate the harm caused, the impact of the unauthorised works and the manner in which it has been carried out is extremely serious."**

It is relevant to note that this damage was carried out by EDC's sub-contractors not EDC themselves. Mr Cox accepted in evidence that there was no correspondence in the bundles showing that he or anyone at T&T or Mallino considered this to be a problem at the time. No further evidence was advanced as to how this matter was resolved. This damage was first raised in February 2018 and it is clear that Mallino were not sufficiently concerned about it to prevent them entering into a contract with EDC in April 2018. This complaint seems insufficient to prevent Mallino accepting a tender which promised them potential savings of some £500,000.

.8 The complaint regarding EDC's lack of expertise in construction work borders on the ridiculous. Mallino, despite asking for EDC to tender for these works, never thought it necessary to ask for EDC's experience of major construction works. Stephen Baker's evidence was clear that EDC had over many years ample experience of major construction works such as:

-1 Carrying out demolition works, building works and steel works to expand the concourse at Chelmsford railway station (whilst a live working station);

-2 The demolition of buildings, removal of foundations, refurbishment of offices and hospital wards, installation of drainage, building of car parks and landscaping large areas at Broomfield Hospital; and

-3 Acting on numerous occasions as principal contractor for Mid Essex Hospital Services NHS Trust in relation to general building and civil works.

43. I accept and so find that PIN-CM's competence as an alternative contractor to EDC for the Section 3 Works has been exaggerated for example;

.1 PIN-CM accounts available at the time had net assets of £77,968, losses of £132 and recent directors' loans of £66,000.

.2 PIN-CM was only incorporated in April 2016. In April 2018 PIN-CM had no track record of carrying out substantial construction projects. Its directors may have had such experience. PIN-CM did not.

.3 Another contractor C Field Construction was appointed to complete the Development in September 2019. No explanation of why C Field Construction replaced PIN-CM has been advanced by Mallino but it may be because PIN-CM were not as competent as Mallino's witnesses now suggest.

44. In all these circumstances, I find that EDC, if the Stage 3 works had been re-tendered, were ready, willing and able to carry out that work. It is an agreed fact that EDC "would have been able to carry out the Section 3 works if it had been appointed". Even if that fact was not agreed, I find that if the re-tendering exercise had been carried out EDC :

- would have re-tendered with their existing tender price;

- their re-tender could possibly have been the only tender submitted;

- their tender had a real and substantial chance of being accepted, particularly in circumstances where the tender price was some £500,000 lower than the price eventually negotiated with PIN-CM.

45. In any event, if Mallino is correct that the principle in Lavarack does apply, I do not accept that the least burdensome course would have been to terminate EDC's appointment. The correct approach is to consider what, on the facts, would have been the least financially burdensome option available to Mallino. Diplock LJ made this clear in **Lavarack** when, at paragraph 295, he stated:

> ***"The events extraneous to the contract, upon the occurrence of which the legal obligations of the defendant to the plaintiff thereunder are dependent, may include events which are within the control of the defendant: for instance, his continuing to carry on business even though he has not assumed by his contract a direct legal obligation to the plaintiff to do so. Where this is so, one must not assume that he will cut off his nose to spite his face and so control these events as to reduce his legal obligations to the plaintiff by incurring greater loss in other respects. That would not be the mode of performing the contract which is "the least burthensome to the defendant."***

To reject EDC's tender in any re-tendering exercise would require Mallino to risk cutting off its nose to spite its face.

8) QUANTUM OF CLAIM AND/OR COUNTERCLAIM

46. In Order to establish the quantum of their claim.

-1 EDC must assess the value of any benefit if it had been awarded the contract for the Section 3 Work.

-2 Then there must be an assessment of the size of the chance that they might have been awarded the contract for the Section 3 Works.

47. Taking each in turn.

.1 The value of any benefit if EDC has been awarded the contract for the Section 3 Work.

48. EDC's Counterclaim has been broken down and explained in their written opening as follows:-

.1 EDC claims 5% on the base cost for the Section 3 Works in the sum of £128,735.69. This was the declared overhead and profit allowance in the Building Contract. Mallino accepts at paragraph 55 of its opening that, if EDC succeeds in principle on its counterclaim, it is entitled to recover this sum.

.2 The Building Contract also expressly included an allowance of 9% for management of risk. As Mr Baker explains, the nature of the Section 3 Works was such that a 3% allowance would very likely have been sufficient to account for any risks. EDC therefore claims the balance of 6% in the sum of £154,482.94, as this would have been realised as additional profit. Mr Whaley's view, which is based on an analysis of a number of helpful comparators, is that it is reasonable to conclude that EDC would have realised between 4-6% as additional profit.

.3 The Building Contract also expressly included an allowance of 3% for additional management. Mr Baker explains that most of the management could have been done from afar (i.e. utilising head office resources) and that 2 of the 3% (£51,046.55) would therefore have been realised as additional profit. Mr Whaley agrees that EDC may have recovered up to 2% additional profit from this allowance.

.4 EDC claims a further £102,988.63, which is the additional profit it would have made by negotiating better prices with its sub-contractors and suppliers once the contract for the Section 3 Works was in place (commonly referred to as 'better buying'). As Mr Baker explains, his experience is that this can typically deliver savings of 3-5%. EDC's claim is the equivalent of 4% of the Section 3 base costs. Mr Whaley agrees that EDC may have recovered up to 4% additional profit through better buying.

.5 EDC claims £38,620.74 for the savings it would have secured through value engineering the designs for the Section 3 Works. Mr Baker's experience is that, through value engineering, EDC can typically save 1-2%. EDC's claim is the equivalent of 1.5% of the Section 3 base costs.

.6 EDC claims a further £38,620.74 for the additional profit it would have made on provisional items and variations. As Mr Baker explains, this claim is based on an estimate made by EDC at the time that it would make additional profits of 1.5% on provisional items and variations. Mr Whaley's assesses this element of the counterclaim at £19,310.37.

49. The Court has had the assistance from two independent expert witnesses Stuart Hardy instructed on behalf of the Claimants. Alan Whaley instructed by the Defendants.

50. The experts have helpfully agreed on a figure as figures basis that the following sums are associated with EDC's counterclaim for loss of profit and overhead contribution.

#	Component of EDC's counterclaim	Basis of EDC's counterclaim	£ for EDC's Counterclaim
1	Declared OH&P	The full Section 3 price allowance	**£128,735.79**
2	Management of risk	6% of the 9% Section 3 price allowance	**£154,482:94**
3	Additional management	2% of the 3% Section 3 price allowance	**£51,046.55**
4	Better buying on sub-contractors and suppliers	4% on base cost	**£102,988.63**
5	Value engineering proposals	1.5% on base cost	**£38,620.74**
6	Enhanced rates on provisional items and variations	1.5% on base cost	**£38,620.74**
Adjustment for error in EDC's calculation of base cost			**(10,522.73)**
		Total	**£503,972.65**

51. Alan Whaley in his report provides a very helpful table showing the overall range of possible recovery of OH&P as set out below.

Item	Component of EDC's counterclaim	£ for EDC's Counterclaim (Agreed "figures as figures" in First Quantum Joint Statement)	£ for Provisional Range of Opinion on Possible Recovery of OH&P, assuming that EDC won the Section 3 tender	
			Low	High
1	Declared OH&P	£128,735.79	£128,735.79	£128 ,735.79
2	Management of risk	£154 ,482 .94	£102,988.63	£154,482.94
3	Additional management	£51,046.55	£0.00	£51,046.55
	Sub-total: EDC's claims Against Section 3 Contract Price Allowances	**£334,265.28**	**£231,724.42**	**£334,265.28**
4	Better buying on sub-contractors and suppliers	£102 ,988.63	£0 .00	£102,988 .63
5	Value engineering proposals	£38,620.74	No opinion	No opinion
6	Enhanced rates on provisional items and variations	£38,620.74		£19,310.37
	EDC's Claims for additional OH&P After Re-tendering	**£180,230.11**	**£19,310.37**	**£122,299.00**

Item	Component of EDC's counterclaim	£ for EDC's Counterclaim (Agreed "figures asfigures" in First Quantum Joint Statement)	£ for Provisional Range of Opinion on Possible Recovery of OH&P, assuming that EDC won the Section 3 tender	
			Low	High
Adjustment for error in EDC's calculation ofbase cost		-£10,522.73	£0.00	£0.00
Total		**£503,972.66**	**£251,034.79**	**£456,564.28**

52. On the issue as to what documentation should have been retained by EDC to support this Counterclaim I prefer the somewhat more pragmatic approach of Alan Whaley suggesting that a contractor of the size of EDC would not be expected to retain much documentation relating to the original tender or the Counterclaim generally.

53. With regard to each head of counterclaim I find on the balance of probabilities as follows:

1 Declared OH & P £128,735.79

2 Management of Risk. £102,988.63
I consider the lowest point of Alan Whaley's range that is 4% is the reasonable figure for additional profit and broadly accords with evidence from Spons, BCIS and the Arcadia data which Mr Whaley relies upon.

3 Additional management. £51,046.55
I accept Stephen Baker's evidence that most of the management could have been done from afar using head office resources so EDC would have recovered 2% additional profit

£282,770.97

4 With regards to the claim for better buying with subcontractors and suppliers I am more sceptical. This was intended to be a competitive tender and I have heard no evidence from subcontractors or suppliers that that the prices used in the tender could be reduced. NIL

5 Value Engineering proposals. This claim is more realistic. Mr Baker says thorough Value Engineering EDC can typically save 1% to 2%. £38,620.74

That seems credible and realistic and the extent of any value engineering is more under the control of the contractor and Mallino were always interested in reducing costs.

6 Enhanced rates on provisional items and variations. NIL
This figure has been reduced by Mr Whaley to £19,310.37.

However Stephen Baker's evidence that 15% of the works could be subject to change appears somewhat speculative given the works were not carried out by EDC and the Court has no

evidence of the extent the works changed once PIN-CM took charge of the works

£321,391.71

.2 The assessment of the size of the chance that EDC might have been awarded the contract for the Section 3 Works

54. As the Editors of Hudson Building and Engineering Contracts 24th Edition point out at paragraphs 7-021.

> **"Once it is found that the chance is real and not merely speculative, then the quantification of that chance is a matter of measure of damage and not causation. A claimant must therefore show that the defendant's actions have caused the loss of a real or substantial chance which would have represented a benefit to the claimant on a balance of probabilities. Once the chance has been established, the value of the benefit lost will be assessed according to the likelihood of the benefit accruing to the claimant. This may involve an assessment at less than 50 per cent."**

55. In considering any such assessment the Court should bear in mind the decision of **Allied Maples v Simmons & Simmons** [1995] 1 WLR 1602 which suggests that there is a reluctance to lay down a bracket in percentage terms when assessing a loss of a chance.

56. The chance of being awarded the Section 3 Works was certainly not speculative. I have found that for the reasons set out in Section 7 of this Judgment that EDC had a real and substantial chance of their tender for the Section 3 Works being accepted if they had been given the opportunity to re-tender for this work. On the basis of that evidence I assess the percentage chance of EDC successfully being awarded the contract for the Section 3 Works at 66%.

9) CONCLUSION

57. In these circumstances EDC is entitled to damages assessed at 66% of £321,391.71 being £212,118.53.

58. I will hear the parties at a date to be fixed on all questions of interest and costs and how the sum paid pursuant to the Second Adjudication Decision should be dealt with insofar as these matters cannot be agreed.

Martin Bowdery Q.C.

Sitting as a Deputy High Court Judge

10th June 2022