Case No.HT 05101

Neutral Citation Number: **[2005] EWHC 3057 (TCC)**

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

St. Dunstan's House

Monday, 19 th December 2005

Before:

HIS HONOUR JUDGE PETER COULSON Q.C.

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B E T W E E N :

EQ PROJECTS LTD Claimant

- and -

JAVID ALAVI

(**T/A MERC LONDON**) Defendant

- -

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MR. BERNARD WEATHERILL Q.C. and MS. CLAIRE JACKSON (instructed by Zermansky & Partners) appeared on behalf of the Claimant.

MR. PAUL LETMAN (instructed by Saunders, Solicitors) appeared on behalf of the Defendant.

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J U D G M E N T

JUDGE PETER COULSON QC:

A: INTRODUCTION

1 This is a building case where the maximum amount of the Claimant's claim is £111,593.90 plus interest. The claim arises out of shopfitting works at the Defendant's shop premises in Carnaby Street ("the Property"). Despite the modest level of the claim and the notable absence of any rancorous correspondence generated during the works themselves, the bundle for the trial consisted of six lever arch files, the trial itself lasted for four days, and the hearing involved allegations that ranged from fraudulent misrepresentation and concocted documents to disputes as to contractual workscope, variations, quantum meruit, defects, delay and every aspect of quantum. It is impossible not to conclude that the relationship between these parties deteriorated dramatically as a result of the manner in which this litigation has been conducted. From 6 th May 2004 onwards neither party has missed an opportunity to run arguments and make points which they hoped would damage the

position of the other, regardless of whether such points were good, bad or thoroughly indifferent. Despite a number of orders of the court, the parties have been unable to reach a compromise on anything other than a tiny handful of the numerous points between them.

2 All that said, the parties have now fought this case out to a finish. They are, if nothing else, entitled to a detailed series of answers on all the numerous issues that they have seen fit to raise. That is what this Judgment endeavours to provide.

3 The parties have identified 15 issues on which they seek an answer from the court. I propose to answer each of those issues as they arise in the course of this Judgment. Accordingly, this Judgment will be structured as follows:

(a) **Section B** below, which sets out an outline of the facts (paras.4-23);

(b) **Section C** below, which makes some general observations as to the evidence (paras.24-34);

(c) **Section D** below, which deals with the original Contract and provides answers to issues 1, 2, 3 and 11 (paras.35-76);

(d) **Section E** below, which deals with the Supplemental Agreement and the claim for quantum meruit and provides answers to issues 4, 5, 6, 7, 8 and 9 (paras.77-137 below);

(e) **Section F** below, which deals with the defects and provides answers to issues 12, 13, 14 and 15 (paras.138-167);

(f) **Section G** below, which deals with the alleged compromise of April 2004 and provides an answer to issue 10 below (paras.168-171);

(g) **Section H** below, which sets out my conclusions (paras.172-179).

B: AN OUTLINE OF THE FACTS

4 The Property operates as a clothing store in Carnaby Street. It consists of two floors. Prior to the works with which this case is concerned, the shop was on the ground floor with the basement used largely as a store room. There was also a staff toilet and kitchen in the basement. The Merc business is owned and run by the Defendant with assistance from his son, Mr. Sassan Alavi.

5 In late 2002 Mr. Sassan Alavi was keen to remodel the property. He regarded the existing property as old-fashioned and he wanted to modernise it. He was keen to ensure that the proposed modernisation of the property matched the simultaneous rebranding of Merc's products generally and was consistent with both their catalogues and website.

6 Merc had a long and productive relationship with a printing/catalogue company called Preprint Imaging Limited ("Preprint") based in Yorkshire. Accordingly, Sassan Alavi first met contact with Preprint to seek their advice and assistance in relation to the proposed refitting of the property. It was clear from the outset that whilst Preprint would design the refit works and carry out some form of project management role, the actual fitting out works themselves would be performed by a specialist contractor. In January 2003 one of Preprint's employees, Mr. Paul Storey, produced a drawing, later referred to as the "Master Plan", which showed in outline form only the proposed fitting out works.

7 Preprint first identified Hirst Stores and Interiors Limited ("Hirst") as the specialist shopfitting contractors who might carry out the works. Representatives of Hirst were provided with the master plan and visited the site to go through the proposed fitting out works in detail with Mr. Storey. It was

accepted in evidence that such discussions were a vital component in the production of a comprehensive quotation. On 27 th January 2003, Hirst provided an estimate for the works in the total sum of £313,867.23. At that stage, because it was envisaged that Hirst would perform the fitting out works as sub-contractors to Preprint, there would also have been an additional amount payable to Preprint. A document dated 14 th February 2003 identified this amount as £25,000, making a total estimated price for the shopfitting works (if carried out by Hirst) of £338,867.23, plus VAT.

8 There is no dispute that the Defendant regarded this figure as well beyond his budget. An internal manuscript document dated 24 th February referred to the budget figure as being '£200,000 to £220,000'. A letter of 5 th March 2003 to Preprint from Merc, written by Mr. Sassan Alavi, identified a lower budget figure of £150,000. A later letter to Preprint of 14 th March 2003, also written by Sassan Alavi, stated that the Hirst figure was simply too high. Indeed, this letter stated that, as a result of the proposals "Merc cannot continue with the development of the Merc store with Preprint". As we shall see, there was a major dispute about the authenticity of these two letters to Preprint.

9 At some stage thereafter, Preprint turned to the Claimant to see if a more acceptable quotation could be provided. There is a dispute as to whether the Claimant's director, Mr. Russ Barrand, visited the store in March or April or early May 2003. At all events, what is clear is that by the end of May he had considered the master plan, visited the site and discussed the proposed works in detail. This enabled him to produce a quotation dated 28 th May 2003 in the total sum of £246,205. This quotation was sent to Mr. Storey of Preprint because, like Hirst before them, the Claimant company envisaged carrying out the work as Preprint's specialist sub-contractors.

10 It appears that Mr. Storey knew that this quotation, which again allowed nothing for Preprint's own fees, would be considered by the Defendant as unacceptably high. As a result, in early June 2003, Mr. Storey spoke to Mr. Barrand about his price. Mr. Barrand agreed that he would carry out the shopfitting works for £200,000. It also appears that Mr. Storey believed that this figure, together with an additional amount for Preprint's fees to reflect the design work that they had done, and an amount to reflect their main contractor's uplift/profit margin, might be acceptable to the Defendant.

11 Accordingly, on 6 th June 2003, Mr. Storey, on behalf of Preprint, provided a fresh quotation to the Defendant. This quotation was in the total sum of £236,119 plus VAT. Surprisingly perhaps, the quotation made no mention of the £200,000 agreed with Mr. Barrand as the figure for the fitting out works themselves. Instead, the quotation identified a figure for the fitting out works in the sum of £223,619. It was suggested in evidence that the difference was explained by Preprint's main contractor's uplift/profit margin. The amount of Preprint's fee for design and project management was put at £12,500 making the total of £236,119.

12 Two further points need to be made about Preprint's quotation of 6 th June 2003. First, one copy of the quotation in the bundle identified two sums, relating to the air conditioning system and the sprinkler system, which were labelled in typeface as being "PC". No explanation for this notation was provided in the quotation. Predictably there is a dispute about it now, it being the Claimant's case that these sums were somehow provisional and not fixed. The other copy of the quotation in the bundle omits this typed reference altogether, and, although the letters "PC" have been added in manuscript, it is not clear when or by whom. In addition, on the second page of both copies of the quotation, there was a list of exclusions from the proposed works. Amongst these exclusions were "new fire exits as proposed by landlord to ground floor".

13 The Defendant wrote seeking a breakdown of the first element of Mr. Storey's quotation of 6 th June. That was a figure of £95,348 in respect of the site installation work. The letter seeking a

breakdown sent on 1 st July made it clear that the Defendant at least believed that a reduction in that figure would be possible. A manuscript note made by the Defendant attests to the fact that he considered that the figure could be reduced by some £20,000 odd. In the event, the request was passed on to the Claimant and on 7 th July 2003 Mr. Barrand provided to Preprint a breakdown of the £95,348. Of course, since the £95,348 figure was Preprint's own figure in the first place and was not a figure that had been produced by the Claimant/Mr. Barrand, this part of the story was rather odd. It is a point to which I shall return.

14 On 17 th July 2003 there was a meeting between the Defendant, Mr. Storey and Mr. Barrand. At the outset of the meeting it was explained that, because of Preprint's financial problems, the proposal now being made was that the Claimant would carry out the works as the main contractor. The Defendant agreed to this. Although what was said at the meeting is contested by the parties, it appears that there was no direct discussion about what effect, if any, this change had on the Preprint quotation of £236,119. In particular, it appears that there was no mention of the allowance within that figure for Preprint's main contractor's uplift/profit margin, which of course would no longer be applicable. Neither does it appear that there was any discussion about the continuing role of Mr. Storey in circumstances where Preprint would no longer be in any contractual relationship with the Defendant.

15 So far, as we have seen, none of the documents refer to the £200,000 plus VAT which Preprint had agreed with the Claimant. Similarly, there was nothing in the documents which expressly suggested that the additional amount, namely the £36,119 plus VAT, would be payable to Preprint. There is, however, a major dispute between the parties as to whether this breakdown or explanation was made plain to the Defendant at the meeting on 17 th July. It was the Claimant's case in opening that it was. It was the Defendant's case in opening that it was not. This was an important dispute because, on the Claimant's case, this was the only time at which the true make-up of the figure of £236,199 was made known to the Defendant.

16 On 25 th July 2003 the Claimant sent to Preprint, but not to the Defendant, two copies of their Health and Safety documentation and their method statement and risk assessment. This material was largely standard with particular matters identified as being specific to this project. It is noted that the documents said that the "estimated duration" of the fitting out works was six weeks.

17 On the same day the Claimant sent to the Defendant a letter. It is the only item of correspondence other than invoices sent by the Claimant to the Defendant during the currency of the contract. It read as follows:

"We think you for appointing EQ Projects Limited as your main contractor for this shopfitting project for the agreed sum of £236,119.

Please find here our payment terms as agreed by both parties:

•
25 per cent with order – £59,029.75 plus VAT due 4 th August 2003

•
25 per cent when start on site – £59,029.75 plus VAT due 15 th September 2003

•
25 per cent on completion of work – £59,029.75 plus VAT due 27 th October 2003

- 25 per cent 30 days after completion, less 10 per cent retention – £35,417.85 plus VAT due 1st December 2003

- 10 per cent retention (£23,611.90 plus VAT) to be held for 90 days

We trust these terms are acceptable and look forward to receiving your order confirmation."

18 Although the position is not entirely clear on the evidence, it appears that on this basis, the Claimant was to be paid £236,199 plus VAT by the Defendant and would then pass on to Preprint the £36,119 plus VAT. Just to complicate matters further, Mr. Storey left Preprint within days of this letter and was invoicing them separately. It does not appear that these internal payment arrangements were ever mentioned to the Defendant. Later Preprint stopped paying Mr. Storey's invoices altogether and he invoiced the Claimant direct, although there is nothing in the documents which shows the total that was paid by the Claimant to Preprint and/or to Mr. Storey separately.

19 The fitting out works had been expressly timed to coincide with certain works to the structure of the property being carried out by the landlord. The fitting out works started in September 2003. The landlord's works were going on at the same time. It seems that they had an impact on the Claimant's performance. On 14th October 2003 there was a meeting in which some of the difficulties being caused by the landlord's works were discussed by Mr. Storey, Mr. Barrand and the Defendant. Two days later, on 16th October 2003, Mr. Storey sent the Defendant an email identifying some of the difficulties that were being encountered as a result of the landlord's works and setting out arguments as to why any associated costs could be recovered by the Defendant from the landlord. In counsel's openings a wide variety of disputes about both the meeting and the subsequent email were identified. Those disputes narrowed significantly in the oral evidence. I deal with the remaining points in **Section E** below since it is that meeting which is said to be central to the alleged supplementary agreement and the alternative quantum meruit claim.

20 The estimated six week period to which reference has already been made ran to 24th October 2003. It appears that the Claimant was on site for two further weeks and that completion of the works was achieved on 5th November 2003. There were two handover meetings, although the Defendant claimed that he was not invited to attend either. Both were attended by Mr. Storey and the second one was also attended by Mr. Darren Turner, then the manager of the Defendant's shop.

21 The three stage payments due on 4th August, 15th September and 27th October 2003 were all paid. Accordingly, by December 2003, payment had been made for 75 per cent of the works with a 10 per cent retention. However, the final 25 per cent payment due on 1st December 2003 was not paid by the Defendant. Shortly after that on 9th December 2003 the Claimant sent the Defendant an invoice, number 1428, in the total amount of £42,433.95. There were nine items of alleged additional work on this invoice. It was agreed that this was the first time a claim had been made for these items. The first five items were and are disputed by the Defendant. The remaining four items are not disputed, although they have yet to be paid. Eventually invoice 1428 was split. Invoice 1428A was re-issued in the total sum of £37,799.98. That comprised the first five-disputed-items in the original invoice 1428. Those sums remain in dispute and are the sums referable to the alleged supplementary agreement/quantum meruit claims. Invoice 1428B contained the remaining four items in the original invoice 1428 in the total sum of £4,634.08. As I have mentioned, that sum is admitted by the Defendant but has not been paid.

22 The Defendant set out in writing its complaints about the disputed additional items on 8 th January 2004. In particular, in that letter the Defendant described the largest single claim, for additional sums in respect of the air conditioning, as “pure madness”. This was followed up in a letter of 19 th February 2004. That same letter suggested that the final 25 per cent due under the original contract would be paid at the end of February, but such payment did not happen then or at any subsequent date. The letter concluded with a very general statement that the Claimant “has not completed the project to our satisfaction”.

23 On 5 th March 2004 the Claimant wrote to the Defendant complaining about the non-payment of the final 25 per cent of the original contract price, the 10 per cent retention and the two invoices for additional work, 1428A and 1428B. It appears that both before and after this letter there were discussions between the parties in respect of the outstanding sums. On the Defendant’s case, these discussions also addressed at least some of the alleged defects. There were further discussions in early April 2004. It is the Defendant’s case that these discussions resulted in a binding compromise agreement. The Claimant disputes that there was any such agreement. These proceedings were then commenced on 6 th May 2004. Unfortunately, because the case was not transferred to the TCC for a case management conference for over a year, it has taken much longer than it should have to come to trial.

C: GENERAL OBSERVATIONS ON THE EVIDENCE

C1 – The Absence of Documents

24 During his cross-examination of both the Defendant and his son, Mr. Weatherill Q.C. made a number of references to the absence of documents emanating from the Defendant. It was put to the Defendant that this was part of a casual attitude on the part of the Defendant and demonstrated “unbelievable complacency”. It is of course true that there are very few documents emanating from the Defendant, but, as is so often the way in this case, precisely the same criticism, if that is what it is, can be made of the Claimant. There are no documents emanating from the Claimant during the entire currency of this Contract except for the letter of 25 th July set out in para.17 above. It is a sad feature of this dispute that, if the parties had spent a fraction of the thought and effort on recording in writing their contemporaneous discussions that they have put into arguing before me all manner of tangential points, the disputes which I now have to decide would never have arisen.

25 The absence of the sort of documentation that one expects to see generated by a Contract of this sort has two consequences. First, it means that the court must treat with particular care those few documents which do exist and should be very slow to depart from the clear and obvious meaning and effect to be ascribed to such documents. Secondly, it means that the court has to reach conclusions as to matters of dispute between the witnesses on which there are few and sometimes no documents which assist one way or the other. Accordingly, the oral evidence of the witnesses, and my assessment of that evidence, was of much greater importance here than would normally be the case.

C2 – The Oral Evidence

26 This is not a case where it is possible for the court properly to deal with the factual disputes by saying that witness X was telling the truth on all matters and that witnesses Y and Z were either mistaken or lying when they gave their evidence. There are both satisfactory and unsatisfactory elements about the evidence of almost all of those who were cross-examined. Notwithstanding that, as will be apparent from the subsequent sections of this Judgment, I have had no difficulty whatsoever in arriving at clear findings of fact on the basis of that evidence. One of the main reasons for this, as I

observed during the closing submissions, was that in cross-examination there was far less between the witnesses than their written statements had led me to expect.

27 Of the four main witnesses, I consider that the Defendant, Mr. Javid Alavi was occasionally evasive in cross-examination and gave some answers which I do not accept. However, nothing he did or said justified the personal attack on him made during the Claimant's closing submissions. I consider that he was an honest witness and that on a number of important points his evidence was entirely clear and straightforward. His son, Mr. Sassan Alavi, was admirably clear and patently honest, but unfortunately he was not involved in many of the key events in dispute in this case. As to the Defendant's witnesses, I find that, although Mr. Barrand's evidence was unclear and unconvincing in relation to certain aspects of the case, particularly the events at and leading up to the meeting of 17 th July, there were many other matters on which he was straightforward and honest.

28 In the round, I find that it was Mr. Storey, a witness called by the Claimants, who was the best and most reliable witness on the events in 2003, although even then I do not accept the entirety of his evidence. There is no doubt, however, that Mr. Storey was endeavouring at all times to be truthful and he had, in one sense, no direct interest in the outcome of the litigation. In many important respects I find that his candour when giving oral evidence significantly undermined not only parts of his two written witness statements but also important aspects of the Claimant's pleaded case.

C3 – Unsatisfactory Features of the Evidence

29 As I have already said, there were a number of unsatisfactory features of the evidence generally. It is unnecessary, and indeed counter-productive, for me to list them in any detail. For present purposes, it is appropriate to identify just three: the gap between the witnesses' oral evidence and the written witness statements produced on their behalf; the irrelevant and unhelpful suggestions as to concocted documents and the like; and the attempts to challenge points which could simply not be disproved. I deal briefly with each of those features below.

30 There are a number of examples where the witnesses in their written statements made serious suggestions of impropriety and the like when there was simply no basis for doing so. Furthermore, when those witnesses came to give their evidence they did not even try to support what was in their written statements. Let us take as an example Mr. Storey's evidence at para.18 of his first statement that, because the letters to Preprint of 5 th and 14 th March 2003 had not been seen by him at the time, he expressly questioned "the authenticity" of these letters and regarded them as "suspicious". When he was cross-examined on the point, the best that Mr. Storey could do was to say that he could not understand why the letters (which were not addressed to him) had not been shown to him by Preprint. He readily conceded that he had no grounds whatsoever for suggesting that the documents had been fabricated and he accepted that he had "over-egged" his statement. It was not explained why his witness statement made a serious allegation that he could not support.

31 A similar gap can be seen in para.14 of Mr. Sassan Alavi's witness statement, although that at least was not making a suggestion of impropriety. The paragraph deals with the contract meeting on 17 th July. From that paragraph it appeared that Mr. Sassan Alavi played a full part in the important contractual discussions at that meeting. When he gave his oral evidence, however, he made it plain that he took no part whatsoever in those discussions. Again, the discrepancy between what the prepared statement said and what the witnesses freely accepted in cross-examination was never explained.

32 I accept of course that witnesses change or modify their views during the course of giving evidence, but given the riot of irrelevant issues in the present case and the repeated allegations or insinuations of dishonesty on both sides, it is difficult not to conclude that some of the witnesses allowed their written statements to be influenced by outside considerations. The result was a series of statements which the witnesses could not in truth support.

33 I have already referred to the letters to Preprint of 5 th and 14 th March 2003. It was the Claimant's case that these letters were never sent to Preprint and the suggestion, as we have seen, was that they may have been concocted after the event. Apparently, in order to make this assertion good, the Claimant asked Preprint's liquidators to search through the papers in their possession to satisfy themselves that no copies could be found on file. A witness summons was even issued against the liquidator for this purpose. As a result of all this, documents were belatedly produced by the Defendant which appeared to demonstrate that the two letters had been respectively faxed and emailed to Preprint. For the avoidance of doubt, I find these two documents were not concocted and were sent by Mr. Sassan Alavi at the times indicated. But much more importantly, I also find that the documents were completely irrelevant to any of the issues in the case. They added absolutely nothing. I am therefore surprised that so much time and effort went into the attempt to prove that these irrelevant documents were somehow not authentic and/or suspicious.

34 The failure on the part of both sides to agree or accept propositions which they could not disprove was widespread. The Defendant was guilty of this trait on a number of occasions during his cross-examination. The Claimant also challenged and disputed points, such as whether the existing air extraction system was working prior to the fitting out works, when it had simply no evidence to that effect on which it could rely. These endless disputes, often on points that were ultimately irrelevant to the issues between the parties, were responsible for a lengthening of the trial itself.

D: THE ORIGINAL CONTRACT

D1 – The Essentials of the Contract

35 It seemed to me, when considering the papers prior to the start of the trial, that the original Contract had been made when the offer letter from the Claimant dated 25 th July 2003 was accepted by the Defendant's conduct, probably when the Defendant made the first stage payment in the middle of August 2003. Because the case on the original Contract had not been pleaded in that way by either party, I put that proposition to both Counsel during their helpful openings. Both of them accepted it without qualification and conducted the trial on that basis. They confirmed that position in their closing submissions. It seems to me, therefore, that the Contract was formed by the written offer of 25 th July, and its acceptance by conduct by the Defendant the following month.

36 It is trite law that in order to have a building contract there must be agreement as to parties, price and workscope (see **Keating on Building Contracts** , 7 th Edition, para.2-22). The absence of an express agreement as to a specific contract period is not fatal to the existence of a contract because, if necessary, the law will imply a term that the contract will be performed in a reasonable time.

37 In the present case there was, on 17 th July 2003 and thereafter, no dispute as to the parties to the proposed contract. The Claimant would be the main contractors carrying out the works and the Defendant would be the employer responsible for making due payment.

38 There is no dispute about the contract price as set out in the letter of 25 th July 2003. It was £236,119. That price, according to the offer letter, was unqualified. Accordingly, it seems to me that

whatever the position in the Preprint quote of 6 th June as to the two PC sums, any such qualification was irrelevant by the time of the Defendant's letter of 25 th July 2003. This was, and was treated by both parties as being, a fixed price contract. There is one remaining dispute about whether or not there was a further term which split the fixed price into £223,619 for construction costs and £12,500 for fees. That is dealt with below.

39 As to the contractual workscope, the parties are agreed that the workscope was that outlined on the master plan, as supplemented by what Mr. Storey agreed were "exhaustive discussions" between the parties at the Property. Mr. Storey accepted in cross-examination that such discussions were vital in order to identify properly the work to be done. I note that this curious approach was the subject of a criticism by the landlord's agent at the time. In his email of 22.10.03 he asked, "How do you price the works if there is not a full specification?" This unsatisfactory way of delineating contract works worth almost £250,000 (namely partly in writing, partly oral) made disputes as to contractual workscope almost inevitable. Fortunately, there is only one such dispute of any significance. That is whether or not the contract workscope included work to the air extraction system in the basement. I deal with that issue separately in **Section D2** below, paras.41 to 45.

40 As to the contract period, there is nothing in the letter of 25 th July 2003 that deals with time at all. Therefore, as a straightforward matter of construction, there was no express agreement as to the contractual period. The work simply had to be carried out within a reasonable time. I also note that the reference in the other documents of 25 th July, those that were not sent to the Defendant, was to an "estimated" period of six weeks. Accordingly, on either view, there was no binding contract to the effect that the fitting out works would take six weeks only. There was no agreement that both parties were either obliged or entitled to achieve such a specific completion date.

D2 – Did the Contract Workscope Include the Air Extraction System (Issue 1) ?

41 For the reasons set out below, I have concluded that neither the stripping out of the existing air extraction system nor the installation of a new system were included the contractual workscope.

42 The first reason for this is that there was no reference anywhere in the documents to stripping out or replacing the air extraction system in the basement. It is not an item identified by Hirst in their breakdown of the proposed works. It is a not an item identified by Preprint in their breakdown of 6 th June. It was therefore not an item of work which anybody reading the relevant documents could reasonably have concluded was within the contractual workscope.

43 Secondly, it is plain that neither Hirst nor the Claimant ever made any allowance in their respective prices for stripping out or replacing the air extraction system. Both Hirst and the Claimant were shopfitters by trade and therefore would have relied on this kind of work being carried out by specialist sub-contractors. Other similar mechanical works were carried out on behalf of the Claimant by Acme. There was no evidence that any quotation for air extraction system work had been requested by Hirst or later by the Claimant.

44 Thirdly, I do not accept that it was agreed or orally that the proposed works at the property would include the stripping out or replacement of the air extraction system. I consider that this was a matter on which the Defendant, possibly for understandable reasons, was mistaken. Plainly he was not helped by the unsatisfactory way in which the contract workscope was described. On this point, however, it is right to say that the evidence of Mr. Storey was extremely persuasive. He had no real interest in the outcome of this particular dispute and he was emphatic, no matter how many times the

point was put to him, that the air extraction system was never discussed as part of the contractual works.

45 For these reasons I reject the suggestion that the Claimant was obliged, pursuant to the Contract, to strip out the existing air extraction system and to replace it with a new one. I consider that the question as to the Claimant's obligations when fitting the new suspended ceiling, to take into account the existing air extraction system, to be a different point entirely, and I address that when considering the relevant element of the Defendant's counterclaim.

D3 – What was the Preprint in the Pre-Contract Negotiations (Issue 2) ?

46 Preprint's role was clear. They were the designers of the fitting out works. Until shortly before 17 th July 2003 it was intended that they would also be the main contractors with the fitting out works themselves being sub-contracted to a specialist shopfitter.

47 It should be noted that if the work had gone ahead in the way envisaged prior to 17 th July, there would have been no professional appointed to look after the interests of the Defendant. There would simply have been the Defendant as employer, Preprint as the main contractor and the Claimant as the sub-contractor to Preprint actually performing the works. Thus, Mr. Weatherill Q.C.'s apparent surprise that, following the meeting on 17 th July, the Defendant did not have someone independent looking after his interests was, I find, misplaced. At no time would the Defendant ever have had a representative to fulfil that role. The Defendant trusted Preprint, Mr. Storey and the Claimant to do a proper job. I am bound to observe that on the evidence that I heard at no time did either Preprint or Mr. Storey or the Claimant ever advise the Defendant that he should have employed someone to fulfil this function on his behalf.

48 Once the Claimant had become the main contractor and the design was complete, the only remaining question would be whether Preprint, through Mr. Storey, had any continuing function at all. On one view, with Preprint no longer acting as the main contractors, they did not. However, everybody assumed that Preprint, through Mr. Storey, did have some sort of limited project management role to play and it appears that Mr. Storey did have such a continuing involvement during the carrying out of the works. I note that, even on his case, that involvement was considerably less than it would otherwise have been because of Preprint's failure to pay him for his ongoing work (see para.39 of his first statement). His precise role and therefore Preprint's role was never discussed, formulated or agreed, either on 17 th July or at any other time. It is perhaps best summarised as the exercise of an overall project management function liaising from time to time with both the Claimant and the Defendant.

D4 – Who was Paul Storey Representing (Issue 3) ?

49 The short answer is that Mr. Storey was representing Preprint. He was their representative during and after the contract discussions.

50 It appears that the Claimant submits that Mr. Storey was in some way the Defendant's agent and that, on the contrary, the Defendant contends that Mr. Storey was the Claimant's agent. I have no hesitation in finding that he was neither party's agent. This was not a conventional situation where an architect or a project manager was appointed by the Defendant employer at the outset to monitor his interests during the progress of the works. As I have already said, Mr. Storey and Preprint had no clear role once the switch to the Claimant as main contractor had been effected. Whilst, for the reasons I have given, I consider that Mr. Storey had an overall project management role, this was

performed as a third party rather than an agent, and he represented neither the Claimant nor the Defendant when fulfilling that function.

D5 – Misrepresentation/Breach of Contract (Issue 11)

(a) The Defendant's Case

51 It is the Defendant's case, made by way of a late amendment, that he entered into the original contract as a result of a fraudulent misrepresentation. The representation relied on was to the effect that the cost of the shopfitting works themselves was £223,619 and that the design and project management fees were £12,500, as per Preprint's quotation of 6 th June. This was fraudulent, says the Defendant, because, unknown to him, the cost of the works had actually been agreed at £200,000, so that the amount he was actually paying to Preprint for design and project management was £36,119. In consequence, the Claimant seeks to recover as damages either the £36,119, or, more appropriately, the £23,619 (being the £36,119 less the £12,500 shown in the quotation of 6 th June as referable to Preprint's design and project management fees).

52 In the alternative, this claim for damages is put by way of a claim for breach on the basis that, in breach of contract, "the price for which the building works was to be carried out was not £223,619 but £200,000 plus VAT …". This pre-supposes that there was a term of the Contract, based principally on the Preprint quotation of 6 th June and the absence of explanation thereafter, that the cost of the works was £223,619 with the design and project management fees being an additional £12,500 (see para.38 above)

(b) The Documents

53 The documents relevant to this part of the case have been set out at paras.8-17 above. In particular, the quotation of 6 th June 2003 put together by Mr. Storey and sent out in the name Preprint plainly stated that the construction costs would be £223,619 with a design and project management fee of £12,500, giving a total of £236,119. Furthermore, Mr. Storey admitted in cross-examination that this did not reflect directly the agreement which had been reached with the Claimant at this stage, namely that the fitting out works would actually cost just £200,000.

54 Mr. Storey also admitted at paras.22 to 23 of his first written statement that the £200,000 figure and the consequential uplift in the amount payable to Preprint were not identified in the quotation because, as he put it, "I was not sure how the Defendant would react to the level of commission which Preprint was seeking … I therefore did some amendments" to the Claimant's original quotation. I am, of course, extremely troubled by the admission that the actual position was deliberately obscured from the Defendant because it was thought that he might not be happy if he knew the true breakdown.

55 The next relevant document was the breakdown provided by the Claimant to the Defendant on 7 th July 2003 of the first element of Mr. Storey's quotation, namely the £95,348 in respect of the site installation costs. Since this was a figure produced originally by Mr. Storey without reference to Mr. Barrand, I cannot accept that there was no liaison between Mr. Storey and Mr. Barrand before Mr. Barrand produced a breakdown of that same figure. It simply cannot be a coincidence that Mr. Barrand was able to arrive at precisely the same figure. Mr. Barrand agreed that it was not a coincidence but was unable to explain how the breakdown had been produced to tally so exactly. I find, therefore, that there must have been some liaison between the two men relating to Mr. Storey's

quotation of 6 th June, and that, accordingly, the Claimant became a party, at least to that extent, to the quotation of that date.

56 Mr. Storey's oral evidence sought to justify the £236,119 figure by saying that the separate sum of £12,500 was just for design and project management and that within the £223,619 he had allowed for a main contractor's uplift/profit margin on the £200,000 base cost agreed with the Claimant. Thus, he said, within his quotation of 6 th June, there was a mark up of £23,619 in Preprint's favour to reflect the normal main contractor's uplift on their sub-contractor's work. He described it as Preprint's "profit margin on EQ's work". There was of course no independent evidence to support this construction of the 6 th June quotation and it is, at least in part, contradicted by Mr. Barrand's breakdown of 7 th July of the figure of £95,348, because that identified no percentage mark-up whatsoever for Preprint on the single biggest item in the quotation.

57 But for present purposes I am prepared to accept that Mr. Storey is right and that the £23,619 to be charged on top of the Claimant's £200,000 must be taken to represent Preprint's main contractor's uplift/profit margin. On that basis, as I suggested to Mr. Storey during his cross-examination, when it became apparent on 17 th July that Preprint would have no role as the main contractor whatsoever, that uplift/profit margin fell away and could no longer be due and payable. Mr. Storey accepted, as he was bound to do, that that would be right. It was, he conceded, "a fair point". Accordingly, even on Mr. Storey's explanation of the make-up of the 6 th June 2003 quotation, any continued justification for the £23,619 could only remain if the true breakdown of the £223,619 was explained to the Defendant on 17 th July and he expressly agreed to pay it on the basis of that explanation. I therefore turn to the evidence of that meeting.

(c) The Meeting on 17 th July

58 Mr. Storey admitted that neither he nor Mr. Barrand went to the meeting with the express intention of explaining to the Defendant that the figures were made up of £200,000 payable to the Claimant and £36,119 payable to Preprint. It also appears to be common ground that no such statement was directly made at the meeting. The highest that Mr. Storey could put it during his cross-examination was that he was fairly sure that these figures emerged in some way in answer to specific questions raised by the Defendant.

59 The key passage in Mr. Storey's evidence was as follows:

"Q The £200,000/£36,000 split was not discussed?

A. It was brought up in conversation. We did not necessarily sit down to discuss it. It was brought up by way of a reply. The Defendant asked if any further sums were due to Preprint. We said, no, it was all in the figures. It was mentioned.

Q That was just the overall price?

A. It was not specifically said: £200,000 and £36,000.

Q It was not said?

A. Not in those terms, no."

This seems to me to be a clear statement that the true split was not explained or revealed to the Defendant at the meeting, even indirectly.

60 Mr. Barrand's evidence was that he had taken a back seat during the meeting. Whilst at one point he indicated that it was his recollection that the breakdown had been discussed by Mr. Storey, he also expressly confirmed that there was no direct discussion on the true split. Furthermore, he emphasised that this was not a discussion in which he had had any involvement at all. As he put it: "that was Mr. Storey's task".

61 It was the Defendant's clear evidence that at the meeting on 17 th July he was not told of the £200,000 figure and was not told that £36,119 would be payable to Preprint. As I have already pointed out, it was common ground that no reference was made to the fact that, since Preprint were no longer going to be the main contractors, the figures might have to be adjusted to reflect the absence of a mark-up.

62 On the basis of the evidence set out in paras.58-61 above, I have no doubt whatsoever that the breakdown of the £236,119, with £200,000 going to the Claimant on the one hand and £36,119 being paid to Preprint on the other, was not explained to the Defendant at the meeting on 17 th July. It is clear that neither Mr. Storey nor Mr. Barrand had thought it was necessary to offer such an explanation. I find that no such explanation was provided either directly or indirectly by way of an answer to some other question. Of course, in the circumstances, I would regard such a method of communication of such an important point as wholly unacceptable in any event.

63 Confirmation, were it necessary, for my finding that the breakdown between the £200,000 and the £36,119 was not given at the meeting on 17 th July, can be found in Mr. Storey's internal email of the following day, 18 th July. This was an email that he sent to Bob Buttress at Preprint. This identified the point that Mr. Barrand's agreement to the £200,000 was still verbal at that stage and followed what Mr. Storey expressly referred to as "our meeting with Russ Barrand Tuesday, 3 rd June, where he agreed this figure with you and I". It was suggested by Mr. Letman during his cross-examination of Mr. Storey that if, which the Defendant disputed, the figure of £200,000 had been the subject of a tripartite discussion and agreement at the meeting on 17 th July, the email would have said so. In addition, it would then have been wholly unnecessary for Mr. Storey to refer back to a meeting six weeks earlier for the evidence that the £200,000 figure had been agreed by Mr. Barrand. I accept those propositions. I find it inconceivable that if, as Mr. Storey maintained, the £200,000 figure had somehow emerged in answer to other questions during the meeting on 17 th July, he would not have said so in this email.

(d) Findings of Fact

64 I find that the breakdown prepared by Mr. Storey on behalf of Preprint on 6 th June 2003 was misleading because it made no reference to the £200,000 figure as the basic cost of the shopfitting works. I find that if Mr. Storey had intended to add to the £200,000 figure an amount for a main contractor's uplift/profit margin that figure should have been shown separately. I find that it was not so shown because Mr. Storey was concerned about the Defendant's reaction to the express identification of such a figure. I find that Mr. Barrand, in providing a breakdown of one part of the quotation of 6 th June 2003, was adopting it at least to that extent. I find that at no time at the meeting on 17 th July was the true position explained to the Defendant, although plainly it should have been. Furthermore, it is common ground, and I find, that at no time in the meeting on 27 th July was it discussed that if the difference between the £200,000 and the £223,619 had previously been explicable by reference to a main contractor's uplift/profit margin, the justification for such a mark-up had now completely disappeared.

65 I accept and acknowledge that Preprint were entitled to an amount in respect of their design and project management. There is no evidence to suggest that the figure quoted by Preprint themselves of £12,500 was unreasonable. Indeed, I note that on 3 rd July 2003, when Mr. Storey was justifying to the Defendant his failure to achieve reductions below £236,000, he said that he was willing to let the design be used by a contractor of the Defendant's choice "for 7.5 per cent of the final contract price". Since we now know that the Claimant would have carried out the work for £200,000, that puts a figure on Preprint's design/project management services of £15,000, a figure close to the £12,500 previously quoted. It was put to Mr. Storey in cross-examination that if the Defendant had known that the cost of the works themselves was just £200,000 he would have agreed to the £200,000 and the 7.5 per cent because that would have produced a total of £215,000, which was less than the £236,119 he was being offered. Mr. Storey replied that the Defendant had thereby "missed an opportunity". Such a glib reply ignored the simple fact that the Defendant did not know about the £200,000, because Mr. Storey had not told him about it, so he therefore never knew about this so-called 'opportunity'either. I am afraid that Mr. Storey's answer also reveals that the Defendant's trust in him and Preprint was sadly misplaced.

66 I find that if the true breakdown of the £236,119 had been explained to the Defendant, as it should have been, he would have realised that the Claimant was prepared to carry out the work for £200,000, the very sum which, as a budget figure, the Defendant himself had articulated on a number of occasions previously. I do not accept that he would have then rejected the Claimant's offer of £200,000 simply because he had found out the true figure so late. Whilst I am sure he would have been disappointed not to have had the position explained to him earlier, his ire would have been mainly (and rightly) directed at Mr. Storey and Preprint. I find that he would have contracted with the Claimant for the sum of £200,000 and he would have agreed the £12,500 previously agreed with Preprint for their design and project management. I find that, not only would he not have agreed to pay Preprint the additional £23,619, that is to say the £36,119 less the £12,500, but he also would have had no reason so to do. Had he thought about it even for a minute, Mr. Storey would have agreed that no such sum would have been justified: the 'fair point' he acknowledged to me.

67 In consequence, I find, on the evidence and in particular upon the 6 th June quotation and the absence of any discussion of those figures on 17 th July, that it was a term of the contract that the fixed price of £236,119 was agreed on the (incorrect) basis that the cost of fitting out work would be £223,619 and the design/ project management fee would be £12,500.

(e) Conclusions

68 I wholly understand why, on the facts as I have found them, the Defendant raised the allegation of fraudulent misrepresentation. There was a false representation which induced the Defendant to enter into a contract that was in a sum £23,619 higher than it should have been and £23,619 higher than could have been justified. But for the false representation, the contract sum would have been £212,500 plus VAT.

69 However, I consider that, on balance, it would be wrong to find that there was dishonesty on the part of the Claimant, and dishonesty, of course, is a central ingredient in a case of fraudulent misrepresentation – see **Derry v. Peak** (1889) 14 A.C. 337 at 359. First, the basic misrepresentation was in the quotation of 6 th June and, until 17 th July, this was principally, if not wholly, Mr. Storey's quotation not Mr. Barrand's. It was not until 17 th July 2003 that Mr. Barrand fully took over that quotation. If it never crossed Mr. Storey's mind that the quotation was now wrong because it allowed for the profit of a non-existent main contractor, it would be harsh to find that not only should Mr.

Barrand have articulated the point in his place, but that he also acted dishonestly when he failed so to do.

70 Secondly, although I consider that Mr. Storey was deceitful (i.e. in failing to give the Defendant the true split because he feared the consequences) the fundamental feature of his evidence on this part of the case was his failure to think things through (i.e. the absence of Preprint as main contractor meant that there could be no main contractor's uplift or profit margin payable to Preprint). This was perhaps because he approached the whole issue in what I consider to be a muddle-headed way. At one point in his evidence, when he was trying to justify the £23,619, he said that "someone should have got the profit"; it did not seem to have occurred to him that this was money that the Defendant should not have been paying in the first place, and had only agreed because he had not been told the true position.

71 Mr. Barrand's role in all this was not above suspicion: in particular, his breakdown of Mr. Storey's own site installation figure (with no allowance for any profit margin) which came to exactly the right total. However, on balance, I do not consider that he was dishonest. I also bear in mind that Mr. Barrand had absolutely nothing to gain from the failure of Mr. Storey to explain the true position to the Defendant. He was only ever going to get the £200,000 he had agreed with Preprint back in early June.

72 For these reasons, I reject the pleaded allegation of fraudulent misrepresentation. In answer to questions from me in closing, Mr. Weatherill Q.C. accepted that on one view of the facts – indeed, the view I have taken and set out above - there had been a negligent misrepresentation, but since that was not pleaded, he said that the Defendant could not avail himself of this point. Mr. Letman did not apparently demur from this.

73 However, pleading points aside, the fact remains that, on all the evidence which I have summarised above, it cannot be disputed that, if the £23,619 had been identified on 17 th July as the non-existent main contractor's uplift/profit margin, no one would or could have argued that it was justified any more: Mr. Storey's "fair point". Thus the Contract would have been agreed in the lower sum of £212,500 plus VAT. Accordingly, it seems to me that, on any view, the Claimant can have no entitlement to the £23,619. In the circumstances, the Defendant's alternative case, for breach of contract, set out at paras.48(a), 48(j) and 48(k) of the Amended Defence and Counterclaim, is made out. There was a breach of the term of the contract set out in para.67 above, a point to which Mr. Storey had no answer when the point was put to him in cross-examination. Thus, the sum of £23,619 plus VAT (£27,752.32) falls to be deducted from the sum otherwise due to the Claimant under the original Contract and credited to the Defendant as damages for breach of contract. To put the same point in another way, there has been a complete failure of consideration in respect of the £23,619 plus VAT.

D6 – Sums due under the Original Contract

74 Under the original contract the Defendant was liable to pay the Claimant the remaining 25 per cent claimed by invoice 1411 in the total amount, including VAT, of £41,615.97. In addition, the Claimant was also entitled to be paid the 10 per cent reduction making a further amount, inclusive of VAT, of £27,743.98. That makes a total of **£69,559.95** .

75 In addition to this amount there is the sum of **£4,634** payable by reference to invoice 1428B. There is no dispute that this amount is also due. Although the items of work were not included in the original

contract workscope they were additional works requested by Darren Turner, the manager of the Defendant's shop. The invoice makes plain that this work was requested by Mr. Turner.

76 Accordingly, these three sums produce a gross amount due to the Claimant pursuant to the original contract of **£73,994.03** . From that falls to be deducted the sum of **£27,752.32** (see para.73 above). Thus, the net sum due to the Claimant in respect of the original contract prior to any considerations of the counterclaim for defective work is therefore **£46,241.71** .

E: THE SUPPLEMENTAL AGREEMENT/QUANTUM MERUIT

E1 – The Pleaded Claim

77 The claim for the additional works is put by reference to an express agreement of 14 th October 2003. The principal claim is pleaded at paras.9-11 of the Particulars of Claim as follows:

"9 Whilst the Claimant was undertaking works under the initial contract it became clear that additional work over and above those agreed in the initial contract would be necessary in order for the works to meet the Landlord's specifications. Without such works the original contract could not be complied with. The extent of the works and the necessity therefore were explained to the Defendant at a site meeting on 14 th October 2003.

10 The Defendant agreed at the meeting that the Claimant should undertake the works and that following satisfactory completion of the works the Defendant would pay to the Claimant the costs of such works upon receipt of an invoice.

11 The Claimant, in accordance with the agreement of the Defendant, undertook the additional works. The meeting and the agreement of the Defendant is evidenced by an email from the Claimant to the Defendant dated 16 th October 2003 which is annexed hereto."

78 There is an alternative claim at paras.15-18 of the Particulars of Claim for a quantum meruit. It is said that this supplemental claim arises "if it is found that there was no supplemental contract due to a lack of agreement in relation to the cost of the works …" This pleaded claim for a quantum meruit again expressly relies on the alleged agreement of 14 th October 2003 (para.16), but seeks to get round any point that might be taken by the Defendant that, although he agreed in principle to be liable for the additional items, he did not agree to the cost of the works. No request to carry out such work is identified in the Claimant's pleading other than the one on 14 th October 2003.

79 In his closing submissions, Mr. Weatherill Q.C. submitted that the quantum meruit claim also operated if, in the absence of a supplemental agreement, it was found that the work had been carried out with the Defendant's acquiescence. This way of putting the quantum meruit claim was not pleaded. However, Mr. Weatherall expressly accepted that it was, in any event, fact- dependent and if it was found that the Defendant had not acquiesced in the carrying out of the additional works at the meeting on 14 th October or at any other time "that is a problem for the Claimant".

80 Accordingly, on any view, my findings as to what was said and done on 14 th October are going to be critical to this part of the case, whether the claim is put by way of a supplemental agreement or as a quantum meruit.

E2 – The Evidence of the Meeting on 14 th October 2003

81 I am in no doubt that, on the Claimant's evidence alone, the claim for allegedly additional work, whether put under the supplemental agreement or for a quantum meruit, must fail in its entirety. The

Claimant's oral evidence, again in contrast to the written witness statements, made plain that there was never any agreement, either express or by acquiescence, on the part of the Defendant that he wanted or would be liable for any alleged additional works.

82 The key passage in Mr. Storey's cross-examination was as follows:

"Q Mr. Barrand wanted to pull people off site. That was not acceptable to Mr. Alavi?

A. Correct …

Q It was not reasonable to expect the Defendant to pay the additional costs?

A. Mr. Barrand wanted to leave. He could not do the works in a proper way. Mr. Alavi would not allow him to do that.

Q Mr. Alavi was entitled to do that?

A. He did say, 'I'll make the bastards pay'.

Q There was no agreement that Mr. Alavi would meet the bill? A. No. We expected him to get the costs from the landlord.

Q Mr. Alavi did not agree?

A. There were no figures. He did say he wanted Mr. Barrand to stay on site."

83 Mr. Storey was there accepting that Mr. Alavi had never agreed to pay for any additional works and since no figures were discussed he could never have agreed specific figures in any event. Not for the first time the basis of the Claimant's pleaded case was fatally undermined by Mr. Storey's candour in the witness box.

84 I have already indicated that I found Mr. Storey to be, in the round, the most reliable witness in relation to these matters of detail. I consider that the passage of his oral evidence that I have set out in para.82 makes it plain that, whilst various matters were raised with the Defendant at the meeting, at no time did he agree to or accept liability for any items of additional work whether in principle or in respect of particular costs. Accordingly, on Mr. Storey's evidence, both of two ways in which the claim is put must fail. To put it another way, contrary to paras.10 and 16 of the particulars of claim there was no agreement or acquiescence on the part of the Defendant at the meeting on 14 th October.

85 I consider that the evidence of Mr. Barrand was entirely consistent with that of Mr. Storey. I identify the following passage in his cross-examination:

"Q There was no agreement to meet your addition costs, was there? A. Not on the face of the meeting. He did not sanction the extra costs at that meeting but he wanted to keep us on site.

Q Why did you say he agreed to meet the costs?

A. He agreed it with Storey …

Q So it is all based on implication which you say was an agreement?

A. I take it on board that it was agreed with Paul Storey …

Q After that, nothing further was said about extra work?

A. Not by myself."

86 Again, therefore, it can be seen that, on the basis of Mr. Barrand's answers in cross-examination, there was no evidence of any sort of agreement between the parties on 14 th October. On the contrary, the highest that it could be put was that, because the Defendant made it clear that he did not want the Claimant to leave site, this somehow implied an agreement to pay for additional works.

87 I should also say that, if there were any doubts about Mr. Barrand's answers in cross-examination, the position was made plain during his re-examination. Mr. Barrand was asked whether Mr. Alavi appreciated that the Claimant would be looking to him, Mr. Alavi, to pay for the additional costs. Mr. Barrand said, "Probably not". There was then this exchange:

"Q He would not have appreciated that you were looking to him to pay these costs?

A. Probably not, no."

Mr. Weatherill Q.C. argued that this clear answer was contrary to the other evidence and should be disregarded. For the reasons I have already given I consider that this evidence was, in fact, entirely consistent with both the evidence of Mr. Storey and the earlier evidence of Mr. Barrand. It confirms my finding that there was no agreement as alleged on the part of the Defendant.

88 My conclusion that there was no agreement as to liability for additional works on the part of the Defendant is entirely supported by Mr. Storey's own email of 16 th October 2003. This is the document referred to in the pleading as somehow supporting the existence of the alleged agreement. I do not consider that it does any such thing. This email which, contrary to the pleading, was sent by Mr. Storey to the Defendant, and did not come from the Claimant, sets out in some detail some of the problems being created as a result of the simultaneous landlord's works. It identifies some of the reasons why, in Mr. Storey's view, any additional costs should be borne, or at least contributed to, by the landlord. There is no reference anywhere to any agreement on the part of the Defendant that these costs would, in the first instance, be paid by the Defendant to the Claimant. Mr. Storey accepted that in cross-examination. Further, the only reference to Mr. Barrand is the suggestion in the penultimate paragraph that he would be going to the site that week-end "to make an assessment of the situation". The entire email contradicts the Claimant's pleading that all matters in respect of the additional works were agreed on 14 th October. It is my view that, in truth, this email supports the Claimant's oral evidence, outlined above, that there was no agreement of the kind alleged on 14 th October 2003.

89 I should add for completeness that the Defendant said that there was no agreement on his part either to be responsible for or to pay for the alleged additional work. In fact, he said that he expressly refuted any such suggested liability. His version of events is, for the reasons I have given, entirely in accordance with the Claimant's oral evidence.

90 Accordingly, I find there was no agreement of the kind pleaded that would support either the claim pursuant to the alleged supplemental agreement or the claim in respect of a quantum meruit. That is sufficient to reject the claim for additional work and to answer Issues 4 to 9 inclusive. However, in order to deal with all of the detailed points that have been raised, I go on to deal with the reasons for the so-called additional works and the five individual items of claim. It will be seen from my analysis below that, even if I were somehow wrong about the Claimant's evidence of the meeting on 14 th October, I still have no hesitation in dismissing these claims in any event.

E3 – The Reasons for the Claims for Additional Works

91 It was common ground that the only reason why there was a claim for additional works at all was the carrying out by the landlord of his own works in and around the property. As Mr. Barrand put it, “The problems were due to the amount of work around us”. It was expressly agreed by Mr. Storey that these works and their effect on the Claimant’s shopfitting works could be categorised as follows:

(a) the fitting of new shop fronts to the Property;

(b) the movement of the fire exit from one wall of the basement of the Property to another;

(c) the works in the service yard outside the Property.

92 I look at each of these three reasons for the additional works below. I am in no doubt that they were all matters for which allowance could and should have been made by the Defendant in the Contract sum. In other words, I do not consider that the risk that these elements of the landlord’s work might have had an impact on the Claimant’s shopfitting works should be borne by the Defendant. On the evidence, given the Claimant’s state of knowledge and the absence of any express provisions in the Contract allocating this risk to the Defendant, these matters were all at the Claimant’s risk.

(a) The New Shop Fronts

93 Both Mr. Storey and Mr. Barrand confirmed in their respective cross-examinations that the Claimant was always aware that the new shop fronts would be installed during the currency of the shopfitting works. They both accepted that this meant that there was clearly always going to have to be co-ordination between the two sets of works and the two sets of contractors. The letters from the landlord’s agents, Hodnett Martin Smith, of 18 th July 2003 confirmed that “the shop fronts will commence to be installed on 29 th September 2003”. It is not entirely clear from this letter whether this was a reference to the shop fronts for the whole frontage or just the Property, but obviously this was a point which Mr. Storey and/or the Claimant could have clarified if they had considered it to be of importance. They did not do so.

94 Accordingly, on the agreed evidence, the Claimant was always going to have to carry out its work at the same time as the fitting of the new shop front, giving rise to a clear co-ordination obligation on the part of the Claimant. Allowance for this should and could have been made in the Contract price. There was nothing in the Contract between the Claimant and the Defendant which sought to limit or exclude the Claimant’s co-ordination role in any way and there was no evidence that the actual co-ordination exceeded that which the Claimant could reasonably have allowed for at the time of tender.

(b) The Fire Exit

95 The fire exit was moved from one basement wall to another. The work was carried out by the landlord’s contractors. Again, it is clear that the Claimant knew that this work was going to be carried out. Indeed, the list of exclusions in the quotation of 6 th June 2003 expressly included the new fire exits proposed by the landlord. Again, Mr. Storey and Mr. Barrant both fairly conceded that the fact that these works would be carried out during the fitting out works was known to everybody.

96 Accordingly, given that the Claimant knew that this work was going to be carried out during the fitting out works and therefore knew that a certain amount of co-ordination was going to be required, it simply cannot be argued that the mere fact that this work was being carried out in October somehow gave rise to an entitlement on the part of the Claimant to additional monies. Again, there is nothing in the Contract which would trigger or support such a claim.

(c) The Service Yard

97 The landlord carried out extensive work in the service yard beyond the property. Mr. Storey freely conceded that this area was not part of the Defendant's premises and was not within his control. The work in this area clearly had an impact on the ease with which the Claimant could gain access to the property by this route, but since the Claimant had no right to such access in the first place it was quite impossible for them to argue that in some way the carrying out of this work by the landlord entitled them to extra money from the Defendant.

98 Indeed, I consider that this point was expressly conceded by Mr. Storey during his cross-examination:

"Q This was a matter of EQ's contractual risk?

A. Yes, I accept that."

99 In his own cross-examination Mr. Barrand attempted to argue that this matter might be the Defendant's responsibility because at some point the Defendant had indicated that the Claimant could park its vans in the service yard. However, it was quickly apparent that any such promise, which was denied by the Defendant, was not made until after the Contract had been entered into. Indeed, at the time of the Contract it is clear that, quite properly, the Claimant did not assume that it could use this area at all. The method statement and risk assessment documents state plainly that any "deliveries to be made via rear entrance at the main street to be agreed with landlord". Moreover, the same document emphasised that the location for parked vehicles would have to be agreed once the Claimant had arrived on site.

100 Accordingly, it is plain that this third and final reason for the claim for additional works was again a matter that was at the Claimant's risk and could not, on any view, be regarded as the Defendant's responsibility under the Contract.

(d) Withholding of Information

101 With a wearisome predictability, the Claimant's written statements, having no basis for imposing a contractual responsibility on the Defendant for the three matters set out above, instead endeavoured to argue that in some way the Defendant had withheld information about the landlord's works from the Claimant, and it was this failure which gave rise to a cause of action for additional sums. This case was set out in Mr. Storey's first statement at paras.44-46 and in particular at paras. 68-69 which contained the surprising allegation that "the over-run was caused by the Defendant not telling the Claimant about the works to the rear of the shop and the windows not being installed". A similar point is made at para.32 of Mr. Barrand's statement and its reference to "the Defendant's failure to accurately inform us of the landlord's plans".

102 On analysis, there was nothing to support this allegation. No documentation and no other evidence was identified to support the suggestion that the Defendant had deliberately withheld information from the Claimant. Furthermore, as happens so often in this case, when the Claimant's witnesses were cross-examined on the point, they quickly and emphatically denied that they pursued these written criticisms of the Defendant.

103 This allegation therefore failed. Its failure meant that the three reasons for the claim for the alleged additional works identified during the course of the evidence were matters which, pursuant to

the Contract between the parties, were known to the Claimant and were at the Claimant's own risk. There was nothing to suggest that they were at the Defendant's risk.

(e) Conclusions

104 It is clear that the three reasons identified by the Claimant for the claim for alleged additional work did not justify any claim against the Defendant under or for breach of the Contract. Therefore, there can be no factual basis for this claim, irrespective of my findings in relation to the meeting on 14th October. This is a second, independent, reason why I am satisfied that the claim for additional works must fail. There is simply no factual justification for it. Again, however, in order to do justice to the detail offered to me by way of evidence, and if I am wrong about that second reason as well, I consider that, on an analysis of the five individual items of claim, no sum would be due from the Defendant to the Claimant in any event.

E4 – The Individual Claims

(a) Introduction

105 The Contract in this case was silent as to the parties' obligations and responsibilities in relation to additional work. However, that simply means that the Contract was subject to the usual implied terms to the effect that the Defendant could order reasonable additional works and that, if he did so, he was liable to pay a reasonable cost for such work. That, after all, was the basis for the additional work ordered by Darren Turner which found its way into invoice 1428B in the total sum of £4,634 and for which liability is not disputed.

106 Accordingly, it is instructive to consider these individual items of claim against that background, asking oneself each time: what was the Defendant's instruction or request to carry out additional work? What was the additional work in question? What were the consequences of the request? Even on the basis of this simple analysis, for the reasons set out below, I am in no doubt that each of the five claims for additional works that were the subject of the disputed invoice 1428A is doomed to failure.

(b) The Air Conditioning

107 There was no request by the Defendant for any additional works in respect of the air conditioning system. It is completely unclear what, if any, works over and above that which the Claimant agreed to perform in July 2003 were actually carried out. Quantum of the pleaded claim is calculated by reference to a gross figure of £24,066.90 with a subtraction of the amount of £11,520 taken from the Preprint estimate of 6th June, giving a net sum claimed of £12,546.90. No breakdown or particulars have been provided of either of those two figures. There are one or two documents which purport to support other unpleaded figures but they have not been satisfactorily proved and their contents are unclear. For these myriad reasons the claim for additional monies in respect of the air conditioning system simply does not get off the ground.

108 Invoice 1428A, although not the pleading, appears to put this item of claim on the basis that the £11,520 was a provisional sum of some sort and was therefore not fixed. The claim appears to assume that the price for the air conditioning was variable and could be replaced with a figure representing actual costs, together with the ubiquitous mark-up, at the end of the Contract. To the extent that this remains the basis of the Claimant's claim, I regard it as misconceived. The contract document in this case that set out the agreed price was the Defendant's offer letter of 25th July accepted by conduct the following month. That identified a fixed price for the work of £236,119. That was not qualified in

any way. It was not said that it included any variable items. Accordingly, I find that the fixed price which was agreed did not include any variable or provisional sums and to claim the contrary is, in my judgment, untenable.

109 I have already made the point that the only pleaded request in relation to alleged extra works to the air conditioning system was the one said to have been made by the Defendant on 14 th October. For the reasons set out in paras.81 to 90 above I have, on the Claimant's own oral evidence, rejected any suggestion that there was any such request. No other request from the Defendant to the Claimant in respect of alleged additional work to the air conditioning was pleaded. More importantly, no other request or so-called acquiescence on the part of the Defendant could be discerned from the evidence of either Mr. Storey or Mr. Barrand. Without any request or acquiescence, there can be no claim for additional work in respect of the air conditioning, whether that claim is put by reference to the supplemental agreement or as a claim for quantum meruit.

110 It is also completely unclear as to what, if any, works were carried out at the Property which were additional to those which the Claimant agreed to perform in July 2003. Paragraph 44 of Mr. Barrand's witness statement is far too vague and generalised to be of any assistance on this point. In addition, I have already made the point that it was the Claimant's obligation to co-ordinate their works with the other works being carried out by the landlords. Accordingly, the direct and foreseeable consequences of that co-ordination would not constitute additional work in any event, but would instead be part of the original contract workscope. What, therefore, were the additional works said to have been carried out? Why, how and in respect of what base workscope were such works said to be additional? The evidence provided no answer to those basic questions. It is a surprise to me that no real effort was made by the Claimant to answer such simple questions.

111 I have already said that this claim for the net sum of £12,546.90 is calculated by taking a total figure of £24,066.90 and deducting £11,520. That smaller figure was part of the Preprint quotation of 6 th June 2005. Thus, it had nothing to do with the Claimant. What it included and what (if anything) it excluded is wholly unknown. Why or how it should be deducted in the way sought is unexplained. More importantly still, there is no basis or breakdown of the final figure of £24,066.90. There are no sub-contract documents as between the Claimant and Acme which would allow me to identify how and why Acme were seeking further sums from the Claimant and whether such claims could be passed up the contractual chain. There are all manner of reasons why such sums might be sought by and payable to Acme: some of them may suggest a potential liability on the part of the Defendant, but others, such as for instance the Claimant's failure to give Acme full information at the outset, or the operation of terms peculiar to the sub-contract between the Claimant and Acme, could not be the Defendant's responsibility in any event. In the absence of the relevant evidence, it is simply not possible for me to find on the facts a liability on the part of the Defendant, whether as pleaded or at all.

112 As to the figures, I note that, even assuming liability, the experts have only been able to agree the quantum of this item in the sum of £3,102 plus VAT. This amount apparently comes from the operation of the alleged PC sum arrangement, which I have rejected as a matter of law. The experts say expressly in their agreed note of 19 th July 2005 that "there was insufficient information" to allow them to identify any further sums that might be due. The single joint expert in his report of 24 th October 2005 also says that there is insufficient information to express "a firm view" as to what, if anything, might be due. After this second report, and in answer to something of a loaded request from the Claimant, Acme provided a one page manuscript document which purported to provide particulars of a new figure of £7,257 plus VAT. This was dated 28 th October 2005. However, this breakdown,

which was not considered by any expert and not spoken to by any witness, was plainly unsatisfactory, including as its principal item a global amount for labour in the sum of £4,455. This figure was wholly unsupported and appeared to me to be unjustified. Mr. Storey said that he had seen nothing to support this claim. Mr. Barrand also said that he had not seen any back-up of any sort from Acme and was guessing at what might be included ("We had to alter electrical work, that might be it"). In those circumstances, it would be quite wrong to allow any claim based upon this late and unexplained document.

113 Accordingly, no basis for the claim for item 1, the air conditioning, has been made out. The claim fails for any one of the numerous reasons noted above.

(c) Fire Alarm System and Intruder Alarm System

114 Invoice 1428B puts these two items in a similar way to the claim in respect of the air conditioning. Two figures are identified as being the sums originally quoted, namely £2,149 in respect of the fire alarm and £1,187.90 in respect of the intruder alarm system. Two figures for actual costs (£3,388 for the fire alarm and £2,474.60 for the intruder alarm) are then identified, giving rise to a claim for what is said to be the outstanding balance of £1,239 in respect of the fire alarm system and £1,286.70 in respect of the intruder alarm.

115 Accordingly, it would appear from this invoice that these claims are also put on the basis of some sort of a prime cost agreement. However, this claim is even more flawed than the one in respect of the air conditioning. At least for item 1 there was an earlier quotation which, in one version, identified the air conditioning system as a PC sum. There is no quotation at all which identifies either the fire alarm system or the intruder alarm system as a PC sum. That was not how they were shown in Preprint's quotation of 6 th June. In fact, there is no quotation which even identifies the figure of £2,149 for the fire alarm and £1,187.90 for the intruder alarm. These omissions were not made good in evidence. Thus, the original figures, let alone the alleged actual costs, have not even been identified, much less proved.

116 Accordingly, there was no justification for treating these two items as being in any way a claim on a PC sum. The basis of the claim, as alleged in the disputed invoice 1428A, was simply not made out.

117 Further and in any event, there was no request by the Defendant for this alleged additional work to be carried out. Again, the pleaded case as to the request itself, was put solely on the basis of the meeting of 14 th October. Again, for the reasons set out in paras.81-90 above, I have rejected that claim. No other request from or acquiescence by the Defendant was identified in the evidence.

118 Again, there was no evidence of what work was carried out or how and why such work could be properly described as "additional". The general points made in paras.110 and 111 above are repeated. Again, para.44 of Mr. Barrand's witness statement was wholly inadequate for this purpose. Mr. Storey's email of 16 th October 2003 suggests that additional site visits may have been made by the alarm sub-contractor as a result of the landlord's work. For the reasons which I have already explained at paras.90 to 104 above, basic co-ordination with the landlord's works was part of the Claimant's contractual responsibility. That very point was made in the landlord's agent's email of 31 st August 2003 in respect of this alarm work. There is therefore no basis in fact or in law to assume that just because the Claimant's sub-contractors have made a claim against the Claimant the Defendant is automatically liable for the same claim, whatever it might be. Such a liability would depend on the evidence, and there was no evidence which indicated any liability on the part of the Defendant.

119 In addition, I am not able to say whether those sums were properly claimed by the sub-contractors against the Claimant because I have not been provided with a copy of the relevant sub-contracts. Neither do I know whether these sub-contracts put the Claimant back-to-back contractually as against the Defendant. In other words, what might have been additional under the sub-contracts would not necessarily be additional under the main contract between the Claimant and the Defendant.

120 There is no breakdown or particulars of the extra costs claimed. Mr. Storey was unable to help, confirming that he had seen no details of the extra costs claimed. The experts agreed that, save for one amount of £285, "there was insufficient information" to allow them to justify the additional sums claimed.

121 For all these reasons, therefore, I reject the claims for additional sums in respect of the fire alarm and the intruder alarm systems.

(d) The Prolongation Claim

122 This claim appears to operate on the basis that:

(a) the contract period was six weeks with a completion date of 24 th October 2003;

(b) the Claimant was entitled to take his men off site in the middle of this period because of the ongoing landlord's works;

(c) the Defendant did not agree to the Claimant taking his men off site;

(d) accordingly the men stayed on site and the works were completed two weeks late, on 5 th November 2003;

(e) thus the Defendant is liable to the Claimant for the cost consequences of that two week delay.

123 In my judgment, the Claimant has failed to demonstrate almost everything that would be necessary to justify such a case. I am bound to say I was surprised that this claim was maintained at all, let alone in the full amount of £13,392.50, together with a further hotel allowance of £2,660. However, since it was, it is necessary to deal with each element of the claim to explain why I consider it to be so flawed.

124 The first point of course is that there was no contractual agreement that the Contract works would take no more than six weeks: see para.40 above. The letter of 25 th July which constituted the offer made no mention of any agreed period for the works. I have already pointed out that the other documents of 25 th July, which were not sent to the Defendant, identified that the six weeks was simply an estimated period, no more and no less. Accordingly, the Claimant had a reasonable time to complete the works. There was no evidence before me as to whether six, eight or even 15 weeks was a reasonable time in all the circumstances. Accordingly, the fact that the work took eight weeks was not, without more, a matter for which the Defendant could be liable to the Claimant in fact or in law. Moreover, given that, on the Claimant's case, the delays were due to the carrying out of the landlord's works, of which the Claimant accepted it was aware and for which a proper allowance should have been made, the evidence suggests that, under the Contract, it may have been the Claimant who contractually was responsible for any alleged over-run: see paras.91 to 104 above.

125 The Contract, of course, contained no express terms entitling the Claimant to make a claim for prolongation costs. In the absence of an agreed contract programme such a claim would have been impossible to mount in any event. Thus, any prolongation claim could only be put as a claim for

damages for breach of contract, and for the reasons which I have given there was no breach of this Contract on the part of the Defendant, either pleaded or discernible in the evidence. The claim therefore fails on the facts. Again, it might be said that it was the Claimant who came closest to breaching the contract when, on 14 th October, Mr. Barrand threatened to withdraw his labour from site. It is trite law that a contractor cannot withdraw his labour unless by consent, and that in normal circumstances such withdrawal amounts to a wrongful repudiation of the contract (see **Keating on Building Contracts** , 7 th Edition, paras.684-697). However, given that the Defendant would not allow the men to be withdrawn in any event it seems that nothing, in fact, turns on the threatened withdrawal.

126 Assuming, contrary to the foregoing, that the prolongation claim was valid in principle and/or on the facts that still leaves its quantification. I was surprised to read para.37 of the Claimant's closing submissions, which suggested that the prolongation costs were justified because of the content of the Claimant's letter to its own solicitors of 22 nd June 2005 and, still more unusually, its solicitor's letter to the Defendant's solicitor of 8 th July 2005. This submission ignored the simple point that, after these two documents had been produced, on 19 th July, both experts agreed that, despite their contents, "there was insufficient information" to justify the claim and that the hours shown on the time sheets "seem excessive bearing in mind they were allegedly doing nothing". In his cross-examination even Mr. Barrant agreed that the hours claimed "sounded excessive", but he confirmed that he had not been through the sheets that formed the basis of the claim. No attempt was made by the Claimant either in evidence or in submissions to address, let alone answer, the experts' damning conclusions as to the quantification of this item of claim.

127 For all these reasons, the claim in respect of prolongation costs was doomed from the start. It fails for all the reasons identified above.

(e) Re-Tiling

128 The re-tiling claim is for £1,045. There was no evidence of any request from the Defendant in respect of additional tiling work. It is, in truth, difficult to work out precisely what, if any, additional work was actually carried out. It is noted that the experts could not determine how many tiles had been affected. It may be that, unlike some of the other items, this is an item where some additional work may have been carried out, but it is quite impossible to be clear as to what was done or why. It is also unclear whether the Defendant obtained any benefit from the alleged additional work.

129 Further and in any event, there is no certainty as to the amount of the claim. The joint experts agreed on 19 th July that "there was insufficient information regarding the additional costs of £1,045 plus VAT to form an opinion". Subsequently, to try and plug this gap, a three-line breakdown had been obtained from the tiling sub-contractor. However, that breakdown does not make clear what work was being done, when or why. Therefore, it does not seem to me that that breakdown can modify, or should modify, the conclusion reached by the experts.

130 Accordingly, for those reasons I reject the claim I reject the claim in respect of the tiling.

E5 – Answers to Issues 4-9

131 Whilst I believe that it is clear what my answers are to Issues 4 to 9 inclusive, it is as well that I set them out.

132 Issue 4: there was no supplemental agreement made on or about 14 th October in respect of the execution of the works referred to in invoice 1428A. I have reached that conclusion on the basis of the Claimant's own evidence.

133 Issue 5: this issue does not arise because there was no supplemental agreement, but further and in any event I have found that none of the items of work that are the subject of this claim were shown to be properly items of additional work giving rise to a liability on the part of the Defendant to pay extra monies.

134 Issue 6: the Claimant has no entitlement to payment on a quantum meruit basis. As was accepted in the Claimant's final submissions, the quantum meruit claim depended on almost exactly the same facts as the supplemental agreement claim. Everything came back to the meeting on 14 th October 2003, particularly as the Claimant had no evidence of any request for, or acquiescence in, extra work on the part of the Defendant on any other date or at any other time. Since I find without hesitation that the Defendant did not accept responsibility for any items of additional work on the 14th, and did not request or acquiesce in the carrying out of additional work at any other time, there can be no basis for the quantum meruit claim.

135 Issue 7: for the reasons set out above I have already found that there was no request for additional work. Therefore, nothing further is due.

136 Issue 8: the Claimant has no entitlement to prolongation costs for the reasons set out in paras. 122-127 above.

137 Issue 9: the quantification of the prolongation costs is irrelevant since there is no entitlement. As a matter of principle, however, I have already noted that the principal item of this claim, namely the hours shown on the time sheets, was described by the experts as "excessive".

F: THE COUNTERCLAIM FOR DEFECTS

F1 – The Air Extraction System

138 For the reasons set out in paras.41-45 above, I have concluded that:

(a) the Claimant had no obligation to strip out the existing air extraction system;

(b) the Claimant had no obligation to install a new air extraction system.

On the basis of those findings, the majority of this item of counterclaim falls away.

139 However, I have come to the equally firm conclusion that the Claimant should have made proper allowance for the existing air extraction system when undertaking the shopfitting works. In particular, the Claimant should have ensured that the new false ceiling in the basement accommodated the existing air extraction system in just the same way as the old ceiling had done. The Claimant failed to do so and, to that limited extent therefore, I find that the Claimant was in breach of contract.

140 Prior to the shopfitting work I find that the air extraction system in the basement worked satisfactorily and was used, albeit mainly in the summer. It was obviously old and antiquated but, since the Claimant was not asked to replace it, that is hardly a matter that can be reflected in any assessment of the counterclaim. The continued use of the air extraction system was apparent from the evidence of Mr. Robson, who had worked for the Defendant in 2003. He said that "it certainly was working before the refit, it cleared out the stale air in the basement." Other evidence that the system

still functioned satisfactorily came from the Defendant, who referred at para.6 of his statement to “a functioning air extractor in the shop and a separate one in the toilet”.

141 The Claimant’s witnesses could not deny this. They did not know whether the system worked or not. Mr. Storey said expressly he did not know one way or the other and expressly agreed that the toilet had an extractor fan. Mr. Barrand also said in cross-examination that he did not know whether it operated because, as he fairly put it, “it was not within the realm of our scope of works”.

142 I further find as a fact that the old ceiling which the Claimant had agreed to replace contained grilles which allowed the air to pass into the ducting behind. That was the evidence of Mr. Barrand who expressly agreed that “there were vents in the ceiling”. It is fair to point out that Mr. Robson did not specifically notice any grilles but, as he put it, “I guess there must have been an opening somewhere”.

143 When the Claimant came to replace the suspended ceiling in the basement, it did not put in new ceiling grilles to replace the old grilles that had been stripped out. The result of this was that the existing air extraction system was rendered inoperable at a stroke. The system could not work because the air passages to the ducting were blocked off. The Claimant, therefore, failed to replace like with like when it fitted the new suspended ceiling.

144 It was Mr. Barrand’s evidence that this failure came about because the Claimant was instructed by the landlord’s agent to block off the system. He accepted that, although there were vents in the ceiling, “we were told by the landlord’s project management that it was no longer functional”. Thus, he said, he never considered further how the ceiling and the air extraction system would work together. He said that he did not know whether this had been wrong or not.

145 In my judgment, the Claimant had no right to accept purported instructions from anyone other than the Defendant, or possibly Mr. Storey. At the very least Mr. Barrand should have checked that the blocking-off of the system by the new ceiling was something which the Defendant wanted him to achieve. His decision to accept instructions from a third party not knowing whether “they were wrong or not” and failing to check with anyone who might even potentially have been representing the Defendant was a mistake and a breach of contract. It was perhaps another example of the failure to co-ordinate. The Defendant was entitled to expect a new ceiling which replaced the old. Since the old had grilles, the new ceiling should have had grilles too.

146 For these reasons, I do not consider that the Claimant is liable for the £12,000 plus VAT and other sums which are claimed in relation to a new air extraction system. However, because I consider that the Claimant should have installed the grilles in the ceiling, I consider that the Claimant is liable for the smallest item of this part of counterclaim, namely the cost of putting those grilles in now. That is calculated by the single joint expert in the sum of £4,700 plus VAT, £5,522.50.

147 The Claimant also objected to any award of damages, even for this lesser sum, on the basis that the air conditioning, which was a different system and which the Claimant did install, provided an air cooling system and therefore the air extraction system was effectively redundant. Although that was the submission made, there was no evidence on which it could be based. Indeed, the evidence of Mr. Robson, the manager, expressly contradicted this argument. Mr. Robson said that when the summer of 2004 came he thought that the air in the basement was stale and when he went to try and do something about it, he wondered why the air extraction system was not being used. It was only then that it was discovered that the system could no longer functional because of the absence of grilles in the new ceiling. The system was not therefore redundant. Furthermore, part of the air extraction

system related to the kitchen and the toilet in the basement and the removal of stale air from those areas would not be affected with or dealt with by the air conditioning system in any event.

148 Accordingly, it seems clear to me that there is a loss to the Defendant represented by the cost of the installation of the grilles. New grilles would put the Defendant back into the position that he would have been in if the Claimant had performed the contract properly in the first place. For the avoidance of doubt, I consider that it is wholly unnecessary to close the store while this work is carried out. Mr. Robson's evidence was that, for obvious reasons, he would prefer the store to be closed whilst the works but there was no evidence that this was either technically or commercially necessary. The claim for lost profit for any store closure is therefore rejected. Thus in relation to this first item of counterclaim I allow it in the limited sum of £4,700 plus VAT, £5,522.50, together with an additional sum of £500 plus VAT (£587.50) as the agreed "out of hours supplement", making a total of £6,110.

F2 – Tiling

149 The evidence from Mr. Robson was that the tiling was defective in the area around the door and that the tiles were lifting due to inadequate adhesive. Indeed, according to Mr. Robson, this was a widespread problem. It is clear that there was a problem in the area around the door. The experts agreed that there was a slight dip there due to the way in which the screed had been laid. They said that would exacerbate ponding. On balance, therefore, I find that the tiling problem was due to the Claimant.

150 I also note that in cross-examination Mr. Barrand appeared to accept a liability in relation to the tiles. He was referred to his letter to his solicitors of 13 th November 2004 which said:

"My tile contractor can and will rectify this problem quite easily. It is a repair and does not warrant a new floor as suggested."

He was certainly right about that. He confirmed in cross-examination that at that time he was prepared to carry out the necessary remedial work and that today he stood by that offer. Even in re-examination he said, "We would have accepted the floor tiles but this was not solely our fault."

151 Accordingly, on all the evidence I find that the Claimant is liable in relation to this remedial work. The cost of that work is agreed at £700 plus VAT, a figure of £822.50.

F3 – Display Units/Paintwork

152 The allegation is that the original units were not primed, as a result of which the paint flaked and they needed repainting. There is no doubt that the Defendant has paid £800 plus VAT for painting, but the state of the units before this work was carried out and the reason why the units had to be repainted is unclear. The parties' experts were unable to reach any sort of view. It appears that the Defendant was told by someone else that the units had not been primed originally, but it was unclear who told him that and what such a view was based on. There was no direct evidence to that effect.

153 Accordingly, I do not believe that the Defendant's allegation in respect of the paintwork has been made out. Further confirmation of that, if required, comes from the Claimant's letter to its solicitor of 13 th November 2004 where, following an inspection, Mr. Barrand stated that, "We did not notice any paintwork peeling within the shop area which was obvious". If the repainting had not been done, then there was no defect that Mr. Barrand could see that justified repainting. If, as may well have been the case, the repainting had already been done by then, it was done without any reference to Mr. Barrand

at all and it would be quite wrong to hold him liable for matters which he has had no opportunity to inspect, let alone rectify. Either way, therefore, I decline to allow this item of counterclaim.

F4 – Counter Top

154 It is my understanding from para.50 of the Claimant's written opening that liability for this item is agreed in the amount of £200 plus VAT, £235. The concession of liability was plainly right given the content of para.2 of Mr. Barrand's letter to his solicitor of 13 th November 2004.

F5 – Leaking Air Conditioning Unit

155 There can be no doubt on the evidence that the air conditioning unit has leaked and therefore needs to be put right. There is also no doubt that the single joint expert has confirmed that, in his view, the Claimant is liable in respect of this item. The problem is quite simple, an air lock in the drainpipe within the emergency staircase storeroom. The cost of putting this right is estimated at £700 plus VAT, a total of £822.50.

156 Despite this clear conclusion, the Claimant maintains a defence to this item. The defence relies on the terms of a warranty in respect of the air conditioning. It is said that the Defendant should have utilised this warranty in order to get the remedial work carried out free of charge. Accordingly, the argument is that, because the warranty was not utilised by the Defendant, there can be no counterclaim against the Claimant.

157 I regard this argument as wrong in principle. In the construction field it is common for contractors to provide their employers with warranties from specialist sub-contractors, suppliers and manufacturers. Those warranties provide a direct route by which the employer can contact the sub-contractor or supplier if there are problems with the relevant work or equipment, but the provision of such warranties can have no impact whatsoever on the basic contractual liabilities of the contractor unless the contract expressly provides for such an eventuality. Put another way, the contractor cannot normally avoid his own contractual obligations by pointing to the existence of a warranty from a third party. It is again trite law that the existence or otherwise of a warranty, like the existence or otherwise of an insurance policy, cannot affect the wrongdoer's basic contractual liability (see the cases summarised by His Honour Judge Smout Q.C. in **Design Five v. Kenniston Housing Association** [1986] 38 B.L.R. 123, and **Keating on Building Contracts** , 7 th Edition, para.8-47A). I therefore agree with Mr. Letman's contention that the existence of the warranty is res inter alios acta . I, therefore, reject this line of defence.

158 In addition, I should also say that the Claimant has not demonstrated that a claim existed under the warranty in any event. Whilst it is clear that a warranty was provided, and I so find, I do not have a copy of it and I do not know what it covered. The single joint expert's report at section 5.3 confirms that the problem was in respect of the installation of the air conditioning, not the equipment itself. It is not at all clear whether such a problem would have been covered by the warranty. Most warranties of this sort relate to the equipment only and not to the works of installation.

159 Accordingly, it seems to me that the Claimant is liable for the defect in the air conditioning unit in the sum identified by the single joint expert of £822.50, including VAT. The existence of a warranty is wholly irrelevant in law and on these facts.

F6 – Staff Toilet

160 This item concerns the plumbing in respect of the staff toilet. The Claimant in final submission said that the item was disputed. However, it is clear to me that, because the experts both agreed that the problem was either concerned with manufacture or fitting, the Claimant must be liable in respect of this item under the Contract. No positive defence has been put forward and Mr. Barrand in re-examination said of the toilet, “We would be willing to correct it”. I therefore find that the Claimant is liable for this item. The costs are agreed at £400 plus VAT (£470).

F7 – Summary of Counterclaim Items

161 I have rejected all but the smallest element of the counterclaim in respect of the air extraction system. I have rejected the counterclaim in respect of the paintwork. Largely on the basis of the agreed expert evidence I have allowed the other items of the counterclaim.

162 The items I have allowed total as follows:

(a) F1 – Air Extraction System £6,110.00

(b) F2 – Tiling £822.50

(c) F4 – Counter Top £235.00

(d) F5 – Leaking Air Conditioning Unit £822.50

(e) F6 – Staff Toilet £470.00

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Total **£8,460.00**

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F8 – Answers to Issues 12-15

163 I think that my answers to Issues 12 to 15 above are clear. However, for the avoidance of doubt, they are summarised below.

164 Issue 12: as to the air extraction system I accept the Claimant’s case that it had no liability in respect of either the stripping our or the replacement of a new air extraction system. The Claimant was, however, liable to replace the old ceiling with a new ceiling which contained grilles so as to allow the existing air extraction system to continue to function.

165 Issue 13: the defects which I have accepted are those set out above and summarised in para.162 above.

166 Issue 14: I expressly reject the submission that the Defendant’s failure to utilise the warranty during the relevant warranty period somehow means that the Defendant is not able to make a valid claim against the Claimant: see paras.156 to 159 above.

167 Issue 15: I consider that the remedial works which I have identified could be carried out without the need for closing the store: see in particular para.148 above. I expressly disallow any claims on the basis that the store could or should be closed.

G: THE COMPROMISE OF APRIL 2004

168 As I previously noted, there were discussions between Mr. Barrand and the Defendant in March/ April 2004 as to whether or not they could resolve their differences. It is clear that in April 2004 the Claimant's solicitor, Mrs. Malik, became involved in this process. Unusually she spoke to both parties. The Claimant placed reliance on her evidence to demonstrate that there was no compromise agreement. However, I should say that I regarded her evidence as unsatisfactory. This was chiefly because her witness statement did not tally with her attendance notes. The reason given for this was that the attendance notes had been redacted to maintain privilege, although the mere fact that the attendance notes had been disclosed at all indicated to me that there had been a waiver of privilege in any event. It was unclear where the alleged waiver started or stopped or how it could be said to be only partial. It is always unsatisfactory for the court to be given a series of documents which contain less than the whole story with no other way of filling the gaps. I therefore make plain that I decide the compromise issue on the evidence of Mr. Barrand and the Defendant alone.

169 It seems to me on the evidence that the Defendant was pushing hard for an agreement in late March/early April. The basis of the proposed agreement was that the claim for additional works (paras.77-137 above) would be withdrawn; the defects (omitting the point about the air extraction system because that was not a complaint that had yet been made) would be dealt with by the Claimant; and payment would be made of the outstanding sum of £73,994.03 (paras.74-76 above). I have no doubt that Mr. Barrand considered this proposal seriously and that there may have been a misunderstanding between the two men as to whether or not there was actually an agreement to that effect.

170 However, I am in no doubt that, as a matter of law, there was no binding compromise agreement on these terms. It seems to me clear that the purported agreement must have been the one to which the Defendant referred in his letter of 8 th April 2004. That there was a detailed discussion at this time is borne out by Mr. Barrand's evidence: see para.59 of his statement where he refers to a meeting in early April 2004. However, I note that even the Defendant by his letter was seeking confirmation that there was indeed an agreement in these terms and that payment would only be made following receipt of such confirmation. That suggests to me that, even if the Defendant was confident that agreement had been reached, it was not final and binding until it had been confirmed by the Claimant and/or its solicitor. No such confirmation was ever received. It appears that Mr. Barrand, although interested in the proposal, sought legal advice upon it and, for whatever reason, he never confirmed any final binding acceptance of that proposal. There was thus no contractually binding agreement between the parties.

171 For those reasons I confirm that in answer to issue 10 there was no binding compromise agreement as pleaded by the Defendant. I quite understand that the existence of the Defendant's offer in the terms indicated may have a relevance on the question of costs.

H: CONCLUSIONS

172 I consider that the straightforward disputes in this case have been submerged by a series of irrelevant issues. The simple ingredients of claims for extra work have been forgotten and replaced with credibility issues and the like. As I have set out fully above, this criticism applies principally to the Claimant's case, although the Defendant cannot be regarded as entirely blameless.

173 I consider that the sum of **£73,994.03** is due and owing from the Defendant to the Claimant under the terms of the original agreement.

174 I find that this sum falls to be reduced by **£27,752.32** as a result of the breach of contract concerning the make-up of the contract sum (paras.51-73 above).

175 I find that the claim for additional works fails in its entirety. I regard that claim as fundamentally flawed for a whole series of different reasons (see paras.77-137 above). Accordingly, the maximum sum due to the Claimant prior to a consideration of the counterclaim for defective works was **£46,241.71** .

176 I find that the counterclaim in respect of the air extraction system fails save in respect of the cost of putting in the grilles to the false ceiling which, in my judgment, was the only element of the work allegedly omitted which should have been done as part of the original contract workscope (paras. 138-148 above). I also find that the counterclaim in respect of the paintwork fails (paras.152-153 above).

177 I find that the counterclaim in respect of the remaining smaller items is proved (see paras. 149-162 above). The counterclaim is thus worth a total of **£8,460** .

178 Accordingly, the Claimant is entitled to £46,241.71 less £8,460, a total of **£37,781.71** . There will be judgment for the Claimant in that sum, together with interest.

179 I reject the contention that the claims were compromised as a result of the discussions and negotiations in March/April 2004. It seems to me that the parties came close to a deal but no binding agreement was ever reached. However, I am bound to conclude that both parties would have been much better off if they had indeed reached a binding agreement along the lines proposed by the Defendant in March or April 2003.

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