Neutral Citation Number: [2022] EWHC 41 (TCC)

Case No: HT-2019-000266

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURT OF ENGLAND AND WALES**
**TECHNOLOGY AND CONSTRUCTION COURT (QB)**

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

Date: 14th January 2022

**Before** :

**MR JUSTICE EYRE**

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**Between :**

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| **1) STEPHEN HIRST** | **Claimant** |
| **2) MOUNTAIN DEVELOPMENT COMPANY LIMITED** | |
| **- and -** | |
| **1) MICHAEL PAUL DUNBAR** | **Defendants** |
| **2) MD CONSTRUCTION (LEEDS) LIMITED** | |
| **3) MD CONSTRUCTION (BRADFORD) LIMITED** | |

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**Dr Timothy Sampson and James Culverwell** (instructed by **Trethowans LLP**) for the **Claimants**
**Martin Bowdery QC** (instructed by **Milners Solicitors**) for the **Defendants**

Hearing dates: 22nd , 23rd, 24th, 25th, and 29th November 2021

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# 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.

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down was 10.00am on 14th January 2022.

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## Mr Justice Eyre:

## Introduction.

1. The First Claimant and the First Defendant have known each other since their schooldays some forty years ago and both have been engaged in the construction industry since they left school. The First Claimant was a joiner by profession but has engaged in building and development work and he is the director of and sole shareholder in the Second Claimant. The First Defendant is a director of and shareholder in the Second and Third Defendants with the former of those being a vehicle for the purchase and ownership of properties and the latter being engaged in the performance of construction work. Little heed appears to have been paid on either side to the difference between the personal capacities of the individuals controlling the companies and the separate legal identity of the companies. I will refer to the Claimants and the Defendants collectively save where it becomes necessary to distinguish between them.

2. These proceedings concern works performed by the Claimants at a development site at Low Newall Farm in Rooley Lane, Bradford ("the Site"). On 4th October 2011 the Site was acquired by Anlysse Enterprise Corp ("Anlysse"), a Belizean company controlled by Mr. Richard Ryder. The Site was to comprise 26 dwellings and as at 4th October 2011 24 (19 houses and 5 flats) of those had been partially constructed. However, those buildings had been vandalised to varying degrees as a result of contractors who claimed not to have been paid by the previous owners having removed fixtures.

3. In October 2011 the Claimants began to perform work on the Site to complete the partially-built dwellings ("the Works"). By July or August 2012 the properties were sufficiently complete for letting to commence and the Claimants then left the Site (subject to some intermittent and limited subsequent attendance as I will explain below).

4. The Claimants say that the Works were performed pursuant to an oral contract (alternatively a contract arising by conduct) whereby they were engaged by the Defendants or one of them to undertake the Works on the footing that they would be paid a reasonable sum for the value of the Works ("the Contract"). They contend that they have performed the Contract and that £487,181.86 is due as the reasonable value of the Works alternatively they say that sum is due on a *quantum meruit* basis. There came a stage when Mr. Hirst sought to buy the Site with his wife (through a company to be formed for that purpose) but that plan came to naught because of difficulties in obtaining funding. However, the Claimants say that the performance of the Works was unrelated to that potential purchase.

5. The Defendants deny liability. They say that the Works were not performed pursuant to any engagement with any of them. Rather, the Defendants contend, Mr. Hirst performed the Works, either himself or through the Second Claimant, at his own risk to improve the value of the Site and for his own benefit as purchaser. Mr. Hirst was unable to raise the funds to buy the Site and so lost the benefit of the Works as a consequence of the risk he had taken in undertaking them before he had acquired the Site.

6. It is common ground that the Works were concluded at the latest by 4th December 2012 when Building Regulations certification was obtained. The proceedings were commenced on 2nd August 2019 when the claim form was filed at court. The Defendants say that any claim is, accordingly, statute barred with the Claimants' cause of action having accrued at the latest in December 2012. The Claimants assert that the Contract was subject to the Scheme for Construction Contracts ("the Scheme") pursuant to the Housing Grants, Construction, and Regeneration Act 1996 ("the Act"). They say that this had the effect that time did not begin to run until five days after the Claimants had made a demand for payment. The Claimants say that demand was made by a letter of 6th March 2014 with the consequence that the proceedings were issued within the limitation period. Initially the Claimants had sought to argue that their subsidiary *quantum meruit* claim was not subject to the six year limitation period imposed by section 5 of the Limitation Act 1980 but in closing Dr Sampson wisely accepted that the same limitation period applied to both bases of claim.

7. In addition to the questions as to the existence of the Contract and limitation there was dispute as to whether the Claimants had established that the sum claimed represented a reasonable sum for the Works together with a related dispute as to whether the Claimants had actually incurred the costs alleged.

8. The parties identified six issues but those can really be condensed into three questions consideration of each of which will involve determining sundry sub-issues:

   i) In performing the Works were the Claimants acting on their own behalf or pursuant to a contract with the Defendants or any of them?

   ii) Is the claim statute-barred?

   iii) If the Claimants have a potential entitlement to payment what, if any, sum is due?

## Assessment of the Evidence of the First Claimant and of the First Defendant.

9. The Claimants' case is that the Contract was formed in a telephone conversation between Mr. Hirst and Mr. Dunbar. The latter denies that there was any such conversation and so there is a direct conflict between the accounts of those two men as to the central question in the case. In assessing their evidence I have borne in mind that they were giving evidence in November 2021 about events some ten years earlier. I have also had regard to the fact that neither of them appeared to be comfortable dealing with paperwork. I have discounted minor discrepancies in the evidence of each man some, at least, of which I am satisfied were due to that fact. I do not find that either of them was deliberately seeking to mislead me but the evidence of each was unsatisfactory. There were inconsistencies in the evidence of each man and each sought to maintain points which were inherently unlikely or which could not realistically be correct in the light of the contemporaneous documents. I concluded that each was heavily influenced in giving his evidence by a belief as to what would have happened (rather than a current recollection of what did happen) and each was unwilling to consider the effect on that belief of inconvenient facts. In those circumstances I have been able to attach little weight to the evidence of either man in addressing this central issue and have rather had regard to inherent likelihood; to the picture which appears

from the contemporaneous documents; and to the evidence of those who did not have a personal stake in the outcome.

10. Mr. Dunbar explained that his role was the organisation of operations on site and acting as a troubleshooter for his companies. He said that he was a "hands on guy" who did not get involved in paperwork. I formed the clear impression during the course of his evidence that Mr. Dunbar was not at ease dealing with paperwork nor in considering documentation. However, even when account is taken of that and of the passage of time his evidence was unsatisfactory in a number of respects. The following are particular instances but more generally it was apparent that Mr. Dunbar was not prepared either to concede that his recollection might be mistaken in any respect or to engage with inconvenient facts or documents.

11. It will be seen below that Mr. Hirst sent Mr. Dunbar a number of text messages in the period from August 2013 through to April 2015. Four of the text messages were in March and April 2014 shortly after the despatch of the Second Claimant's letter of 6th March 2014 in which payment for the Works was sought. In those circumstances I was unable to accept Mr. Dunbar's evidence that the conversation which had occurred when he responded to those text messages had been purely about social matters rather than about the question of payment for the Works. However, it is also to be noted that in the text messages Mr. Hirst makes reference to having spoken to Mr. Dunbar about a section 106 agreement in December 2013. This was not mentioned in either man's statement nor was it explored in the oral evidence but it does indicate that there was more interchange between them at that time than either man now recalls or accepts.

12. Mr. Dunbar was taken to the certificates from Brunswick Estates dated 4th April 2012 and to the email from Mr. Hewardine of his conveyancing solicitors dated 21st January 2013 which I will consider below. In each case he was not prepared to engage with the fact that the picture appearing from those documents was inconsistent with the history for which he contended. The Brunswick Estates certificate said that the practice had been engaged by "MD Construction Ltd who are the developers in this case"; described that company as also being the contractor; and said that visits had been undertaken on that basis "from the commencement of the construction". The solicitors' email had said that the purchase of the Site had been a joint venture between Mr. Dunbar and Mr. Ryder. In each instance Mr. Dunbar's response was evasive and boiled down to contending that the professionals concerned had drawn up the documents incorrectly and/or had misunderstood their instructions. There may be some force in this as an explanation of the Brunswick Estates certificates. In respect of those it seems unlikely to have been the case that there had in fact been visits from the commencement of the construction given that the construction was begun before Anlysse's purchase of the Site and I cannot exclude the possibility that the certificates were not completely accurate. However, it is hard to see how Mr. Hewardine can have formed the view he did other than as a result of his instructions from Mr. Dunbar. The significant point at this stage is that Mr. Dunbar's response when cross-examined about these documents was evasive and failed to address the issue.

13. Mr. Hirst was similarly not at ease with paperwork. However, there were aspects of his evidence where there were deficiencies which went to the reliability of that evidence and which could not be explained by either the passage of time or by a lack of skill at addressing documents.

14. Thus in his witness statement at [9] Mr. Hirst had said that he and Mr. Dunbar had worked together on a number of occasions without needing written tenders or other paperwork. The statement gave a clear impression that their previous dealings had been predominantly if not exclusively on the basis of oral agreements. However, it transpired in the course of the evidence that when Mr. Hirst or his companies had dealt with the Defendants previously on projects of any size there had been formal arrangements with regular interim valuations by the Defendants' quantity surveyors and formal documentation. There had been occasions when a less formal approach had been adopted but those had related to instances of limited joinery work performed personally for Mr. Dunbar or those associated with him. Contrary to the impression given in the witness statement there had been no previous projects of the scale of the Works which had been conducted on the informal basis alleged by Mr. Hirst.

15. When he was cross-examined Mr. Hirst put forward an alternative or additional explanation for the lack of formality in respect of the Contract and in particular for the absence of regular interim valuations on behalf of the Defendants. He said that this was because of Mr. Dunbar's desire for anonymity in the sense of wanting to conceal his involvement in the Site from the previous owners. However, even if that had been Mr. Dunbar's desire it is hard to see how his position would have been compromised by the undertaking of interim valuations. There is an even greater difficulty with this contention by Mr. Hirst namely that it is common ground that Paul Fairweather and other employees of the Defendants were on the Site undertaking groundworks in connexion with the completion of the development. The Defendants say that they were engaged to assist the Claimants and payment was to be made by the Claimants for these services while the Claimants' case is that Mr. Fairweather was supervising the Site on behalf of the Defendants and giving directions to the Claimants in that capacity. Whichever of those is the correct analysis each is inconsistent with the contention that Mr. Dunbar was seeking to hide his involvement in the Site and that this was the reason why there were not interim valuations.

16. In September 2012 the City of Bradford MDC wrote to Mr. Dunbar saying that Mr. Hirst had been in discussion with the Council on a number of occasions with a view to varying the amount of the payment due under a section 106 agreement relating to the Site. In October 2013 the Council wrote that Mr. Hirst had told the Council that "he was employed by MD Construction and was working on their behalf to renegotiate the section 106 agreement". In his witness statement, at [16], Mr. Hirst referred to this correspondence and prayed in aid the fact that he had been acting on behalf of the Defendants in his dealings with the Council as an indication that he was not acting on his own behalf or at his own risk in relation to his involvement in the Site. However, when answering questions in the course of his oral evidence Mr. Hirst said that he had spoken to the Council about renegotiating the section 106 agreement on his own behalf at the instigation of his mortgage broker, Mr. Craven. He went so far as to say that he had "no idea how the Council came to believe that I had told them I was an employee of MD Construction – I did not tell them that". It follows that Mr. Hirst was giving directly contradictory accounts of the same dealings.

17. However, I do not regard as relevant two matters which Mr. Bowdery QC submitted should be seen as impacting on the reliability of Mr. Hirst's evidence. The first related to the deficiencies in the Claimants' paperwork. The documents disclosed by the Claimants included works job sheets relating to the Site but in the name of Thirteen

Twenty Electrical. That is a reference to Thirteen Twenty Electrical Ltd and that company was wound up by an order of 15th April 2010. Mr. Hirst said that those documents were used because the Claimants had a pile of unused work job sheets bearing the name of Thirteen Twenty Electrical and they were used because the Claimants did not want them to go to waste. That is clearly not an appropriate course but it is an understandable one and I accept Mr. Hirst's explanation for the use of those job sheets. It was an exercise in using up sheets which were to hand. It demonstrated a failure to understand the separate identities of the various companies controlled by Mr. Hirst but I am satisfied that there was no more sinister motive and I do not regard it as relevant to assessing Mr. Hirst's evidence on the crucial disputes of fact. The second matter was the fact that both Thirteen Twenty Electrical Ltd and Thirteen Twenty Contracts Ltd were wound up on the petitions of unpaid creditors (in the former case that of HM Revenue & Customs). Mr. Bowdery argued that this was a reason for regarding Mr. Hirst's evidence as unreliable. I do not agree: the winding up of those companies is not, without more, an indication that Mr. Hirst's evidence in these proceedings is unreliable.

## The History of the Parties' Dealings.

18. Planning permission had been obtained for the development of the Site and work had begun in 2006 or a little earlier. In order to obtain that permission the former owners had entered a section 106 agreement with the City of Bradford MDC. This provided for two payments totalling £240,000. First, a payment of £15,000 had to be made before the construction works could start. That payment had been made before the current parties became involved in the Site. The agreement also provided that no more than half of the new dwellings to be built on the Site could be occupied until a further £225,000 had been paid and at the time with which I am concerned that payment had not been made.

19. The former owners had made some progress in developing the Site but they appear to have run out of funds. The Site was transferred to Anlysse on 16th November 2011 with a price of £1,050,000 being recorded as having been paid on 4th October 2011. As noted above the Site was then in a partially completed state and some of the part-built properties had been vandalised by the removal of items by unpaid contractors. The Defendants provided £990,000 of the funds used by Anlysse to buy the Site. There is a dispute as to whether Mr. Ryder and Anlysse were acting as Mr. Dunbar's nominees or whether the loan was a commercial arrangement. The Claimants say that the former was the true position. They say that Mr. Dunbar was acting through Anlysse and Mr. Ryder so as to conceal his involvement in and ownership of the Site. The Claimants say that his ownership of the Site explains why Mr. Dunbar was keen for the development to be completed and was prepared to engage the Claimants to undertake the Works. The Defendants say that there was indeed a loan and that neither Mr. Ryder nor Anlysse were nominees. They say that the agreement between Mr. Ryder and Mr. Dunbar was for a six-month loan. The intention was that the Site would be sold quickly with the principal debt of £990,000 being repaid out of the sale proceeds and with three of the townhouses being transferred to Mr. Dunbar by way of interest and loan charges.

20. There is very limited documentation from the time of the original purchase of the Site by Anlysse. However, there is an email of 30th September 2011 from Mr. Dunbar to Mr. Ryder's secretary in which the former said that he had agreed to lend Mr. Ryder £990,000 and asked for the bank details of Mr. Ryder's solicitor so that the sum could

be transferred. In the email Mr Dunbar said that the loan was "to be paid back within a six month period with the understanding that the interest and charges due to me will be discharged by way of transfer of 3 no. townhouses at Rooley Lane, Bradford." The Defendants rely on that contemporaneous document as showing the true nature of the arrangement.

21. As explained below the Second Defendant acquired the Site in April 2012 and secured loans on the Site. In early 2013 there appears to have been a refinancing. In the course of that the solicitors acting for the lenders asked the Second Defendant's solicitors for clarification of the connexion between the Second Defendant and Anlysse. On 21st January 2013 Mr. Hewardine of the Second Defendant's solicitors replied saying:

> "My client had no direct legal involvement in the Belize company. My client had a business relationship with a Mr Ricky Ryder with respect to the purchase of this property and continues to have so with respect to several other projects and has done so for many many years. That gentleman acquired the property through the vehicle of the Belize company. My client (Mick Dunbar) had an informal agreement with Mr Ryder with respect to the purchase and how profits/losses/costs/income should be split etc and the purchase from the administrator was as far as they were concerned a joint enterprise by them. As you might appreciate it was Reward Capital who insisted the property be transferred to my client from the Belize company before they agreed to lend against it. My client agreed with Mr Ryder on completion of that transfer to MD Construction (Leeds) Limited that he (Mr Ryder) would have no further involvement."

22. At an early stage in his involvement in the Site Mr. Hirst was provided with a set of documents now identified as the Feasibility Pack. This consisted of costings which had been sent in August 2011 to Simply Bridging Ltd by various contractors giving figures for performing works on the Site. Mr. Hirst says that he was provided with this by Mr. Dunbar in late August or early September 2011. He was told that Mr. Dunbar had already acquired the Site and that he was trying to persuade others to invest in completing the development. Those potential investors had obtained costings of the Works as part of the exercise of considering whether or not to invest. The figures were given to Mr. Hirst to see if he could do the Works for less. He says that he and Mr. Dunbar agreed that this would be possible. Mr. Hirst also says that he and Mr. Dunbar met the potential investors on the Site in the latter part of September 2011 to explain that the Works could be completed for less than the figures in the Feasibility Pack. Mr. Dunbar does not accept providing these documents to Mr. Hirst and the Defendants' position is that Mr. Hirst must have obtained them from Mr. Ryder.

23. I find that Mr. Hirst was given the Feasibility Pack by Mr. Dunbar and that the pack was given to Mr. Hirst with a view to considering whether he could perform the Works or at least some elements of them for less than the figures in the pack. I am satisfied that Mr. Hirst's account of how he came to be given the Feasibility Pack and of his meeting with the potential investors on the Site was neither invented nor was it a misrecollection. Those dealings are significant as demonstrating Mr. Dunbar's interest in the Site. Mr. Dunbar's blanket denial of any knowledge of the Feasibility Pack was not only unconvincing but it also cast doubt on the reliability of his evidence more generally. My finding as to the Feasibility Pack is, however, far from conclusive on the question of whether the Defendants engaged the Claimants to perform the Works. Moreover, I was unable to accept Mr. Hirst's evidence that Mr. Dunbar said that he, Mr. Dunbar, had already acquired the Site. This is, in part, because on the timing stated by Mr. Hirst the dealings were before the Site had been acquired from the previous

owners. More significantly the account which Mr. Hirst gives of Mr. Dunbar seeking to persuade others to engage in the development of the Site is suggestive of efforts to obtain the funding to acquire and develop the Site rather than of actions by a person who had already acquired it.

24. The Claimants began the Works in October 2011. From November 2011 Paul Fairweather and three other employees of the Third Defendant were also engaged in work on the Site.

25. The issue as to the basis on which the Claimants were performing the Works is at the core of the dispute before me. There is also a dispute as to whether Mr. Fairweather was supervising the Claimants' actions on behalf of the Defendants or whether he and the Defendants' other employees were present because the Defendants had agreed to undertake groundworks on behalf of the Claimants in return for payment. The resolution of that question and of the question of the basis on which the Claimants were undertaking the Works are closely related. In that regard and more generally it becomes important to consider the role played by Mr. Fairweather. If, as the Claimants contend, he was on the Site exercising control of the Works on behalf of the Defendants; approving what was being done by the Claimants; and agreeing the schedule to which I will refer below as defining the scope of the Works such conduct would be a powerful indication that the Claimants' account of the dealings is correct. It would show the Defendants exercising control of the Claimants' works and would markedly reduce the force of the argument that the absence of documentation and precise terms indicates that there was no contract. The Defendants say that Mr. Fairweather was on the Site as part of the team which the Defendants had provided to undertake the groundworks when requested by the Claimant to assist with that and to provide some more general assistance to the Claimants in effect as sub-contractors. If that characterisation is correct then that would support the Defendants' account of the dealings and suggest that the Claimants were performing the Work on their own account and not pursuant to the Contract as alleged.

26. The bundle contains three emails sent by Mr. Fairweather in November 2011 and notes prepared by him on 28th November and 6th December 2011. The documentation is, accordingly, limited but I am satisfied that the only realistic interpretation of Mr. Fairweather's correspondence is that he was seeking Mr. Hirst's approval of his actions and authority for the steps he proposed rather than giving direction to Mr. Hirst. Mr. Dunbar was copied into the correspondence but in context this was a matter of keeping him informed of what was happening.

27. Thus on 1st November 2011 Mr. Fairweather emailed Mr. Hirst, with a copy to Mr. Dunbar, saying "Steve, to keep you up to date these are the next items and jobs I need to keep the momentum going on site" and he then listed plant and materials which were needed. On 2nd November 2011 Mr. Fairweather emailed Mr. Dunbar, with a copy to Mr. Hirst, saying to Mr. Dunbar "just got a job list off your mate Steve in which order he wants them doing". The job list is in the bundle and, as do the items and tasks listed in the 1st November email, it relates to groundworks. Then on 11th November 2011 Mr. Fairweather emailed Mr. Hirst, with a copy to Mr. Dunbar, saying "Steve, please find set out my proposed job list for week 5". The manuscript note of 28th November 2011 has a number of headings including "information required" and "questions" and was copied to Mr. Dunbar and Mr. Hirst and to "site". That of 6th December 2011 was sent to Mr. Hirst, Mr. Dunbar, and "site" and was headed "Materials Required ASAP".

28. The language and addressing of those items indicates that Mr. Fairweather was seeking Mr. Hirst's approval for the works he proposed to perform and that he was telling Mr. Hirst the plant and materials he, Mr. Fairweather, would need to perform that work. Moreover, it is significant that the emails and notes appear to relate to groundworks. That is consistent with the Defendants' case that they provided Mr. Fairweather and other employees to assist the Claimants in performing the groundworks at the Claimants' request. It is, however, inconsistent with the Claimants' case. The Claimants say that they were performing some of the work needed on the Site but that the Defendants were performing other aspects, in particular the groundworks, on their own behalf. If that was the position then there would be very little reason for Mr. Fairweather to inform the Claimants of what was being done in respect of groundworks and certainly not to do so in terms of asking approval for proposed works and stating the plant and materials which the Claimants needed to provide to enable those works to be done. Indeed, the exchange between Mr. Fairweather and Mr. Dunbar on 2nd November 2011 shows that Mr. Hirst had given Mr. Fairweather a job list setting out the groundworks which Mr. Hirst wanted Mr. Fairweather to perform.

29. The impression arising from those exchanges is reinforced by the material from the Third Defendant's records which shows that a Sage ledger entry was allocated to Mr. Hirst. I accept the evidence of Mrs. Dunbar who was in charge of the Defendants' office operation that the costs of labour and materials in respect of the work performed on the Site by Mr. Fairweather and those working with him were debited to that account. In that regard it is also of note that the two payments of £5,000 made to Mr. Hirst in April 2012 were recorded by the Defendants as loans rather than interim payments of sums due under an existing contract where the Claimants would be entitled to payment from the Defendants. That is an indication of the Defendants' contemporaneous view of the arrangement.

30. In addition the Claimants relied on the fact that Mr. Fairweather had compiled the daily records of the labour on site and the times of clocking in and clocking out and had provided copies of these sheets to the Defendants. Some of the sheets on which he had done this were headed "MD Construction" while others were headed "1320 Construction" and on all the sheets the "company" column for each operative (including Messrs Fairweather, Ward, Harper, and S Dunbar who were employees of the Third Defendant) bore the entry "1320" (a reference to the Second Claimant's trading style). The Claimants say that this shows Mr. Fairweather controlling the Site on behalf of the Defendants and providing records to the Defendants so that they would be able to know how much should be paid for the Works. I do not accept this analysis. In the light of the correspondence to which I have already referred it is more likely that this is indicative of Mr. Fairweather (who appears to have been an experienced construction professional) providing assistance while he was on the Site. The inclusion of the Third Defendant's employees on the sheets but described as 1320 operatives is inconsistent with the Claimants' characterisation of the purpose of these sheets. If the Claimants' case is correct the Defendants were clearly not going to be paying the Claimants for the work done by those men. I am satisfied that the sheets were compiled simply as a record of who was on the Site and when.

31. It follows that I find that Mr. Fairweather was not on the Site supervising the Claimants' works on behalf of the Defendants. Rather he was there performing groundworks as an

employee of the Third Defendant but doing so at the direction of Mr. Hirst as part of services which were being supplied by the Defendants to the Claimants.

32. There is no dispute that there came a time when Mr. and Mrs. Hirst decided that they wanted to buy the Site. The Claimants say that this was not until December 2011 and so some time after the Claimants had been engaged to perform the Works by the Defendants. The Defendants say that the decision had been made before the Claimant began the Works. They say that Mr. Dunbar had mentioned the Site to Mr. Hirst in September or October 2011 and that Mr. Hirst had then approached Mr. Ryder and agreed to acquire the Site.

33. In the Defence it is said that Mr. Dunbar attended at Mr. Ryder's house in October 2011 to find Mr. Hirst engaged in discussions with Mr. Ryder about acquiring the Site. It is there said that Mr. Dunbar was present for only part of the meeting but was present when it became apparent that Mr. Hirst was agreeing to buy the Site. In Mr. Dunbar's witness statement the account is slightly different with Mr. Dunbar saying that he attended at Mr. Ryder's home as Mr. Hirst was leaving and that Mr. Ryder had then told him that Mr. Hirst had agreed to buy the Site. Dr. Sampson sought to portray this as a significant discrepancy in the Defendant's position but I do not accept that. The gist of the point being made remained the same namely that Mr. Dunbar learnt of the purchase when attending at Mr. Ryder's home for a different purpose and when he was not present for all the exchanges between Mr. Ryder and Mr. Hirst. The modest difference between the accounts is readily explicable by the fact that the Defence and the witness statement were addressing matters about 8½ and 9½ years respectively after the events described and in circumstances where it is clear that Mr. Dunbar was not adept at checking documents let alone picking up on different nuances of meaning.

34. Mr. Hirst accepts that there was a time when he was present at Mr. Ryder's house with Mr. Dunbar but his account of the dealings there is very different. He says that the only conversation he had with Mr. Ryder in the absence of Mr. Dunbar was about some balustrading on the staircase of the house. Mr. Hirst says that he had no discussion with Mr. Ryder about buying the Site and certainly did not agree to buy it. The purpose of the meeting was to seek advice from Mr. Ryder about reducing the sum which had to be paid under the section 106 agreement and Mr. Hirst was present "to discuss how he should carry out the works within that agreement."

35. Whenever the proposal that they should buy the Site came about there came a time when Mr. and Mrs. Hirst were seeking to raise funds with which to buy the Site. There were difficulties in getting funds. There was a dispute as to the extent to which Mr. and Mrs. Hirst were dependent on and/or wanted funding from Mrs. Hirst's family as part of that exercise. The precise details of that are of very limited relevance. It suffices to note that there came a time when members of Mrs. Hirst's family were approached to become involved and that after initially expressing interest they decided not to engage in the purchase.

36. Mark Craven was the finance broker engaged by the Hirsts to find funding for their proposed purchase of the Site. He was called on the Claimants' behalf and has provided finance broking services to the Claimants for a number of years though it appears that the work on this intended purchase was the first time he did so. Understandably Mr. Craven was not able to be precise about dates but he believed that he first became involved towards the end of 2011 at which time the plan was for at least part of the

funding to be provided by Mrs. Hirst's family. That arrangement fell through and it was then that finance was sought from other sources. This supports the Defendants' contention that the Claimants had been optimistic of receiving at least some funding from Mrs. Hirst's family and also indicates that the intention to purchase had been formed at least some time before the approaches at the very end of 2011 to Bridgebank Capital Ltd ("Bridgebank"). More significant is Mr. Craven's evidence about the Works. He had no knowledge of what arrangements had been made for the Claimants to be paid for these but by the time of his involvement he was aware that the Claimants were using their own resources to fund the Works and that this was regarded by the potential lenders as the Hirsts' "input towards a deposit because they were adding value to the site and the purchase price was not changing, so it was equivalent to a cash input." In his oral evidence Mr. Craven said that throughout his involvement he had thought that the Hirsts were funding the Works and that he believed they had remortgaged their home to pay for them . In that regard it is to be noted that Mr. Ramsden, the mortgage broker who acted for the Hirsts, was engaged at one time in remortgaging their home but was not aware of any link between that remortgaging and the Rooley Lane project.

37. Bridgebank was approached in December 2011 and that company offered to provide funding of £1.3m.

38. In the course of the dealings with Bridgebank there had been a meeting on 9th February 2012. That was a meeting at Bridgebank's premises attended by Mr. and Mrs. Hirst with Mr. Craven and Mr. Dunbar. The Claimants say that Mr. Dunbar attended because Bridgebank had wanted to meet the vendor of the Site. They say that Mr. Dunbar held himself out as the vendor of the Site and had explained that he had arranged for the purchase to be through Anlysse for reasons of anonymity. Mr. Craven supported this account in his evidence. The meeting was followed, on 16th February 2012, by a letter from Bermans, the solicitors acting for Bridgebank, saying that their client had been told the Belizean company had been set up for reasons of anonymity and tax efficiency. However, it seems subsequently to have been said that Mr. Dunbar was only an investor in the project and Bermans asked for details of the terms of the investment. This received a response from the conveyancer acting for Anlysse simply saying "the terms of the `investment' between my Client and Mr. Dunbar is a private matter".

39. Those matters would appear to be significant indications that Mr. Dunbar was the true owner of the Site and that he was willing to hold himself out as such. However, the position is not as stark as would appear from that evidence. Mr. Dunbar says that he attended the meeting to give an assurance that he would allow the three townhouses which Mr. Ryder had agreed would come to him to be secured to Bridgebank. He denies that he held himself out as the vendor of the Site and says that he was not present for the whole meeting but waited outside while the Hirsts and Mr. Craven discussed the funding with the representatives of Bridgebank. That account is supported by the funding offers which Bridgebank made. Offers had been made on 5th and 6th January 2012 which made no reference to Mr. Dunbar nor to any security being provided by him. Those were followed by a revised offer of 9th February 2012 (and so shortly after the meeting) which for the first time made reference to Mr. Dunbar and included as a condition precedent "units 1, 20, and 21 to be pledged as security by Michael Dunbar." That is consistent with Mr. Dunbar's account of matters. Moreover, it is hard to see why Bridgebank would have needed to meet the vendor of a property when that company was considering making an advance to a purchaser. Indeed, such a meeting

would be unusual. Conversely, it can readily be understood why the presence of a person who was to retain part of the Site and who could provide additional security for the advance might have been sought by Bridgebank. Although I did not regard Mr. Dunbar as a reliable witness I did find his account of the dealings with Bridgebank more consistent with the contemporaneous documents and inherent likelihood than that of the Claimants. Accordingly, I find that Mr. Dunbar did not say to Bridgebank that he was the vendor of the Site.

40. James Hill is now retired but was formerly engaged in the arrangement of finance typically in connexion with the provision of mezzanine finance (namely finance to supplement loans provided by front line banks and typically secured by second or subsequent charges). He also became involved in seeking funding for a purchase of the Site. Mr. Hill explained that although he has had dealings with Mr. Dunbar from a period about two years after he was involved in the Rooley Lane project he did not know him at the time of that involvement. Instead it was Mr. Ryder who asked Mr. Hill to become involved. Mr. Ryder told Mr. Hill that he had acquired the Site through an overseas company because he wished to conceal his involvement from the previous owners. Mr. Ryder said that there was a potential purchaser who was seeking funding and asked Mr. Hill to assist in that exercise. This was a reference to the Hirsts and Mr. Hill had meetings with Paul Robinson who he believed was acting on behalf of Mr. Ryder but was also engaged in seeking funding for the Hirsts so that they could buy the Site from Mr. Ryder. Mr. Hill was made aware that the Hirsts had encountered difficulties in getting funding but he also saw Mr. Hirst overseeing works on the Site. He was told, by Mr. Robinson, that Mr. Hirst was doing the works even though he had not yet obtained funding to buy the Site in order to increase the value of the Site and with a view to supporting his funding applications.

41. It is to be noted that Mr. Hill met Mr. Hirst only once and his direct dealings with Mr. Hirst were limited. Nonetheless, there was no suggestion that Mr. Hill was not seeking to give his genuine recollection of matters albeit at an interval of ten years

42. Although Bridgebank had initially agreed to advance the Hirsts £1.3m it changed its mind at a late stage and said that it would only advance £900,000. This was insufficient to enable the Hirsts to buy the Site. It is of note that even at the time of the trial Mr. Hirst clearly remained aggrieved at the actions of Bridgebank and attributed his failure to acquire the Site to that chance of stance.

43. It is also of note that the arrangements for a purchase by Mr. and Mrs. Hirst had been sufficiently advanced for a draft transfer from Anlysse to be prepared. This provided for a transfer of the Site from that company to Mrs. Hirst for the sum of £1,250,000.

44. On 12th April 2012 the Site was transferred from Anlysse to the Second Defendant with the sum of £1,100,000 being recorded as having been paid on 21st March 2012. Mr. Dunbar said that the background to this was that he had committed to the purchase of three further development sites in Bradford. The intention had been for that purchase to be funded by the repayment of the sums which had been lent to Anlysse on the footing of a quick sale of the Site. The delay which had occurred meant that the loan could not be repaid out of the proceeds of the sale of the Site and Anlysse had no other funds from which the loan could be repaid. This in turn meant that the Defendants had to obtain bridging finance to fund the other Bradford purchases. The Site was transferred to the Second Defendant by way of repayment of the loan and so that the

Defendants could provide security for the bridging finance. The documents are consistent with this account with the Second Defendant receiving an offer of bridging finance from Reward Capital on 6th March 2012 with the security for that advance being charges over the properties in Bradford together with a charge executed by Anlysse over the Site. The transfer then followed on 12th April 2012. The Defendants say that those dealings show the distinction between them and Anlysse and indicate that Mr. Dunbar was not seeking to conceal his involvement in the Site. The Claimants say they show the true ownership of the Site being revealed either because Mr. Dunbar's need for anonymity had become less pressing or because his need to be able to provide security for the funding needed for the Bradford purchases outweighed the benefits of that anonymity.

45. I find that until that transfer neither Mr. Dunbar nor the Second Defendant was the owner of the Site. The Claimants say that Anlysse and Mr. Ryder were acting as nominees and contend that the true position was demonstrated by Mr. Dunbar's comments to Mr. Hirst in particular in the context of the Feasibility Pack; by the comments they contend he made to Bridgebank; and by the account given by Mr. Hewardine in January 2013. Against those matters the email of 30th September 2011 provides substantial contemporaneous support for the Defendants' account of matters. There is no suggestion that it was fabricated nor that it was deliberately sent to create a false history. The most credible explanation of the email is that in it Mr. Dunbar was setting out the arrangement which he believed existed with Mr. Ryder. The Claimants say that Mr. Dunbar was deliberately seeking to distance himself from the Site and to conceal his involvement and that of the Second and Third Defendants. The subsequent actions of the Defendants would, however, be inconsistent with such a desire. Thus, as already noted, from November 2011 employees of the Third Defendant were working on the Site; in February 2012 (on the Claimants' account of matters) Mr. Dunbar was holding himself out as the vendor of the Site; and in April 2012 the Site was transferred to the Second Defendant. Substantial support for the Defendants' position comes from the evidence of Mr. Hill which I have summarised above. Mr. Hill's evidence was indicative of a real involvement by Mr. Ryder and of the proposed sale to Mr. and Mrs. Hirst being in truth a sale by Mr. Ryder rather than Mr. Dunbar. In the light of those matters I find that Anlysse was the true owner and was the vehicle of Mr. Ryder rather than of the Defendants. However, although they were not the owners of the Site the Defendants had a real interest in the Works being concluded quickly and in a quick sale being achieved. That is because it is apparent that the sale of the Site was necessary for the advance made to Anlysse or Mr. Ryder to be repaid and also that the return of those funds was necessary for the Defendants to fund the Bradford purchases.

46. On 4th April 2012 Brunswick Estates Partnership issued documents described as "Professional Consultants Certificates" in respect of plots 1 and 20. The certificates were intended to be relied on by the first purchaser of each property and by any mortgage lender making an advance to such a purchaser. Each certificate identified the Second Defendant as both the developer and the contractor and the first four paragraphs of each certified thus:

> "1. I have visited the site at appropriate periods from the commencement of construction to the current stage to check:
>
> (a) Progress
>
> (b) Use of materials, and

> (c) Conformity with structural drawings, specifications and Building Regulations.
>
> 2. At the time of my last visit on, the property had reached the stage of completion.
>
> 3. So far as could be determined by each periodic visual inspection, the property has been constructed:
>
> (a) to a satisfactory standard, and
>
> (b) in general compliance with the approved structural drawings and specifications and/or Building Regulations.
>
> 4. I was originally retained by MD Construction Ltd, who are the developers in this case."

47. The bulk of the Works had been completed by July or August 2012 and the first letting of a completed dwelling was on 16th July 2012. Shaun Mellor is a letting agent and he was introduced to Mr. Hirst by Mr. Dunbar. Mr. Mellor became involved in late 2011 and from early 2012 he was engaged in the process of marketing the properties being built on the Site. The significant feature of his evidence is that from the outset of his involvement he dealt with Mr. Hirst with the latter giving him his instructions and acting as owner of the Site. Mr. Hirst explained to Mr. Mellor that he was buying the Site from Anlysse.

48. Mr. and Mrs. Hirst remained interested in buying the Site after it had been transferred to the Second Defendant and even after the Works had been done. Thus in late July 2012 Mr. Robinson was engaged in fixing a meeting between them and potential funders.

49. There were intermittent visits to the Site by the Claimants employees after August 2012. Initially it had seemed that there would be dispute as to the extent of the work done at the Site by the Claimants in 2013. However, in the course of the trial it was accepted that there had been minimal attendance at the Site in 2013. The limited works performed related at most to some remedying of snagging defects and some warranty work and the Claimants accepted that those works were not relevant for limitation purposes.

50. As noted above Final Certification for Building Regulations purposes was obtained on 4th December 2012 and it is common ground that by then at the very latest there had been substantial completion of the Works.

51. The parties' accounts of their dealings after the completion of the Works differ radically. Those accounts are to be considered against the background of the following documents.

52. There is a letter from the Second Claimant to the First Defendant at the Second Defendant dated 6th March 2014. This refers to the Site and says:

> "Please find enclosed a breakdown of net costs which I have incurred in the sum of £476,886.29 less monies owed to you.
>
> Please can we meet up and to discuss and finalise this, however I would like this to be paid as opposed to having a piece of land in lieu of the debt as you previously offered.
>
> I have on numerous occasions tried to contact you by phone and text.

Can you please ring me at your earliest convenience."

53. Mr. Hirst sent Mr. Dunbar a series of text messages in the period from 13th August 2013 to 16th April 2015 most of these said "please call cheers Steve" though one sent in December 2013 asked Mr. Dunbar to ring Mr. Hirst "about the 106 agreement we were talking about last week".

54. On 17th October 2018 the Second Claimant wrote to the Second Defendant saying that "we jointly undertook works to [the Site] from October 2011 until around early 2013 and we have incurred considerable costs for which we have n't been paid". It went on to set out the costs which the Claimants had incurred. The letter concluded by seeking payment saying "whilst we appreciate that there were various things that occurred along the way with this project, ultimately we worked for you as a contractor under your instruction and we did a lot of construction works, all of which have come in at less than your original cost plan for the works."

55. Finally on 27th November 2018 the chartered surveyors whom the Claimants had by then engaged, Bennington Green Ltd, wrote to the Defendants seeking payment.

56. The Claimants' case as set out in the Particulars of Claim was that the Works had been completed in September 2013 and, at [52], that "following completion of the works, the First Claimant and the First Defendant had a telephone call in February 2014 to discuss the costings and the First Claimant produced a document which was provided to the First Defendant in hard copy at site shortly thereafter." It is then said that a formal account was submitted in November 2018.

57. In his witness statement Mr. Hirst said that "following completion of the works in September 2013, I did not demand payment immediately because Mick had told me he had no cash to pay me.… Mick assured me that when he had sorted out his financial situation we would both sit down and work out what was owed to me `*from the ground up*"'. He then said that Mr. Dunbar had phoned him in early 2014 "to ask if I would take a piece of land in lieu of the debt". Mr. Hirst responded to that suggestion by saying that he would consider it. Having considered it Mr. Hirst decided to press for payment and sent the letter of 6th March 2014. Matters deteriorated thereafter with Mr. Dunbar evading Mr. Hirst's attempts to contact him. That account was maintained in Mr. Hirst's oral evidence though he did accept that there had been no significant attendance by the Claimants on the Site after December 2012.

58. In the Defence, at [36], the Defendants said that the Claimants had left the Site in July or August 2012 and that "around a week after leaving Site, to the surprise of the First Defendant, the First Claimant demanded to be paid for the full amount of work undertaken. The First Defendant refused and confirmed to the First Claimant that no sums were owed…" In his witness statement, at [55], Mr. Dunbar said that it was in March 2018 that Mr. Hirst came to another site on which the Defendants were engaged and said "now that you are making some money again Mick, what about getting some payment for Rooley Lane." Mr. Dunbar replied that no one had ever agreed to pay the Claimants and that they had gone on to the Site without funding at their own risk.

59. In his oral evidence Mr. Dunbar said that he had replied to at least some of the text messages by phoning Mr. Hirst when he, Mr. Dunbar, was going through his text messages at the end of each day but that he had only got through to Mr. Hirst once when

their conversation had been purely about social matters and the activities of mutual friends.

60. The Defendants denied receiving the letter of 6th March 2014 and did not reply to the subsequent letters. Mrs. Dunbar said, at least in respect of the last of the letters from the Claimant, that the Defendants had not replied because the claim made no sense and appeared to be "gibberish".

61. The letter of 6th March 2014 is significant. It was not suggested that this was not sent to the Defendants although the Defendants did say that it was not received. I do not need to make a finding as to the latter point although the Defendants' failure to respond to the letters of 17th October and 27th November 2018 does suggest an approach of disregarding correspondence about this matter. That means that in the circumstances here the absence of a response is not a strong indication that the letter was not received. It is significant that the letter makes a claim for £476,886 calculated by reference to a spreadsheet. It is also of note that Mr. Hirst wrote "I would like this to be paid as opposed to having a piece of land in lieu of the debt as you previously offered". It was not suggested that the latter comment was in some way a fabrication. Indeed for the Claimants to have inserted in a letter in 2013 a false assertion that the Claimants had been offered land in lieu deliberately doing so with a view to advancing the point subsequently in support of court proceedings some years down the line would involve a degree of deviousness and pre-planning inconsistent with the balance of Mr. Hirst's conduct. Accordingly, I find that at the time he wrote the letter Mr. Hirst believed that he was owed money by the First and/or Second Defendant and also I find that he was correct in saying that there had been a conversation between him and Mr. Dunbar in which the latter had offered land in lieu of the sums which Mr. Hirst was saying were due. This is a significant matter and I will consider its effect below.

62. These proceedings were commenced on 2nd August 2019.

## The First Issue: Did the Defendants or one of them engage the Claimants or one of them to perform the Works?

63. The Claimants' primary case is that the Contract was formed in a telephone conversation between Mr. Hirst and Mr. Dunbar in the week commencing 10th October 2011. The Defendants deny that there was any such conversation and say that the Claimants chose to perform the Works having agreed with Mr. Ryder that Mr. and Mrs. Hirst would buy the Site from Anlysse. I have already explained that I was not able to regard either Mr. Hirst or Mr. Dunbar as reliable witnesses. In the light of the findings I have already made what other material is there which can assist in resolving that dispute?

64. There are a number of matters which support the Claimants' account. The first is the undoubted performance by the Claimants of substantial works at the Site at a time when neither claimant had any interest in the Site and when no agreement for purchase by Mr. and Mrs. Hirst had been concluded. That is unusual conduct and at first sight would be thought so uncommercial as to make it inherently unlikely that the Claimants would be performing the Works unless they had been engaged to do so. This remains a potent factor but its force is markedly reduced by the evidence of Mr. Craven and Mr. Hill. I will consider the effect of that more fully below. It suffices to note here that the former was acting for Mr. and Mrs. Hirst (and giving evidence for the Claimants) and he said

that there came a time when they were hoping to buy the Site but had no concluded agreement to do so and when the performance of the Works was being regarded as akin to a deposit being contributed by them.

65. The fact that Mr. Dunbar gave the Feasibility pack to Mr. Hirst does provide some support for the Claimants' case though as already noted it is far from conclusive.

66. The conversation which I found took place following the completion of the Works and in which Mr. Dunbar indicated that payment in some form would be made to the Claimants with land being offered in lieu of payment is a powerful factor in favour of the Claimants' case. Its effect is reinforced by the absence of any response to the letter of 6th March 2014 and the subsequent letters. I found Mrs. Dunbar's explanation that the last letter had been ignored because it made no sense unpersuasive and the reality appears to be that the Defendants were ignoring the correspondence in the hope or belief that the Claimants would not pursue matters. Mr. Bowdery was right to point out that the March 2014 letter does not in terms refer to a contract and also to the fact that even this letter was some considerable time after the Works had been performed. It is also to be noted that the Defendants had received the benefit of the Claimants' performance of the Works and that a recognition of a moral obligation to recompense the Claimants in the circumstances as they had turned out is very different from an acceptance that the Works had been performed pursuant to a contract between the Claimants and the Defendants. Nonetheless the letter and the conversation which I have found preceded it remain powerful factors in support of the Claimants' account of matters.

67. The Defendants' case was that the Third Defendant was owed just over £95,000 by the Claimants as payment for its performance of the groundworks on the Site together with the sum of £10,000 lent to Mr. Hirst. No attempt was made to seek payment of those sums and there is force in the argument for the Claimants that if that sum had truly been due with the balance being in favour of the Defendants then the latter would have chased for payment. However, it is accepted that the Claimants had financial difficulties at this time. Mr. Dunbar said that he was aware of this and chose not to pursue the debt knowing that there was little prospect of payment other than through enforcing against Mr. Hirst's home. I remind myself of the limited weight that can be accorded to impressions derived from a judge's assessment of a witness's demeanour and also that I have already noted the respects in which Mr. Dunbar was an unimpressive witness. Nonetheless, his evidence in this regard was given straightforwardly and gave the impression of being a genuine explanation of the reason for the Defendants' inaction. In those circumstances the assistance which this factor gives to the Claimants is markedly reduced. There was also considerable force in the explanation given by Mrs. Dunbar. She said that as the Defendants had ended up owning the Site and as they had the benefit of the Works they were prepared to bear the cost of this part of the Works. I accept that this was an important factor in the Defendants' approach and I also regard it as relevant to my consideration of the conclusions to be drawn from the conversation or conversations about payment being made to the Claimants.

68. There are a number of matters which point to the Defendants' account of the dealings as being the more likely.

69. The first matter is an argument which Mr. Bowdery put at the forefront of his submissions. This is the vagueness of the Contract as asserted and the absence of the documents which would have been expected if there had been such a contract. Thus

there is a lack of clarity as to who were the parties to the Contract. Moreover, although the Particulars of Claim set out what are said to have been "the operative terms of the Contract" Mr. Hirst's statement gave no indication of how or when most of these were agreed when the Contract was formed. His statement in fact says that the alleged term that there would be no interim payments was only agreed "a few weeks" after the commencement of the Works. Mr. Bowdery contends that if there had been an engagement to perform the Works one would have expected to see terms agreed and recorded in writing which identified the parties and addressed: the scope of the works; the payment arrangements including provision for interim payments and setting out the rate of payment for particular items of work; provision for measurement and valuation by quantity surveyors at intervals; the time within which the works were to be performed; and the consequences of a failure to perform the works in that time. The absence of express agreement and recording of such matters is, the Defendants say, an indication that there was no such agreement. There is considerable force in this point. Mr. Hirst said that there was no written agreement because that was not how he and Mr. Dunbar worked in their dealings. I have already explained why I found that unsatisfactory as a characterisation of the way in which the Claimants and the Defendants had worked together previously. I have also explained above why I was unpersuaded by Mr. Hirst's contention that the absence of formality was the consequence of a desire by Mr. Dunbar to conceal his involvement with the Site. The reality was that both Mr. Hirst and Mr. Dunbar were experienced in the construction industry and both operated through limited companies. This was a development project involving substantial works to a value of the order of £500,000. The parties' previous dealings in respect of substantial projects had involved formal agreements with provision for interim valuations and interim payments. In those circumstances the absence of such documents and arrangements here is, indeed, an indication that there was no contractual arrangement between the parties.

70. I note in passing that in his written opening Mr. Bowdery advanced a further line of argument which was that even if there had been an agreement such as alleged by the Claimants it was too vague to be enforceable. This point was not pressed by Mr. Bowdery and I am satisfied that if I conclude that an agreement such as alleged by the Claimants was made the vagueness of the terms would not preclude enforcement.

71. The absence of an agreed scope of works is of particular note in circumstances where the Claimants' case is that they were not to perform all the works but that some elements were being performed by the Defendants on their own account. In those circumstances it would become all the more important to know the extent of the works to be performed by each party to the Contract. The Particulars of Claim assert that the Works were to be performed in accordance with "the plans and drawings provided by the First Defendant" but that the Claimants' "drawing team" produced new plans. The former seems to have been intended as a reference to the Feasibility Pack but that did not contain any plans or drawings and identified the work to be done at a high level of generality. The Claimants have not advanced in evidence any plans which are said to have been produced by them let alone approved by the Defendants.

72. The Claimants do rely on a schedule setting out works to be performed in various of the partially completed houses. They say that this was drawn up on the Site by Mr. Hirst, his brother, and Mr. Fairweather. The Claimants say that Mr. Fairweather agreed the schedule on behalf of the Defendants as showing the works to be performed by the

Claimants for the Defendants. My finding as to Mr. Fairweather's role means that to the extent that he was involved in compilation of the schedule of works his involvement does not, without more, demonstrate the Defendants' acceptance that the Claimants were being engaged to perform those works. In that regard it is to be noted that the Claimants' case was that the works to be performed "excluded plots 12 and 13, which were to remain unbuilt" (see the Particulars of Claim at [21]). Mr. Hirst accepted that despite this the schedule referred to work on those two plots and said that they must have been printed off and included in the schedule in error. That is a somewhat puzzling explanation given that the plot numbers had been added to the schedule in manuscript but it is a further indication that care is needed in attaching any weight to that schedule.

73. My finding as to the basis on which Mr. Fairweather and the Third Defendant's other employees were engaged on the Sites is strongly indicative that the Defendants' account of the parties' dealings was correct.

74. The Claimants' case is that the plan that Mr. and Mrs. Hirst should buy the Site arose after the Works had started and after the Contract had been formed. In his witness statement Mr. Hirst said that if he had bought the Site then the Defendants would not have needed to pay the Claimants for the work done to date but that "the agreement remained that if I did not purchase the site and he [sc Mr. Dunbar] remained the owner and he would need to pay me for the works as they would have been completed to his benefit." However, the Claimants do not suggest that there was any express variation of the Contract at that stage nor any change in the arrangements for payment for the Works. It seems that Mr. Hirst is saying that this was his understanding of the position but not that there was any formal discussion to that effect. Mr. Bowdery was right to contend that this does not appear to accord with commercial common sense. The proposal was for the Hirsts to buy the site for £1.3m which was a modest uplift on the price paid by Anlysse but markedly less than the value of the Site in its developed state (the Bramleys report of September 2012 gave a developed value of £2.6m and a range depending on the valuation approach taken of £2.1m to £3.7m). If the Claimants were still to receive payment for the Works even after the Hirsts had bought the Site then they would be receiving the benefit of the enhanced value arising from the Works but also recovering the cost of the works from the Defendants. The Defendants on the other hand would in those circumstances receive (either as the true owner of the Site or by way of repayment of the loan made to Anlysse) no more than £1.3m but would have to pay the Claimants just under £500,000 for the Works so recovering less from the arrangement than the amount of the original advance to Anlysse. In the light of that if the parties' dealings had been subject to the Contract it would have been expected that the discussions about the purchase of the Site would be accompanied by an express consideration of the effect which such a purchase would have on their rights and obligation under the Contract. The purchase by the Hirsts did not come to fruition and so it is not decisive that there was no final variation of the terms of the Contract. What is significant, however, is that it is not suggested that there was any discussion about a variation potentially on the footing that if the Hirsts bought the Site the Defendants would not be charged for the Works. If there had been an engagement of the kind alleged by the Claimants such a discussion would have been expected to have taken place after the Hirsts decided to buy the Site to avoid the commercially unrealistic outcome I have just described. The absence of any evidence of such a discussion is supportive of the Defendants' position.

75. I found the evidence of Mr. Craven and Mr. Hill, at [36] and [40] above, respectively to be of particular significance.

76. The significance of Mr. Craven's evidence is that it suggests that at least by the time of Mr. Craven's involvement the performance of the Works was being seen as the Hirsts' contribution to the development of the Site and that it was being funded at that stage from their own resources. This is consistent with the Defendants' account of the arrangements. Moreover, if the Claimants had a contractual entitlement to be paid for the cost of performing the Works one would have expected Mr. Craven to have been told about it and also to have been told if the arrangement was that payment would be made to the Claimants if their purchase did not proceed.

77. Mr. Hill's evidence was significant in terms of his account of Mr. Ryder's involvement; the confidence which he was led to believe Mr. Hirst had that funding would be obtained; his understanding of the reason why the Works were being performed; and in his indication that the search for funding was taking some time (Mr. Hill attended the Site three times seemingly at a time before Mr. Craven was involved). The picture which emerges from Mr. Hill's evidence is markedly closer to the Defendants' account of matters than that of the Claimants.

78. The evidence of Mr. Mellor, see [47] above, was of note though of rather lesser weight than the preceding matters. Mr. Mellor's evidence is relevant as a further indication that Mr. Hirst was confident that he would obtain the Site and that he was prepared to proceed on that basis before actually concluding the purchase.

79. A further relevant factor, though again one of lesser weight, is the failure by the Claimants to press for payment at an earlier date. There is a dispute as to whether the letter of 6th March 2014 was received but I am satisfied that it was sent and that it had been preceded by an offer of payment. However, even on the Claimants' case it seems that the text messages did not start until August 2013. Moreover, in his witness statement Mr. Hirst puts the completion of the Works as September 2013 and says that it was then that he decided not to demand immediate payment. However, the Claimants left the Site in the summer of 2012 on the Defendants' case and by December 2012 on the Claimants' case and the properties were ready for occupation at the latest at the latter time (with some having been let earlier). To the very limited extent that there was attendance on the Site by the Claimants in 2013 that was to address snagging defects and/or to deal with warranty problems identified by the letting agents. The Claimants say that they had a contractual entitlement to sums totalling over £486,000 and if that was the position it is surprising that the first written demand for payment was not until March 2014. Mr. Hirst is an experienced construction professional and the Second Claimant is a construction company. If the parties had entered the Contract with the consequence that payment of £486,000 was due to the Claimants in December 2012 one would have expected a final account to have been submitted by the Claimants in early 2013 at the latest and chasing for payment to follow shortly thereafter. The absence of such action indicates that the Claimants did not believe that they were entitled to that sum as of right. Mr. Hirst's assertion that he believed that the Defendants had financial difficulties and would not be able to pay the Claimants would potentially explain a failure to chase for payment but not a failure formally to set out the sums due.

80. It is common ground that there was an occasion when Mr. Hirst and Mr. Dunbar were both at Mr. Ryder's home at the same time. The Claimants say that this was in about

October 2011 and the Defendants say it was in the summer of 2011 and that it was then that Mr. Hirst agreed to buy the Site from Anlysse. For present purposes the relevance is that in my judgement Mr. Hirst's explanation of the reason for his presence there does not accord with the surrounding circumstances or with inherent likelihood whereas Mr. Dunbar's explanation of the position does. In his witness statement Mr. Hirst said, at [16], that "the purpose of the meeting was to discuss the section 106 agreement, as [Mr Ryder] had some experience and knowledge in this area and claimed he could help renegotiate the section 106 terms." In the Reply, at [11], it was said that Mr. Hirst "attended to discuss how he should carry out the works within that agreement". It follows that Mr. Hirst is saying that the meeting was before a purchase by him and his wife was contemplated and at a time when the Claimants were simply contractors engaged to perform the Works. The section 106 agreement required a payment to be made to the Council and any renegotiation would be with a view to reducing the amount of the payment. Moreover, on the Claimants' case, Mr. Dunbar was either the true owner of the Site or the development of the Site was a joint venture between him and Mr. Ryder. In those circumstances there would have been no reason for Mr. Hirst to be attending a meeting to discuss attempting to renegotiate the section 106 agreement. Similarly, in circumstances where the concern was about the payment to be made under the section 106 agreement and where that agreement did not provide for the performance of works the suggestion that Mr. Hirst attended to discuss the carrying out of works also does not make sense. Conversely, the Defendants' explanation for Mr. Hirst's presence namely that he was discussing the purchase of the Site does make sense and accords with inherent likelihood.

81. The position, therefore, is that the relevant dealings took place ten years ago; there is little by way of contemporaneous documentation; neither Mr. Hirst nor Mr. Dunbar was an impressive witness; and there are potent factors supporting both the Claimants' account and that of the Defendants. No single factor is conclusive but those of particular significance for the Defendants are the absence of the formal contractual arrangements and of the early and formal chasing for payment both of which would have been expected if there had been a contract for the Claimants to perform the Works; the conclusion I have reached as to the role of Mr. Fairweather on the Site; the picture which emerges from the evidence of Mr. Craven and Mr. Hill; and my finding as to the explanation for Mr. Hirst's presence at Mr. Ryder's house on the occasion when it is agreed that he, Mr. Dunbar, and Mr. Ryder were there together. Against those I have to take account of the considerable weight in the Claimants' favour of my finding that there was discussion about payment after the Works had been completed with an offer of land in lieu of payment being made.

82. Looking at the evidence in the round I am satisfied that the Defendants' case is more consistent with inherent likelihood; with the limited contemporaneous documents; and with the impression formed by those who had no direct personal interest in the matter. It follows that I am satisfied that the Defendant's account is the more likely explanation of the relevant matters and find that the Claimants were not engaged by the Defendants or any of them to perform the Works. The Claimants did not perform the Works pursuant to an engagement by the Defendants but did so because of Mr. Hirst's belief that he would be able to buy the Site and so would benefit from the performance of the Works. The Claimants were acting on their own behalf and at their own risk and had no agreement for payment from the Defendants.

83. I have found that there was discussion about a payment being made to the Claimants after the Works had been completed and after it became clear that Mr. and Mrs. Hirsts' hopes of buying the Site would not come to fruition. It was in that context that an offer of payment was made by the Defendants. However, I am satisfied that the offer came about not because the Claimants had performed the Works pursuant to the Contract. Rather it was a recognition that as matters had turned out the Second Defendant had got the benefit of the Works performed by the Claimants. The offer to make payment was a consequence of that benefit but did not arise from nor did it give rise to a legal liability. It was an illustration of the attitude demonstrated by Mrs. Dunbar's explanation, see [67] above, of why the Third Defendant did not press the Claimants for payment for the groundworks performed by Mr. Fairweather and his colleagues. This analysis of these dealings also explains why the 6th March 2014 letter referred to the "net costs" which had been incurred and why a final account had not been submitted by the Claimants at the conclusion of the Works.

84. Although put forward as an alternative to the primary case of a contract formed in a conversation between Mr. Hirst and Mr. Dunbar the allegation that the Contract was formed by conduct must fall for the same reasons as the primary case. The interpretation to be placed on the conduct of the parties depends on the understanding with which they were acting and for the reasons already explained I find that the Defendants' account of that understanding is to be preferred.

85. The *quantum meruit* claim fails for the same reasons. If, as I have found, the Claimants performed the Works at their own initiative and at their own risk rather than at the request of the Defendants and did so on the footing that they would benefit from the Works through their purchase of the Site then they have no entitlement to payment in circumstances where they were unsuccessful in their attempt to buy the Site.

## Is the Claim statute-barred?

86. In the light of the conclusion I have just set out this point is now academic. However, the issue was fully-argued before me and I will set out my conclusions and reasoning in full because I am persuaded the Defendants are correct to say that the claim even if otherwise sustainable is statute-barred. It follows that the claim fails even if I am wrong in my assessment as to the basis on which the Works were performed.

87. The claim form was lodged at court on 2nd August 2019. It is common ground that the relevant limitation period is six years from the date of the accrual of the Claimants' cause of action so the question to be considered is whether the Claimants' cause of action accrued before 2nd August 2013. At the start of the trial there appeared to be a question as to when the Works (or at least the Claimants' performance of them) had concluded and whether the works undertaken by the Claimants at the Site in 2013 were relevant to limitation. However, it became apparent not only that practical completion had been achieved by 4th December 2012 but also that the Claimants had in substance left the Site by the summer of 2012. Moreover, attendance by the Claimants at the Site in 2013 was very limited and involved dealing with snagging problems and/or warranty works. It was not suggested that such attendance was relevant for the running of time.

88. In its finally developed form the Claimants' case was that the Scheme applied to the Contract and that this had the consequence that time did not begin to run until a payment notice under paragraph 9 of the Scheme had been or should have been issued by the

Defendants. The Claimants said that this should have happened not later than five days after the letter of 6th March 2014 which was to be seen as the making of a claim under paragraph 6 of the Scheme with the consequence that time ran from 12th March 2014. The Defendants denied that the Scheme applied but said that regardless of whether or not it applied time ran from the substantial completion of the Works and so at the latest from 4th December 2012. The matters to be addressed were, therefore, first, whether the Scheme applied; second, the date of the accrual of the Claimants' cause of action if the Scheme did not apply; and third, the date of its accrual if the Scheme did apply. In respect of the second of those the Claimants accepted that if the Scheme did not apply the claim was statute-barred. There was also agreement that these questions were matters of construing the Contract (including if they did apply the terms of the Scheme) in the light of the principles to which I will now turn.

The Applicable Law.

89. Although they initially put this in issue the Defendants accepted that if there was an enforceable contract in the terms of the Contract then that would be a construction contract within the meaning of the Act. The following provisions of the Act and the Scheme are relevant.

90. Section 110 of the Act provides as follows in respect of dates for payment:

> "(1) Every construction contract shall –
>
> (a) provide an adequate mechanism for determining what payment becomes due under the contract, and when, and
>
> (b) provide for a final date for payment in relation to any sum which becomes due.
>
> The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.
>
> (1A) The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on –
>
> (a) the performance of obligations under another contract, or
>
> (b) a decision by any person as to whether obligations under another contract had been from performed.
> …
>
> (3) if or to the extent that a contract does not provide such provision as is mentioned in subsection (1) the relevant provisions of the Scheme for Construction Contracts apply."

91. Section 110A stipulates in the following terms that each construction contract shall make provision for payment notices.

> "(1) a construction contract shall, in relation to every payment provided for by the contract –
>
> (a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or

> (b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not less than five days of the payment due date.
> …
>
> (5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply."

92. Paragraph 3 of the Scheme provides that:

> "Where the parties to a construction contract fail to provide an adequate mechanism for determining either what payments become due under the contract, or when they become due for payment, or both, the relevant provisions of paragraphs 4 to 7 shall apply. "

93. Paragraph 6 states:

> "Payment of the contract price under a construction contract (not being a relevant construction contract) shall become due on
>
> (a) the expiry of 30 days following the completion of the work, or
>
> (b) the making of a claim by the payee,
>
> whichever is the later"

94. Paragraph 9 addresses the requirement for a payment notice in these terms:

> "(1) where the parties to a construction contract fail, in relation to a payment provided for by the contract, to provide for the issue of a payment notice pursuant to section 110A (1) of the Act, the provisions of this paragraph apply.
>
> (2) the payer must, not later than five days after the payment due date, give a notice of the payee complying with sub-paragraph (3).
>
> (3) a notice complies with this sub-paragraph if it specifies the sum that the payer considers to be due or to have been due at the payment due date on the basis on which that sum is calculated.
>
> ..."

95. The court's starting point when determining the date of the accrual of a cause of action was summarised thus by HH Judge Coulson QC in *Birse Construction Ltd v McCormick (UK) Ltd* [2004] EWHC 3053 (TCC) at [7]:

> "the date of the accrual of a cause of action for sums due under a contract for work or services will usually depend on the terms of the contract itself. However, it is important to note that starting point for any consideration of this question is the established principle that, in the absence of any contractual provision to the contrary, a cause of action for payment for work performed or services provided will accrue when that work or those services have been performed or provided. In such circumstances, the right to payment does not depend on the making of a claim for payment by the party has provided the work or services. …"

96. The established principle to which the judge referred was derived from the decision of the Court of Appeal in *Coburn v Colledge* [1897] 1 Q B 702. Section 37 of the Solicitors Act 1843 provided that a solicitor could not commence an action to recover fees until one month after a bill in respect of those fees had been sent to the client. The issue for the court was whether the limitation period against a solicitor seeking payment of his

fees had begun to run when he had completed the work to which the bill of costs related or only at the expiry of the statutory period of one month from despatch of the bill. The court found that the answer depended on when the solicitor's cause of action accrued and the members of the court were agreed that this was when the work had been completed and not either when the bill of costs was sent or at the expiry of the one month period following that.

97. At 705 Lord Esher MR enunciated the normal rule thus:

> "in the case of a person who is not a solicitor, and who does work for another person at his request on the terms that he is to be paid for it, unless there is some special term of the agreement to the contrary, his right to payment arises as soon as the work is done; and thereupon he can at once bring his action."

98. Then, at 706, Lord Esher reaffirmed the definition of "cause of action" which he had given in *Read v Brown* 22 QBD 128 as "every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court". Lord Esher explained that this meant those facts the absence of any of which would have made the claim demurrable under the pre-1872 rules of pleading or, under the current regime, liable to be struck out as showing no cause of action.

99. The members of the court drew a distinction between the right to bring an action for a particular payment and the right to that payment (see per Lord Esher at 706, per Lopes LJ at 709, and per Chitty LJ at 209 – 210). It was the latter rather than the former which was the cause of action and it was the accrual of the latter which was the accrual of the cause of action for limitation purposes even if there was some restriction on the right to bring an action to enforce the right to payment.

100. The parties before me were agreed that the starting point was that a right to payment arose when the work in question was completed and that it was a matter of construction whether the terms of a particular agreement led to a different result. As Lambert J explained in *ICE Architects Ltd v Empowering People Inspiring Communities* [2018] EWHC 281 (QB) the matter is to be approached on normal principles of contractual construction with the court seeking to arrive at "the objective interpretation of the intentions of the parties" (see at [12]) in the light of the documents and subject to the consequences flowing from the purpose of the limitation regime which I will consider below (see also per Lord Neuberger MR in *Legal Services Commission v Henthorn* [2011] EWCA Civ 1415 at [44]).

101. In some circumstances the consequence of a proper construction of the parties' contract can be that the potential payee's cause of action accrues not when the work is completed but only when some further condition is satisfied. This was the position in *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814. There the issue for the Court of Appeal was when the contractor's cause of action accrued in dealings governed by a contract incorporating clause 60 of the ICE Standard Form (6th ed). That clause provided that the employer was to make payment in the amount certified by the engineer as being due. Dyson LJ (in whose judgment Sir Andrew Morritt VC and Thomas LJ concurred) held, at [23], that the issue of a certificate was a condition precedent to the contractor's entitlement to payment with the effect that the right to payment arose when a certificate was issued or should have been issued and not when the work was completed. That had the consequence that the contractor's cause of action accrued only when a certificate was or ought to have been issued. Various further

aspects of the contract and the judgment are of note for present purposes. First, under the terms of the contract "the contract price was not fixed at the outset, but was to be ascertained by the engineer by the application of the contractual provisions in the light of the work that was actually done and the events that occurred during the carrying out of the works." (see at [17]). Second, Dyson LJ's analysis was concerned with determining when the contractor's "entitlement" or "right" to payment arose. Finally, it is to be noted that Dyson LJ approached the issue as one of contractual construction with a view to seeing whether clause 60 was a "special term of the agreement to the contrary" of the kind which Lord Esher had said could displace the normal rule.

102. It is necessary to distinguish between (a) contractual terms (or statutory provisions) such as that in *Henry Boot Construction* which are conditions precedent to a right to payment arising and (b) provisions which impose conditions for the bringing of proceedings and which are concerned with limiting the right to bring an action to enforce an entitlement to payment. The former affect the date on which the cause of action accrues whereas the latter have no impact on that date even though they may mean that the period in which a potential claimant can commence proceedings is less than the full limitation period running from the date of accrual of the cause of action.

103. The provision in *Coburn v Colledge* requiring a solicitor to delay for one month after delivery of a bill of costs before commencing proceedings was an example of the latter kind of provision.

104. Similarly, in *Swansea City Council v Glass* [1992] 2 All E R 680 the claimant council was entitled under the Housing Act 1957 to recover the cost of undertaking necessary repair works to a property under the control of the defendant. The Court of Appeal accepted that the effect of sections 10 and 11 of that Act meant that the council had to serve a demand for its expenses before it could commence proceedings to recover those expenses. It also accepted that the effect of the Act was that if an appeal was made against a demand for payment then proceedings to recover the expenses could not be commenced until the appeal had been determined. Nonetheless the court concluded that the council's cause of action accrued when the works were completed and not when the demand was served. Taylor LJ (in whose judgment Ralph Gibson and Purchas LJJ concurred) explained that there was a difference between a "procedural requirement" and a matter which was "an inherent element in the cause of action" (see at 685h-j). Construing the particular Act he concluded that "the requirement to serve a demand is a procedural condition precedent to bringing proceedings. It [was] not part of the cause of action" (see at 686e).

105. In *Sevcon Ltd v Lucas CAV Ltd* [1986] 2 All E R 104 the House of Lords considered the effect of section 13 (4) of the Patents Act 1949 on the limitation period for proceedings in tort for the infringement of a patent. Section 13 (4) provided that such proceedings could only be instituted after the patent had sealed. The only substantive judgment was delivered by Lord Mackay. At 106e and following he accepted the definition given by Lord Esher in *Coburn v Colledge.* Then, at 108g and following Lord Mackay rejected the contention that the effect of the exceptions to time running provided in the Limitation Act 1980 was to show that "Parliament did not intend time to run where a person was not in a position to pursue his claim". Rather the "true principle …is that time runs generally when a cause of action accrues and that bars to enforcement of accrued causes of action which are merely procedural do not prevent the running of time unless they are covered by one of the exceptions provided in the

1980 Act itself". Lord Mackay then concluded that the restraint imposed by section 13 (4) was such a procedural bar to the enforcement of the cause of action which had accrued by reason of the relevant infringement and that it did not prevent the running of time.

106. The distinction was applied albeit with a different result in *Legal Services Commission v Henthorn* where the Court of Appeal was concerned with the accrual of the Commission's cause of action for the recovery of the overpayment of money paid to a barrister on account of fees under a civil legal aid certificate. Lord Neuberger MR (in whose judgment Lewison LJ and Sir Stephen Sedley concurred) held that the cause of action accrued when the assessment identifying the overpayment had been made rather than when the work to which the fees related was performed or when the overpayment was made. However, its accrual was not delayed by the fact that the relevant regulations required a demand to be made before the Commission could take "any steps to enforce its right to recover" the overpayment (see at [30]). At [51] Lord Neuberger characterised the difference between that case and *Coburn v Colledge* thus. In *Coburn* the court had been concerned with "a provision which simply imposed a procedural step on enforcing a claim which was assumed already to exist in common law" while in *Henthorn* the court was addressing a "self-contained regulatory scheme" which created the right on which the Commission was relying and the terms of which determined when the right arose.

107. In *ICE Architects Ltd* Lambert J identified a further distinction which, as will be seen when I consider the terms of the Scheme, is of particular assistance in the current case. The judge applied, at [22] – [23], a distinction between on the one hand an agreement or term determining when an entitlement to payment arose and on the other an agreement or term "concerning only the process of billing and payment". The former but not the latter would be relevant to the question of when a cause of action for payment accrued. In construing the contract with which she was concerned Lambert J used that distinction as a way of deciding how the term in issue was to be characterised and, as a consequence, what effect, if any, it had on the accrual of the relevant cause of action.

108. In construing contractual terms which are said to have displaced the normal rule the courts have taken account of the inconvenient consequences which would flow if that rule were to be displaced.

109. Thus in *Coburn v Colledge* at 709 Lopes LJ pointed out that a consequence of the plaintiff's argument would be that a solicitor could abstain from delivering his bill for twenty years but would be able to commence proceedings if he were then to do so. He said that "would be a very anomalous and inconvenient result". Taylor LJ quoted that passage in *Swansea City Council v Glass* pointing out that if the council's interpretation of the legislation were correct that would mean that service of the demand could be delayed indefinitely and that on serving a demand long after the works had been completed "they would have a further six years in which to take proceedings."

110. In *Legal Services Commission v Henthorn* Lord Neuberger said:

> "save where it is the essence of the arrangement between the parties that a sum is not payable until demanded (e.g. a loan expressly or impliedly repayable on demand), it appears to me that clear words would normally be required before a contract should be held to give a potential or actual creditor complete control over when time starts running

> against him, as it is such an unlikely arrangement for an actual or potential debtor to have agreed."

111. In *ICE Architects*, at [24], Lambert J noted the relevance of those dicta. Lambert J also took account of the purpose of the limitation regime which she derived from Chitty LJ's judgment in *Coburn v Colledge* and which she summarised as being to provide a debtor with "a degree of protection by the certainty [Lambert J's emphasis] of a fixed period during which a claim can be brought" and "to avoid the courts becoming embroiled in collateral issues" such as questions of the reasonableness or otherwise of any delay in rendering an invoice. That led Lambert J to say that:

> "In these circumstances, it seems to me that clear words are needed if the Court is to construe an agreement between the parties in such a way as to give the creditor control over the start of the limitation period and/or to avoid the Courts becoming engaged in determining satellite issues which deprive the limitation provisions of their central purpose: certainty and the avoidance of stale claims."

112. It is not necessary for me to consider the extent to which any formal requirement for clear words is compatible with the general rules governing the construction of contractual terms as they have now been enunciated in *Rainy Sky v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900 and *Arnold v Britton* [2015] UKSC 36, [2015] AC 1619 as explained in *Wood v Capita Insurance Services Ltd.* [2017] UKSC 24, [2017] AC 1173. Those general rules place a renewed emphasis on the language actually used and require the court to construe the contract so as to give effect to the parties' intention as disclosed by that language when read in context. Even if that approach means that there can no longer be a formal requirement for clear words the practical result of the construction exercise is likely to be unaltered. This is because an interpretation which would give a potential creditor control over when time runs for bringing proceedings to recover the debt in question would be one which is unlikely to have been agreed as a matter of commercial common sense and one which would also be incompatible with the purpose of the limitation regime. That would be an unusual provision to include in a contract. As a result when having regard to the context in which the contract is being construed the court is unlikely to conclude in the absence of clear words that a contract can properly be construed as giving the creditor control over the date at which time begins to run for limitation purposes. That follows from the assessment that if the parties intended such a departure from the norm they are likely to have used clear words to give effect to that intention and the absence of such words is an indication that there was no such intention.

Did the Scheme apply to the Contract?

113. Mr. Bowdery strove to argue that if there was a contract in the terms alleged by the Claimants the Scheme did not apply. He said that this was because the alleged contract provided for a final date for payment namely the conclusion of the Works and also provided an adequate mechanism for determining what sums were due namely a reasonable sum.

114. That contention is untenable. I leave aside the fact that it fails to address the need for a provision as to a payment notice as provided for in section 110A. The more significant failing is that it is a mischaracterisation of the questions being addressed in sections 110 and 110A and of the nature of the provisions of the Scheme. As explained below the Defendants are right to say that the Scheme (or at least those provisions of relevance

here) is concerned with arrangements for the "process of billing and payment" to adopt Lambert J's characterisation. The purpose of the relevant provisions of the Act and of the Scheme is to ensure that there are terms addressing the process of billing and payment so that there are mechanisms for determining the dates for payment; for identifying the parties' positions as to the sums due; and for resolving disputes as to those matters. The terms of the Contract providing for payment of a reasonable sum with the entitlement to that sum arising on the conclusion of the Works are dealing with different questions concerned with the parties' substantive rights. It follows that the Contract if it had existed would have contained no provisions addressing the arrangements for billing and payment with the consequence that the Scheme would apply.

The Limitation Position if the Scheme does not apply.

115. It was common ground that if the Scheme did not apply then the Claimants' cause of action would have accrued on the completion of the works which was by December 2012 at the latest with the consequence that the claim would be in those circumstances be statute-barred.

The Limitation Position if the Scheme does apply.

116. Dr. Sampson contended that the effect of section 110A (1) of the Act and paragraph 9 of the Scheme was to make the issue of a payment notice a precondition of the Claimants' right to payment. He said that notice was to be equated with the engineer's certificate considered in *Henry Boot Construction.* That had the consequence that time only began to run from the date when such a payment notice was given or in the absence of such a notice the date when it should have been given. It followed that the demand of 6th March 2014 gave the base line for calculation of the date from which time began to run. That was because that was the date when the Claimants made a claim and so when the payment of the contract price became due pursuant to paragraph 6 of the Scheme. However, it was not itself the date for which time ran. Rather that was 12th March 2014 because that was the date by when the Defendants should have issued a payment notice in accordance with paragraph 9.

117. I reject that contention. The provision at paragraph 9 of the Scheme for a payment notice from the paying party is different in nature from the requirement for an engineer's certificate which was considered in *Henry Boot Construction.* The former provision is concerned with the *process* of billing and payment not the question of when the Claimants' *entitlement* to payment arose. It follows that paragraph 9 had no relevance to the question of when the Claimants' cause of action accrued. That question falls to be answered by reference to the general principle that the right to payment arises when work is completed. In the circumstances here that means that the Claimants' cause of action accrued on 4th December 2012 at the latest and their claim is, accordingly, statute-barred even if the Scheme does apply. I reach that conclusion for the following reasons.

118. The starting point is the normal rule and that will apply "unless there is some special term of the agreement to the contrary" in Lord Esher's words. As explained above that is a matter of the construction of the relevant contract which on this hypothesis is the Contract subject to the application of the Scheme. However, in the absence of clear words the court is unlikely to be able to be satisfied that the parties intended a result which would displace the normal rule and which would give the creditor (here the

Claimants) control over when the limitation period began to run. On the Claimants' case the relevant date is to be identified by reference to paragraph 9 as the date when the payment notice was or should have been given. The difficulty is that the notice is to be given not later than five days after the payment due date which, in turn, is to be calculated by reference to paragraph 6. That paragraph provides for the date to be the later of two events one of which, the making of a claim by the Claimants, is wholly in the control of the Claimants. That would be a "very anomalous and inconvenient result" to use the words of Lopes LJ and neither the Contract nor the Scheme can in the light of the following considerations be properly seen as having that result.

119. In his closing submissions Dr. Sampson sought to address this difficulty by submitting that the provision in paragraph 6 (a) for the making of a demand by the Claimants was to be regarded as subject by implication to the requirement that the demand be made within a reasonable period. However, that point had not been addressed in the pleadings or the evidence and there was, in any event, no basis for saying that such a restriction was to be implied. It would, moreover, involve the difficulties adverted to by Lambert J of the potential for satellite litigation as to whether a reasonable period had or had not passed between the performance of the Works and the making of the demand. That difficulty was demonstrated by Dr. Sampson's fall-back position of saying that the period from the conclusion of the Works to March 2014 was anyway not to be seen as an unreasonable period and that I should address the reality of what had happened rather than take account of the possibility that a demand might have been made after an unreasonable delay. That line of argument does not assist because the question with which I am concerned is one of contractual interpretation in which I have to construe the terms of the Scheme as at the date of the Contract. Moreover, I do not regard it as self-evident that the interval between the completion of the Works and the making of the demand was a reasonable one and again this point was not addressed in the pleadings or in the evidence.

120. The situation under the Contract is wholly different from that under the ICE standard conditions which were being considered in *Henry Boot Construction.* In that case there was no way in which the parties could know what, if anything, was due in the absence of the engineer's certificate. It was that certificate which was to identify the sum due by applying the contractually agreed rates of payment to the work which he found to have been done in the circumstances which had occurred during the course of the works. It was the certificate which gave the right to payment. Here the Claimants' case is that they had a right to a reasonable sum in respect of the Works. In providing a certificate under the ICE conditions an engineer is performing an independent and avowedly determinative role. Conversely the payment notice under paragraph 9 was to be provided by the Defendants and was to state the sum they considered due. The two exercises are different in nature.

121. Following on from the last point it is necessary to identify the Claimants' cause of action. The cause of action is the right to payment of a reasonable sum for the Works. The only element which is needed for that cause of action to be complete is the completion of the Works. Once the Works had been performed the Claimants had done all that they were required to do under the Contract to earn their right to payment and there was no further qualification needed or any further requirement to be met. In the Particulars of Claim, at [55], the Defendants' breach is said to have been their failure to make payment in response to the 2014 demand. However, that is not a true

characterisation of the Claimants' claim. The true nature of the claim is in fact set out in the alternative case at [57] where the *quantum meruit* claim is advanced. There it is said that the entitlement to a reasonable sum arose because the Claimants had performed the Works and the Defendants had taken the benefit of the same. That, in truth, is the basis of the Contract claim as well. A pleading asserting the Contract and the performance of the Works would have adequately set out the totality of the Claimants' cause of action sufficiently to meet the requirements of Lord Esher's definition and would not have been liable to be struck out as showing no cause of action for a claim for a reasonable sum.

122. If the parties had entered the Contract the Claimants would have had a right to payment when the Works had been completed. If the Scheme applied that was a right to payment at a date to be determined in accordance with the Scheme but it was a right which had accrued and in respect of which the Claimants did not need to take any further action for the right to be crystallised. The right to payment could have been assigned or, if the Defendants disputed their liability, the Claimants could have sought a declaration that payment would be due at the date identified under the Scheme. The position here is even starker than that in *Coburn v Colledge* where there was a distinction deriving from statute between the plaintiff's right to payment and his right to bring an action to enforce that right. Limitation ran from the former even though the latter was confined by law to a later date. Here there was no such restriction on the Claimants' right to bring proceedings.

123. There is a difference between a provision which gives rise to an entitlement or right to payment and one which identifies when payment is due. The difference might be thought a narrow one but it is real. A provision of the former kind which identifies when an entitlement to payment has arisen is relevant for determining whether a cause of action has or has not accrued. A provision of the latter kind which lays down a mechanism for identifying when payment is due or for identifying disagreement about the amount due is not a provision determining the accrual of a cause of action. Rather, adopting Lambert J's terms, it is a provision of a different kind "concerning only the process of billing and payment". The terms of the Scheme are provisions of the latter kind. This is apparent from their language and effect when seen in context. The point can be illustrated by considering the nature of a payment of the contract price under paragraph 6 either thirty days after the completion of the works or in response to the making of a claim by the payee. Such a payment is the discharge of a cause of action which already exists and which accrued independently of the terms of the Scheme.

124. It follows that even the Claimants had succeeded in establishing that they and the Defendants had entered the Contract; that the Works were performed pursuant to the Contract; and that the Scheme applied the claim would still fail as being statute-barred.

## If the Claimants have an Entitlement to Payment what Sum is due?

125. In the light of my earlier conclusions I will deal only briefly with this question. Although the parties broke this aspect of the dispute down into a number of sub-issues it can be boiled down to the question of what is a reasonable sum in respect of labour and materials for the Works.

126. Typically the court would approach that question by establishing the work performed and determining in the light of expert evidence the value of that work. The prime

difficulty in attempting that exercise here is the absence both of any initial agreed scope of works document and of any final identification of the work which had been performed. That difficulty is compounded by the facts that the Claimants did not start work from scratch but were completing a development which had been started by others and where the houses and flats were partially constructed. Moreover, not all the work on developing the Site was performed by the Claimants even after the start of the Works. It follows that it is not possible with any confidence to identify either what work the Claimants should have done or that which was in fact done let alone to attribute any value to it. There is very considerable force in Mr. Bowdery's closing submission that "the Claimants only carried out a fraction of the works and the size of that fraction can neither be estimated nor costed."

127. Instead of providing the core documents which would normally be relied upon in a case such as this the Claimants have provided a quantity of documents showing expenditure and which are said to be attributable to the Works. Those documents are in a markedly unsatisfactory state with the difficulties of interpretation and correlation compounded by the use of paperwork in respect of companies other than the Second Claimant.

128. The Claimant's expert, Ryan Greening, described some of those difficulties in his initial report. Thus at 5.2.3 he said:

> "In my opinion I do not consider it possible to provide any alternative assessment based on a notional reasonable value for the following reasons:
>
> a. It is clear that Hirst was not the only contractor working on the site and there is no clear distinction as to the works performed by Hirst and the works performed by others. It is, therefore, practically impossible to differentiate the Hirst works.
>
> b. The scope of works performed is at best loosely defined and evidenced.…
>
> c. There is almost no factual evidence of the works that were required to the houses.… In any event in my opinion pricing the schedule is problematic as there is no evidence of the state and/or condition of the properties prior to Hirst's commencement and the schedule is so bland in its descriptions that it is simply not possible to determine the works that are actually required in order to price the described items.
>
> d.… There are no doubt other examples which effectively make it impossible to ascertain the scope of the works that was actually undertaken, or the order in which the works were undertaken. In my opinion this means that it is impossible to quantify and rate the works performed.
>
> …
>
> f. Invariably on completion projects like this there will be an element of reworking of works performed by others either because those works were incorrectly performed, or because the works were performed in the wrong sequence and need to be removed to allow something else to take place. There is limited evidence of the works actually performed and hence identifying the extent of these reworks is practically impossible."

129. Faced with those difficulties Mr. Greening approached the valuation exercise by comparing the sums said to have been incurred by the Claimants with the estimated costs set out in the Feasibility Pack. He concluded that the latter provided evidence of the works performed and also of the reasonableness of the sums asserted by the Claimants because those sums were lower than each of the estimated costings set out in the pack.

130. For the Defendants Simon Hall pointed out that in the documents provided by the Claimants:

> "there are no construction drawings, specifications meeting minutes or reports in sufficient detail to provide clarification of the extent, or programming, of the Project Work. The Claimant's Disclosure Documents are a mix of invoices, delivery notes, timesheets and expense claims."

131. Mr. Hall "undertook a thorough review of the invoices, delivery notes and timesheets in an attempt to understand the works and their associated broad timeline". Having undertaken that exercise he concluded that the only conclusion he could reach as to a reasonable sum in respect of the costs incurred was as to the sum of £99,310.10 as opposed to the figure of £447,773.42 advanced by the Claimants.

132. The Claimants disclosed further documents and the experts had discussions resulting in a joint statement setting out their separate views.

133. Mr. Greening came to a revised figure of £474,861 albeit after having expressed, inter alia, the following reservations:

> "4.2.10 it would have been preferable for the Claimant to have evidenced its payments by way of accounting records linking the payment to a specific invoice/application. Unfortunately, this information either is not available or has not been provided and hence it is impossible precisely to link a particular payment to a particular invoice and hence a particular claim within the Final Account. A particular issue with the way the information has been presented is there is no evidence of the tax status of each subcontractor so it is not known which would be the subject of tax deductions. It is therefore not possible to know what amount should have been paid to each subcontractor to pay the provided invoices in full.
>
> …
>
> 4.2.17 in my opinion there is simply insufficient evidence available to enable me to untangle the payments and/or set off amounts in order to provide an opinion upon the reasonable value which should be associated with this Project."

134. Mr. Hall regarded the further material as unhelpful. He said that the payment evidence provided "[did] not evidence that payment had been made by the Claimants for the Works" and that the material provided clouded matters further. Mr. Hall was very much influenced by the use of paperwork from different companies; by different formulations of the trading style "Thirteen Twenty"; by the difficulty he found in being confident that the reference "1170" actually related to work on the Site by the Second Claimant; and by the difficulty in showing that the Claimants had in fact repaid Hurst Stores and Interiors Ltd for the payments that company had made. As a result he concluded that his previous figure of £99,310 had been overly generous and that there was no sum which could safely be attributed to the Works.

135. The burden is on the Claimants to establish on the balance of probabilities the reasonable value of labour and materials and it is not for the court to speculate about figures. The approach initially adopted by Mr. Greening of a comparison with the figures in the Feasibility Pack was inevitably at a high level of generality. Moreover, it is not possible to be confident that the exercise was comparing like with like (indeed the better view would appear to be that the work performed by the Claimants represented an unascertainable part of the work to which the estimates in the Feasibility

Pack relate). Similarly his more recent assessment appears to involve a substantial acceptance of the Claimants' figures in circumstances where they do not speak for themselves and where his acceptance of the reasonableness of the figures appears still to be ultimately dependent on the comparison with the figures in the Feasibility Pack. Conversely, Mr. Hall's conclusion that no figure can safely be attached to the Works was the result of an unduly severe approach to the documentation. I am satisfied that the sundry documents using different company names and different versions of the trading style but making reference to job no 1170 were intended to relate to the Second Claimant and to the Works.

136. In my judgement the deficiencies of the material provided by the Claimants and of the evidence as to the work done mean that any attempt to assess the reasonable value of the Works would come perilously close to speculation. There is considerable force in the contention that the burden being on them the Claimants have failed to show that any sum would be due and that they are in that regard the authors of their own misfortune by reason of the deficiencies of their paperwork. However, there is no dispute that substantial works were performed by the Claimants at the Site and that fact cannot be disregarded. If I had found that the Claimants were entitled to payment I would have concluded that the only sum which could safely be found to have related to the Works would be the figure of £99,310.10 which Mr. Hall had originally been prepared to accept as having been shown to be so related. With some hesitation I would also have found that on the balance of probabilities the Claimants had shown that such amount represented a reasonable sum for labour and materials expended in the Works but no greater sum would have been awarded.

## Conclusion.

137. The claim accordingly fails. I have found that the Works were not performed pursuant to the Contract alleged by the Claimants but that even if that conclusion is incorrect the claim would fail by reason of being statute-barred.