MR JUSTICE COULSON

Approved Judgment

Neutral Citation Number: [2009] EWHC 3365 (TCC)

Case No: HT-08-97

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

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 21st December 2009

Before:

THE HONOURABLE MR JUSTICE COULSON

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Between:

FITZROY ROBINSON LIMITED **Cla**

- and -

MENTMORE TOWERS LIMITED

Defe

(A company incorporated in Jersey

And

FITZROY ROBINSON LIMITED **Cla**

- and -

(1) GOOD START LIMITED

(2) ANGLO SWISS HOLDINGS LIMITED **Defen**

(Both companies incorporated in Jersey)

-No 3-

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Mr Peter Fraser QC and Mr Zulfikar Khayum (instructed by **Laytons**) for the **Claimant**

Mr Paul Darling QC (instructed by **Mishcon de Reya**) for the **Defendants**

Hearing dates: 10th, 14th and 15th December 2009

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Judgment

Mr Justice Coulson:

1. INTRODUCTION

1. The Claimant (FRL) is a well-known architectural practice. The Defendants own a number of adjacent properties in Piccadilly, including the In & Out Club, and Mentmore Towers, in Buckinghamshire. Between the summer of 2005 and December 2007, FRL acted as architects in connection with the Defendants' ambitious scheme to develop both sets of properties as part of an exclusive private member's club. Amongst other things, FRL had obtained planning permission on both elements of the project by the time of the suspension of their work in December 2007.

2. The Defendants failed to pay FRL's fees in accordance with the terms of the three Contracts agreed between FRL and each of the three Defendants. These proceedings began life, therefore, in April 2008 as a relatively simple fee claim by FRL, based on the unpaid instalments set out in those Contracts. The total sums claimed were about £1.5 million, inclusive of some interest. The Defendants raised a variety of issues in their defence and counter-claim, including a number of related allegations concerning Mr Jeremy Blake, the individual director then with FRL, who was crucial to the Defendants' decision to appoint FRL as the architects on the project, but who, unknown to the Defendants, had already tended his resignation by the time that the Contracts were finally agreed in March-May 2006.

3. Pursuant to my order of 3.10.08, there was a trial of all liability and causation issues in May and June of this year. My subsequent Judgment, dated 7th July 2009, [2009] EWHC 1552 (TCC), can perhaps be summarised as follows:

(a) I construed the payment terms of the Contracts largely in the way advanced by the Defendants although I also found that they were in breach of contract in failing to pay the instalments as they fell due;

(b) I concluded that FRL had been guilty of fraudulent misrepresentation in failing to disclose to the Defendants, before the Contracts were finalised, their knowledge that Mr Blake was not going to be with FRL for much of the projected period of the project. However, I found that, on the evidence then available, the only demonstrable loss flowing from the misrepresentation was the duplication between Mr Blake and Mr Hobart, his successor, a head of claim now assessed as being worth about £40,000;

(c) I concluded that the allegations against FRL of professional negligence and/or delay were unfounded and I dismissed them in their entirety.

4. Following the handing-down of that Judgment, as envisaged by my original order of October 2008, all that was left were issues of quantum. These essentially divided into three parts: the ascertainment of the precise fees due to FRL pursuant to the Contracts; the amount of the adjustment, if any, arising out of or in connection with the fraudulent misrepresentation or any other finding against FRL identified in the Judgment; and the claims for interest. Slightly to my surprise, the parties have been unable to agree these quantum disputes, although, by the time of the quantum hearing, many of the matters which were previously in dispute had been agreed, either by the experts or as part of the commercial negotiations between the parties.

5. Accordingly, this final Judgment is concerned with the remaining issues of quantification. It is structured in this way: at **Section 2**, I set out the contractual basis of the fee claim; at **Section 3**, I set out my conclusions as to the correct approach to the assessment of the fees due, and at **Section 4**, I set out my assessment of those fees. Thereafter, at **Sections 5 and 6,** I deal with the effect, if any, of the fraudulent misrepresentation and the other matters raised by the Defendants. At **Section 7**, I deal with the detailed arguments as to interest. There is a short summary of my conclusions at **Section 8**. I am again grateful to leading counsel for their assistance.

2. THE CONTRACTUAL BASIS OF THE FEE CLAIM

6. Section D1 of my Judgment of 7.7.09 set out the relevant contractual provisions concerned with payment and my conclusions as to their proper construction. In essence, I concluded that the parties had agreed a lump sum Fee in respect of each of the three Contracts, and those fees were broken down into monthly instalments, which were (in the absence of the necessary notices from the Defendants) payable in full as they fell due. However, I also accepted the Defendants' case that, at any quantum hearing, those instalments were capable of adjustment, depending on whether or not it could be shown that the scope of the Services was altered and/or whether those Services were performed in accordance with the Programme. It appears that, for the reasons outlined in the next three paragraphs, much of that analysis has now been superseded by events.

7. As noted above, on 24th December 2007, the Services were suspended by the Defendants and they have never been reactivated. In those circumstances, so it seems to me, FRL's entitlement to fees was governed by clauses 15 and 16.3 of the Contracts. Clause 15 was entitled 'Suspension' and was in these terms:

"The Employer shall be entitled to suspend the Services by written notice. Upon any suspension of the Services the Consultant's fee entitlement shall be as provided for in Clause 16.3. If a suspension lasts more than 6 months the Consultant may make a written request for the Services to be resumed and if no such instruction to resume is given within 28 days after such request the engagement of the Consultant under this Agreement shall then terminate"

8. Clause 16.3 was entitled 'Obligations following Termination/Suspension of the Services' and was in the following form:

"In the event of any termination of the Consultant's engagement for any reason (other than those set out in Clause 14.1) or upon any suspension of the Services the Consultant will be entitled to a fair proportion of the Fee for any of the Services properly performed up to and including the date of termination or suspension having regard to the instalment schedule set out in Schedule [2] and the payments already made to the Consultant under this Agreement."

9. Accordingly, whatever may have been the precise contractual mechanism for the adjustment of the instalments in Schedule 2 prior to any suspension of FRL's Services, it seems to me that, following that suspension, there can be no doubt that FRL's entitlement was governed by clause 16.3. By the conclusion of the quantum hearing, I did not understand this point to be in dispute between the parties. Accordingly, the first question for the court is the proper calculation of "a fair proportion of the Fee for any of the Services properly performed" by FRL, in accordance with clause 16.3.

3. THE CORRECT APPROACH TO ASSESSMENT

10. There were three different methods put forward by the parties as being an appropriate way of calculating a fair proportion of the Fee pursuant to Clause 16.3. For the reasons set out below, I have concluded that only one of these alternatives represents the proper method in all the circumstances.

a) The Time-Based Claim

11. FRL's principal way of putting their fee claim was by reference to the time expended by the FRL team on these two elements of the project. There can be no doubt that this claim was based on valid contemporaneous time sheets, which Ms Vela checked at the time, and which were incorporated by FRL into monthly financial reports. The hours recorded on these time sheet were then valued at the

rates used by FRL in their original bid. This calculation resulted in a net claim, taking into account the sums already paid, of £508,336 in respect of Mentmore and £540,540 on the two sets of Piccadilly properties.

12. Whilst I consider that this is a useful exercise, because it identifies the maximum sum that might now be recoverable by FRL, I do not consider that this is the most appropriate method of arriving at a fair proportion of the Fee under clause 16.3. There are a number of reasons for that conclusion.

13. First, it seems to me that the court is concerned with calculating a fair proportion of the Fee (emphasis supplied). The Fee is defined in the Contracts as the fee payable in accordance with Schedule 2. That is the total lump sum agreed in relation to each of the three Contracts, namely £2,291,736 on Mentmore Towers; £3,800,037 on 90-95 Piccadilly; and £955,668 on 100 Piccadilly. Accordingly, as a matter of construction, what is required by clause 16.3 is a calculation – an apportionment - based on those three lump sums. A calculation which is based on hours worked, and then multiplied by the bid rates, seems to me to be some way away from the methodology envisaged in these Contracts.

14. This leads onto the second point. FRL's entitlement under these Contracts was not at any stage an expressly time-based entitlement. Prior to the suspension, FRL were not entitled to be reimbursed a particular sum merely because they had worked a particular number of hours. Thus, so it seems to me, it would be wrong to alter the entire basis of FRL's remuneration, and convert it into a time-based entitlement, merely because of the suspension of the Services.

15. FRL were not entitled to additional fees merely because the Services took longer to perform than had been envisaged. If the performance of the Services took FRL longer than they had anticipated, such that the carrying out of the Services cost them more than was set out in the Schedule 2 monthly payments and/or lump sum totals, then that was a matter for FRL. It was their risk under these Contracts. They were not entitled to seek extra sums merely because of delay. Again, there is no reason to alter that agreed allocation of risk because of the suspension.

16. Thirdly, I do not consider that a calculation based solely on time expended is a fair way of arriving at the proportion of the Fee due. In most construction contracts, or contracts for associated professional services, the contractor/professional will always seek as an optimum an hourly-based method of remuneration. That is because such a methodology is almost entirely risk-free to the contractor. When a task takes an architect five times longer than he anticipated, if he is being paid on an hourly basis, he will simply recover for the time spent, no matter how long it took. It seems to me that that is the very opposite of the lump sum agreement here.

17. A methodology that simply takes the hours spent and multiplies them by the bid rates would have the effect of making the Defendants (as the employer) liable to compensate FRL for every incidence of delay and disruption. For the reasons noted already, I do not believe that this is encompassed in clause 16.3 or the lump sum nature of the agreement between the parties.

18. On behalf of FRL, Mr Fraser's principal submission in favour of the time-based claim was that any scheme which was not based on the time expended would fail to take into account the effects of the delay and disruption to FRL. Whilst that is right, I have already noted that there was no contractual basis upon which FRL would have been entitled to be reimbursed for such delay and disruption in any event, so the argument did not advance matters.

19. In addition, there are no specific facts or incidents pleaded by FRL which allegedly caused delay to them and which could justify a time-based calculation in their favour. Delay and disruption have only featured in this case because it was an element of the Defendants' cross-claim against FRL, to the effect that it was FRL who had caused delay to the obtaining of planning permission on Piccadilly. I rejected that case. I am not, however, in a position to make any findings the other way, namely that, prior to the suspension, the Defendants caused delay to the project for which they were obliged to reimburse FRL.

20. For all these reasons, therefore I do not consider that the time-based approach is the appropriate methodology for the assessment of fees under Clause 16.3.

b) Calculation of The Work Left to Perform

21. FRL's tertiary case was based on the lump sums identified in the Contracts, with a reduction to reflect the value of those works not completed by FRL. My initial impression of that methodology was that, whilst it was again a useful way of checking the accuracy of the parties' competing submissions as to the value of the work actually completed by FRL, it was a slightly cumbersome way of calculating a fair proportion of the Fee due. Surely the obvious method would be to calculate the percentage of Work Stages actually completed in order to calculate the fair proportion of the Fee, as opposed to the percentage of Services that had not been and never would be completed?

22. This view was confirmed by the evidence which demonstrated that the evidence as to the percentage of Services that was incomplete was calculated in a different way to the percentage of the Services actually performed, and which by the end of the trial had been agreed. I was also troubled that the alleged percentages of Services left to complete were rather uncertain, and I was not persuaded, on the evidence, that they represented - on their own - a proper method of ascertaining the proportion of the Fee due under clause 16.3.

c) Percentage of the Services Performed

23. In my judgment, the proper assessment of the proportion of the Fee due to FRL, pursuant to clause 16.3 of the Contracts, was by reference to the RIBA Work Stages completed by FRL prior to the suspension. Where a Work Stage was incomplete at the date of suspension, a fair proportion of the Services completed could be assessed. It seems to me that, of the three methods proposed, this was by far the fairest and most satisfactory. I note also that it was FRL's secondary case as to methodology and the Defendants' primary case.

24. For the avoidance of doubt, I accept Mr Darling's submission that this methodology comes closest to the words of clause 16.3, because it reflects the Services actually performed. So it seems to me, it also has a number of other practical advantages. Its adoption would mean that FRL would not be reimbursed for any work that they may not have efficiently or completely carried out; and it means that, if a particular item of work took FRL longer than they had anticipated, they would not be reimbursed for the additional time. Importantly, it also renders it unnecessary to make any further deduction to reflect the duplication between Mr Blake and Mr Hobart which, in my previous Judgment, I had found to be the only recoverable head of claim arising out of the fraudulent misrepresentation. The parties are agreed that, if the method of assessment is based upon percentage completion, the duplication (otherwise valued at about £40,000) is already accounted for in the methodology.

25. For all these reasons therefore, I conclude that the methodology by which the proportion of the Fee due is to be calculated is by reference to the percentage completion of the RIBA Work Stages. That is the appropriate contractual basis for assessment.

4. THE ASSESSMENT OF THE FEES DUE

26. On the face of the parties' pleadings, there was a significant difference between them as to percentage completion. Although on both Mentmore and Piccadilly, it was agreed that Stages A –D of the RIBA Work Stages had been completed, the pleaded differences as to Work Stages E and F varied as follows:

a) Mentmore/Stages E and F - the Defendants' case as to completion was, respectively, 35% and 25%, whilst FRL's case was 80% and 60%;

b) Piccadilly/Stages E and F – the Defendants' case as to completion was, respectively, 50% and 10% whilst FRL's case was 85% and 70%.

27. These differences were the subject of the experts' joint statements and reports. They narrowed the differences noted above, although before trial, for example, Mr Miers (on behalf of the Defendants) was still contending that, on Piccadilly, the correct percentage completions for Work Stage F was only 25-35% whilst on Mentmore, it was only marginally better at 35-45%. However I consider that, on the evidence, these were significant underestimates. This was the result of Mr Miers' late involvement in the detail of the case and, in particular, the small number of drawings he had been able to look at before completing his report. I accept Mr Fraser's point that, the longer that Mr Miers was involved, the greater the percentage completion he was apparently prepared to allow.

28. On the second day of the hearing, Monday 14th December 2009, the parties produced a schedule which identified their agreement as to percentage completion. That was in the following form:

Project Work Stage Percentage Completion

Mentmore Towers/ Mentmore towers Limited	Stages A-D	100%
	Stage E	70%
	Stage F	55%
90-95 Piccadilly/ Anglo Swiss Holdings Ltd	Stages A-D	100%
	Stage E	77.5%
	Stage F	55%
100 Piccadilly/ Good Start Ltd	Stages A-D	100%

	Stage E	77.5%
	Stage F	55%

29. The only remaining issue in respect of the assessment based on percentage completion concerned the application of these Work Stage percentages to the lump sum Fee on each Contract. On Mentmore Towers, it was agreed that, when these percentages were applied to the Fee in order to arrive at a fair proportion, the gross sum (ie before taking into account sums already paid) due on Mentmore, based on the Services actually completed, was £1,210,059. It was also agreed that, when these percentages were applied to Piccadilly, the gross sums due were £1,986,481 for 90-95 Piccadilly and £615,004 for 100 Piccadilly. But the first Piccadilly calculation, in relation to 90-95, was subject to one relatively minor caveat, dealt with in the next two paragraphs.

30. As noted in paragraphs 57 and 58 of my original Judgment, the three Contracts in question contained, at Schedule 2, a list of the monthly payments due to FRL. These monthly payments were taken from the Resources Schedules (referred to at paragraph 47 of the same Judgment). Those Resources Schedules, although not contract documents, were an integral part of the negotiations between the parties and comprised the agreed basis of these three Contracts.

31. When the figures were transposed from the Resources Schedules to Schedule 2 of the Contact in relation to 90-95 Piccadilly, the sum of £101,350 in relation to Month 4 was omitted in error. Thus, although Schedule 2 identified the correct lump sum total of £3,800,037, the monthly figures shown in the Schedule did not arrive at that total, because of the omission of the £101,350. It was plain to me that the missing sum related to Work Stages A-D and must therefore be included in the calculations for the net fees due to FRL. That conclusion was not challenged by Mr Darling in his closing submissions, and he confirmed that he accepted the figure of £1,986,481 noted in paragraph 29 above.

32. Accordingly, the net sums due and owing to FRL pursuant to clause 16.3 are identified below.

a) Mentmore Towers/Mentmore Towers limited

33. The agreed percentages of 100% for Stages A-D, 70% for Stage E and 55% for Stage F, produce an agreed gross amount due of £1,210,059 on this Contract. Mentmore Towers Limited have paid £1,048,842. Thus, subject to the next two Sections of this Judgment, FRL are entitled to the net sum of **£161,217** in relation to the Mentmore Towers part of the project, exclusive of VAT and interest.

b) 90-95 Piccadilly/Anglo Swiss Holdings Limited

34. The agreed percentages of 100% for Stages A-D, 77.5% for Stage E and 55% for Stage F produce an agreed gross amount due of £1,986,481 on this Contract. Anglo Swiss Holdings Limited have paid £1,695,423. Thus, subject to the next two Sections of this Judgment, FRL are entitled to the net sum of **£291,058** in relation to 90-95 Piccadilly exclusive of VAT and interest.

c) 100 Piccadilly/Good Start Limited

35. The agreed percentages of 100% for Stages A-D, 77.5% for Stage E, and 55% for Stage F produce an agreed gross amount of £615,004 on this Contract. Good Start Limited have paid £517,063. Thus subject to the next two Sections of this Judgment FRL are entitled to the net sum of **£97,943** in relation to 100 Piccadilly, exclusive of VAT and interest.

d) Summary

36. Thus, subject to the next two Sections of this Judgment, I find that FRL are entitled to be paid **£550,218** as the outstanding balance of the fees due to them pursuant to clause 16.3 of the Contracts, exclusive of VAT and interest.

5. THE EFFECT (IF ANY) OF THE FRAUDULENT MISREPRESENTATION

37. The next issue is the effect, if any, of my earlier finding of fraudulent misrepresentation against FRL on their entitlement to the sum of £550,218. It is the Defendants' case that, solely because of the fraudulent misrepresentation, FRL are not entitled to any further fees at all or, alternatively, they should only be entitled to a small proportion of the fees otherwise due.

38. No authority is cited in support of this surprising submission. Furthermore, for the reasons outlined below, I consider that it is contrary to basic principles.

39. This is not a case in which the Defendants can argue that they received no benefit from the services performed by FRL. On the contrary, FRL obtained planning permission in relation to both the In & Out Club and the Mentmore Towers elements of the project. Neither of those planning applications could sensibly be regarded as a certainty, and both of them, particularly that relating to the In & Out Club, were the result of detailed and often fraught negotiations with the respective Councils. Furthermore, once those planning permissions had been obtained, the value of the properties had plainly been enhanced: it is a truism, on which all property developers rely, that a property with planning permission is always more valuable than one without.

40. In those circumstances, it seems to me that the finding of fraudulent misrepresentation cannot entitle the Defendants, without more, to the windfall which would result if they were not obliged to pay FRL a proper fee for the valuable Services performed pursuant to these three Contracts.

41. In my original Judgment, at paragraphs 175-190, I wrestled with the question of what loss, if any, the Defendants could show arising from the fraudulent misrepresentation. My conclusion was in these terms:

"I find that the misrepresentation was a material inducement to the Defendants to enter into the Contracts. As a result of the finding of fraudulent misrepresentation, I conclude that, on all the evidence, it is a fair inference that, but for that misrepresentation, these Contracts would not have been executed. Whilst that opens up the possibility of a counterclaim for damages, such a counterclaim would not encompass delay (none being demonstrated as having been caused by the departure of Mr Blake) and would not encompass any disruption/duplication suffered directly by the Defendants or BSH (there being no pleading or evidence of such losses). Thus the only potentially recoverable area of loss is in relation to the disruption to or duplication by FRL arising out of Mr Blake's departure. The precise assessment of the financial consequences of this (if any) will have to await the quantum hearing, because it would, at most, lead to a reduction in the fees otherwise due to FRL. "

42. As already noted, because I have chosen the percentage completion method of assessing the proportion of the Fee due, the particular deduction that I identified resulting from the fraudulent misrepresentation has already been made. No further deduction is warranted or justified.

43. I should add this. Throughout my involvement in this case, I have been trying to work out where the allegation of fraudulent misrepresentation might go, and to what substantial damages claim or

other loss it might lead. That was one of the reasons why I was troubled by the failure on the part of the Defendants to set out in their original pleadings any clear statement on causation and loss. I have concluded that, on the new pleadings and the evidence in this case (and the duplication point aside), the Defendants are quite unable to hang any item of loss or fee-reduction on this aspect of the case.

44. I had half-expected a case to the effect that, but for the fraudulent misrepresentation, the Defendants would have appointed other architects, whose fees would have been less than those payable to FRL, with the difference between FRL's higher fees and the lower fees of the notional successful architect representing the damages resulting from the fraudulent misrepresentation. It seems to me that, as a matter of principle such a claim would have been open to the Defendants. No such claim was made: I can only assume that, on the figures, such a claim could not be pursued because, in the event, FRL's fees were not higher than those of the notional architect.

45. In the absence of such heads of claim, Mr Darling's submission came down to this: because, under clause 16.3, the entitlement was "a fair proportion of the Fee", the assessment of the fairness of the Fee was a wide enough process to encompass a consideration of the finding of fraudulent misrepresentation. I agree with that, as far as it goes, but only to the extent that that finding could be demonstrated to have had a particular effect on the fairness of the Fee otherwise due. The only effect that I could identify in my original Judgment was in respect of the duplication point, and the methodology that I have chosen allows for that deduction. No general or arbitrary deduction in the Fee otherwise due can be fair or appropriate, and no authority is advanced in support of any such deduction.

46. Accordingly, on the material before me, I am unable to find that any other discount or reduction should be applied to FRL's fees arising out of the fraudulent misrepresentation. I consider that they are entitled to those fees without abatement, a process which might itself have given rise to difficulties of principle: see the authorities – to the effect that a professional's fees cannot be abated - summarised by Jackson J (as he then was), at paragraphs 640-663 of his judgment in **Multiplex Constructions (Uk) v Cleveland Bridge UK Limited and anr**[2006] EWHC 1341 (TCC).

6. QUALITY, 'UNDERPERFORMANCE' AND DELAY

47. The Defendants maintained a case at the quantum trial that the 'fair proportion' exercise pursuant to clause 16.3 should take into account FRL's underperformance, and in particular the criticisms of the quality of FRL's drawings made by Mr Miers, their expert. They also argued that there should be an adjustment to reflect the delays in achieving planning permission on Piccadilly. FRL say that these matters are properly matters of liability and causation and are therefore not now open to the Defendants on this quantum trial. They also say, in relation to the allegation of delay, that it a matter which was expressly decided in my original Judgment. Further, FRL contend that there is no proper evidence on any of these allegations.

48. I deal first with the allegations that the drawings provided by FRL were of insufficient quality. It seems to me that this allegation fails in its entirety. First, to the extent that it is an allegation of professional negligence or default on the part of FRL, it should have been raised at the trial in May/ June of this year and it is not open to the Defendants to raise this matter now.

49. Secondly, it seems to me that the allegation, even if it could be pursued, is quite unfounded. There is no cogent evidence before me that FRL's drawings were in any way deficient. Whilst it appears that this point was first made by Mr Miers, it is quite plain that, as Mr Miers himself accepted, the "severe limitations" under which he accepts that he was working (such constraints having been imposed upon

him by the Defendants themselves) meant that he was simply not able to form any sort of credible view as to the quality of FRL's work. The Defendants' refusal to instruct him to do any meaningful work until a few days before the quantum hearing, and the insurmountable difficulty that this created for him (and the court), mirrored closely the difficulties the Defendants placed in the way of their previous expert, Mr Salisbury, which was the subject of my comments in paragraphs 232-237 of my original Judgment. This highly unsatisfactory aspect of the quantum dispute may also be relevant on costs.

50. Thirdly, and for completeness, I should say that, even if the quality allegations could have been pursued at this quantum trial, and even if there was any evidence in support of them (both of which assumptions I refute) it is difficult to see how this would have affected FRL's entitlement to their fees in any event. As noted above, there is, in principle, no ability to abate a professional's entitlement to their fees. The only way that the allegation could have been pursued was either by way of counterclaim (and in this case there was no counter claim based on deficient drawings), or a detailed pleading that identified particular drawings which were said to be deficient, with a clear explanation of how each deficiency impacted on the calculation of the Fee under clause 16.3. There was no such pleaded case.

51. For all these reasons, therefore, it seems to me that the allegations in relation to the quality of FRL's drawings fail at every level.

52. There were also references by the Defendants to FRL's 'underperformance'. These references were mainly tied back to an e-mail from Miss Vela of FRL of 11th September 2007, which was the subject of the original Judgment at paragraphs 228-229. However, the evidence as to underperformance in this email, and other contemporaneous documents, was very vague. It seems to me that, to be relevant to the assessment of fees, the alleged 'underperformance' would have had to have manifested itself in a particular way': to be relevant, it would have needed to have caused specific loss or duplication. As I have indicated, there was no proper evidence to suggest that there were any inadequacies in FRL's ultimate product. And to the extent that the alleged underperformance manifested itself in delay or an inefficient way of working then, for the reasons noted above, no further deduction would have been applicable in any event, because the percentage completion methodology means that the Defendants are not reimbursing FRL for such delay or inefficient working anyway.

53. As to delay, I remind myself that one of the issues at the liability/causation trial in May/June was the alleged delay on the part of FRL in obtaining planning permission on the Piccadilly element of the project. I dealt with that in detail at paragraphs 198-265 of my original Judgment. I concluded that FRL were not responsible for any delays in relation to the obtaining of planning permission. There is no appeal against that finding. Accordingly, this matter cannot now be reopened by the Defendants. In any event, as noted already, any delay to FRL is not being reimbursed to them, so a deduction is not appropriate.

54. Accordingly, I reject the Defendants' case that allegations in relation to quality and delay are either open to them or can or should have any effect on FRL's entitlement to their fees. Thus FRL are entitled to judgment in the total sum of £550,218 plus VAT. That then brings me to interest.

7. INTEREST

a) The Issues

55. Although there is no dispute between the parties that interest is due to be paid by the Defendants to FRL, there are a variety of disputes as to what principal sums should attract interest and how it should be assessed. Those disputes can be broken down as follows:

(i) What is the nature of the issue of principle between the parties? (sub-paragraph (b) below).

(ii) Under which statutory provision is interest payable? (sub-paragraph (c) below).

(iii) For what period or periods should interest be calculated? (sub-paragraph(d) below) (vi)At what rate is interest payable? (sub-paragraphs (e) and (f) below).

I deal with each of those issues in turn below.

b) The Issue of Principle

56. The issue of principle stems from the fact that FRL's entitlement under the Contracts has altered over the course of time. Under each of the three Contracts, FRL were entitled to be paid the monthly instalments set out in Schedule 2. Pursuant to the express words of clauses 10.5 and 10.6 (which are themselves derived from the **Housing Grants (Construction and Regeneration) Act 1996**), the Defendants' failure to serve any payment notices indicating proposed adjustments to the instalments otherwise due, and/or any withholding notices indicating cross-claims, meant that those instalments were due and payable in full long ago and (save perhaps for the December 2007 instalment), before the suspension on 24th December 2007. I have already found, at paragraph 90 of the original Judgment, that the Defendants were in breach of contract in not paying those instalments and that, in consequence, FRL were entitled to interest on those unpaid sums.

57. The complication arises because, although these proceedings commenced as a claim for those unpaid instalments, the ultimate claim which I am now assessing is the claim under clause 16.3, namely the 'fair proportion' claim. The figures demonstrate that the sums that I have found due under clause 16.3 are less than the sums originally due by way of instalment. The Defendants do not dispute that FRL are entitled to interest on the (lesser) judgment amount of £550,218. But they maintain that, as a matter of law, FRL are not entitled to interest on the higher sum represented by the unpaid instalments. In order to test the validity of that argument, it is necessary to analyse the statutory regime relating to interest.

c) The Statutory Regime

58. Section 35 A (i) of the **Supreme Court Act 1981** provides:

"Subject to rules of court, in proceedings (whenever instituted) before the High Court for the recovery of a debt or damages there may be included in any sum for which judgment is given simple interest, at such rate as the court thinks fit or as rules of court may provide, on all or any part of the debt or damages in respect of which judgment is given…"

59. It is common, but not inevitable, for interest under the **Supreme Court Act** to be at a rate of 2% over base: see the judgment of Jackson J (as he then was) in **Claymore Services Limited v Nautilus Properties Limited** [2007] BLR 452, and his analysis of the authorities at paragraphs 70-81 of that judgment. Importantly, under the **Supreme Court Act**, interest can only be awarded on a judgment sum. Thus, whilst interest would be due on the sum of £550,218 identified above as the result of the clause 16.3 exercise, it would not be due on the higher sum represented by the difference between the £550,218 and the total of the unpaid instalments. That is because that difference is not part of the judgment sum.

60. One of the radical features of the **Late Payment of Commercial Debts (Interest) Act 1998** (hereinafter referred to simply as 'the 1998 Act') is that, in certain circumstances, it allows the court to award interest on commercial debts, regardless of whether or not those debts are included in a subsequent judgment sum. The contract must be one caught by section 2, and there is no dispute that these Contracts are of the type defined in that section. Importantly, the debt in question must be a qualifying debt in accordance with section 3 of the Act, namely "a debt created by virtue of an obligation under a contract to which this Act applies to pay the whole or any part of the contract price…" Section 4 of the 1998 Act sets out the period for which statutory interest under the Act would run. Under the Act, statutory interest is currently set at 8% above base. That rate can be remitted in accordance with section 5, "where by reason of any conduct of the supplier, the interests of justice require that statutory interest should be remitted in whole or part in respect of a period for which it would otherwise run in relation to a qualifying debt.…"

61. In the present case, Mr Darling, on behalf of the Defendants, properly accepts that the sum assessed under clause 16.3 (totalling £550,218) is a qualifying debt and that therefore the 1998 Act applies to that figure. However, he maintained that the instalments were not themselves a qualifying debt, and therefore any interest calculated by reference to the higher sum represented by those unpaid instalments was not recoverable under the 1998 Act.

62. The first point to make is that, if this argument were right, it would mean (because on any view the **Supreme Court Act 1981** does not apply to any claim for interest on the difference between the judgment sum and the unpaid instalments), that FRL would not recover any statutory interest at all as a result of the Defendants' abject failure to pay the instalments as they fell due under the Contracts. Not only is such a stance very unattractive, it is also contrary to my (unappealed) finding, at paragraph 90 of the original Judgment, that interest was indeed due on that basis.

63. Further and in any event, I consider that, as a matter of principle, interest would be payable under the 1998 Act. The argument to the contrary was put by reference to section 11 of the 1998 Act, which is concerned with the particular treatment of advance payments. Mr Darling said that at least some parts of the instalments due under the three Contracts may comprise an advance payment for Services which had not been performed at the time that the instalments fell due. Accordingly he submitted that, pursuant to section 11 (4), not all of each unpaid instalment would necessarily constitute a qualifying debt, and that, since there was no evidence to enable the court to work out the true position as to whether some Services had not been carried out, no interest at all was payable.

64. I do not accept that submission, which seems to me to strain the words and mechanism of the 1998 Act beyond breaking-point. I consider it plain and beyond doubt that the instalments were qualifying debts under section 3, such that FRL's entitlement to statutory interest operated as an implied term of the Contracts, pursuant to section 1. The instalments themselves were precisely identified, on a monthly basis, and were due pursuant to the express terms of the Contracts. Moreover, the Contracts had been expressly varied by the parties so that the instalments were paid a month in arrears, rather than a month in advance, of the Services being performed. In those circumstances, it does not seem to me that section 11 of the Act is of any applicability to the instalments in this case. I do not consider that section 11 applies to situations, such as this one, where the qualifying debts were plainly specified in the contract itself. And if I was wrong about that, then I have no doubt that a purposive construction of section 11, in the context of the policy of the 1998 Act as a whole, would not permit a defaulting party (such as the Defendants) to argue that, because some part of the contractual instalment otherwise due might contain an element relating to work yet to be performed, despite the fact that no attempt had been made to see whether that was the case and/or, if

it was, what proportion of the instalment might be affected, the claim for interest under the 1998 Act on those unpaid instalments must fail in its entirety. Since the vast majority of instalments payable under commercial contracts may include an element (no matter how small) of advance payment, such an argument would substantially defeat the purpose of the 1998 Act.

65. Accordingly, I conclude that interest would be payable under the 1998 Act in respect of, first, the unpaid instalments and then, secondly, by reference to the judgment sum of £550,218. Clearly, interest would not be due on both sums at the same time, because the larger sum represented by the unpaid instalments includes within it the smaller sum represented by the judgment sum.

d) The Relevant Periods

66. It follows, as was debated at the hearing with the parties, that in my judgment interest is due under the 1998 Act, based upon the unpaid instalments, until a certain date, and then due on the lesser sum represented by the judgment sum, from that date until today. The question is when that change-over date occurred.

67. I think that Mr Fraser is right in his submission that the change-over date arose when FRL stopped being entitled to the unpaid instalments, and started being entitled to the sum calculated in accordance with clause 16.3 instead. However, I think that Mr Fraser is wrong to say that this occurred relatively recently. His preferred dates were either the date of the original Judgment on 7th July 2009, or the date of this Judgment, namely 21st December 2009. It seems to me that those Judgments merely identified the nature of FRL's entitlement under the Contracts: they did not create that entitlement.

68. It seems to me that the correct analysis is this. Up to the suspension of the Services on 24th December 2007, FRL were entitled to be paid the instalments in full in accordance with Schedule 2, and they should therefore be entitled to interest on those instalments (or part instalments) which were not paid by the Defendants. However, I consider that, as a result of the suspension, FRL's entitlement changed. Clause 15 of the Contracts (paragraph 7 above) made plain that their entitlement to be paid was thereafter to be assessed in accordance with clause 16.3. Thus, if we take a notional period of 30 days after the suspension, namely 23rd January 2008 (as calculated by Mr Fraser, as his first but least favourite of the possible change-over dates) then it seems to me that, at that date, FRL's entitlement was to be paid in accordance with clause 16.3, and was no longer by reference to the unpaid instalments. Thus it is at that date that the interest would stop being calculated by reference to the unpaid instalments, and start being calculated by reference to the unpaid sum calculated in accordance with clause 16.3, namely £550,218.

69. Although, as I have indicated, the 23rd January 2008 was one of the dates suggested by Mr Fraser, it was his least favoured because, so he said, it would result in an unfairness to FRL. Why, he asked rhetorically, should the fact that the Defendants had chosen to suspend the performance of the Services under these Contracts mean that FRL should then be entitled to a lesser sum by way of interest?

70. In truth, I consider that there are two complete answers to this question. The first, shorter answer, is that that is what the Contract provided. In my view, there can be no doubt that clause 15 was designed expressly to have this effect: that, post-suspension, the entitlement to further payment was in accordance with clause 16.3 only.

71. But the second answer is this. The reason why Mr Fraser complains that this would be unfair to FRL is because, on the particular facts of this case, the sum due under clause 16.3 is less than the sums due pursuant to the instalments. That is itself the product of the fact that the Services took longer than envisaged by the rather ambitious Programme that had been agreed. The Contracts did not, I think, envisage that there would be any significant financial difference between the Schedule 2 instalments and the 'fair proportion' of the Fee calculated under clause 16.3. I have already made that point in my original Judgment at paragraphs 80-81.

72. Accordingly, it seems to me that this issue has only arisen now because, on the facts, the instalments were running ahead of the Services actually being performed by FRL and I spent some time in my original Judgment, at paragraphs 66-93 pointing out that, pursuant to the Contracts, this would have required an adjustment to the instalments at some point. Accordingly, it is not inequitable for that adjustment to be triggered by the suspension; indeed, it seems to me that this leads to a very fair result. It means that FRL are compensated by way of interest on the unpaid instalments up to the cessation of work which, for this purpose, I take as 23rd January 2008; and they are compensated by way of interest on the sum of £550,218 actually due to them from that date onwards.

73. Accordingly, for these reasons, I find that there are two principal sums to which interest under the 1998 Act attaches in this case. The first is the total of the sums due by way of unpaid instalments under each of the three Contracts, for which interest is payable from the date that the particular instalment should have been paid, until 23.1.08. The second is the sum due under the three Contracts and identified in paragraphs 333-36 above, totalling £550,218, on which interest will be payable from 23.1.08 onwards.

e) The Relevant Rate

74. The relevant rate under the 1998 Act is 8% over base. That sum is payable unless, pursuant to section 5, the interests of justice require remission of either period or time.

f) Interests of Justice

75. The leading case on remission is **Ruttle Plant Hire Limited v Secretary of State For Environment** [2009] EWCA Civ 97; [2009] BLR 301. That case is the only decision of the Court of Appeal concerned with the 1998 Act. It was largely concerned with errors in and omissions from the supplier's invoices and consequential arguments arising under section 4 of the 1998 Act. Jacob LJ said:

"31. The section needs to be read in context and in the light of the policy of the Act. As to context it is vital to bear in mind that mistakes in the supplier's invoice can be dealt with by way of remission pursuant to the section 5 powers. Because a wrong invoice may lead to a remission of interest rather than none at all there is no need to read "amount" so strictly as "the true amount, the whole true amount and nothing but the true amount". Nor to confine the second half of the provision to cases where for some reason one cannot calculate the sum due…

38. In summary, as regards the construction of section 4, I would say this: that my construction does not lead to any unfairness. A paying party can withhold payment for sums reasonably in doubt or not yet properly settled. The court will protect him by use of section 5 omission because the uncertainty to that extent was created by the supplier. What he cannot do is pay nothing at all and expect to escape high rates of interest imposed by the Act on what on any view is due."

76. In addition, the court held that, as to the interests of justice, questions such as the high rate of interest under the Act were irrelevant: what matters is the conduct of the supplier, and whether that conduct merits remission.

77. I would make two points by reference to the decision in **Ruttle**. The first is that, having regard to paragraph 38 of the judgment of Jacob LJ, cited above, I am confirmed in my view that the right date for the change-over is 23rd January 2008. Prior to that date, the Defendants were not entitled to withhold payment of the full amount, because in the absence of withholding notices and the like, there was no doubt that what was due were the instalments set out in Schedule 2 of each Contract. Those were the sums that should have been paid. After that date, the Defendants would have been entitled to withhold the difference, if any, between the total amount of the unpaid instalments and the lesser amount due pursuant to a proper assessment under clause 16.3, although they were obviously still obliged to pay that lesser figure, now calculated at £550,218.

78. Secondly, although my decision that 23.1.08 was the correct change-over date affords the Defendants sufficient protection from unfairness due to the change in entitlement, it also means that, just as with the Secretary of State in **Ruttle**, what the Defendants in the present case cannot do is to pay nothing at all because the right sum has not been invoiced, and then expect to escape the high rates of interest on what was, on any view, due and payable.

79. What, then, are the points raised by the Defendants by reference to the interests of justice? The first boils down to the assertion that the assessment under clause 16.3 has led to a lesser amount than that originally invoiced, so the Defendants should not have to pay the statutory rate. But for the reasons already outlined, that is a bad point. As for interest on the unpaid instalments up to 23.1.08, the sums invoiced should have been paid in full, so the point does not apply at all. And as for interest on the lesser sum assessed under clause 16.3, for the reasons explained by Jacob LJ in **Ruttle**, the fact that higher sums were claimed cannot possibly amount to a reason why interest at the statutory rate, on the lesser amount actually due, should be remitted. For the reasons which I have explained in the preceding paragraph, the identification of a change-over date of 23rd January 2008 is eminently fair to the Defendants, because it reduces the principal on which interest is to be calculated, from the sum invoiced to the sums due under clause 16.3. Remission of the rate as well would be unjustified.

80. That brings us right back to the fraudulent misrepresentation, which was the other point relied on by Mr Darling in respect of the interests of justice. He contended that it cannot be in the interests of justice for FRL to be awarded interest without remission under the 1998 Act, in circumstances where they have been found guilty of fraudulent misrepresentation. That argument was not the subject of, and perhaps did not need, further elaboration.

81. I have concluded that this not a factor which I should allow to trigger a remission of statutory interest. The reasons are these. First, the fraudulent misrepresentation has been taken into account in the calculation of the fees due (see paragraph 24 above). Why should it trigger a further reduction, this time by way of remission of statutory interest? Secondly, on any view, the Defendants have wholly failed to make proper payment to FRL for the Services performed, notwithstanding the fact that those Services have been of real benefit and value to the Defendants. In those circumstances, the fact that FRL's conduct on a completely different aspect of the Contracts was reprehensible does not, by itself, mean that the statutory entitlement under the 1998 Act should be remitted.

82. Thirdly, as part of the overall balancing exercise of the court's discretion, it seems to me that it is in the interests of justice that the statutory rate is not remitted because, for the majority of the period

in question, in accordance with this Judgment, the rate would apply to the lesser sum calculated in accordance with clause 16.3, as opposed to the higher figure, based on the unpaid instalments.

83. Accordingly, whilst I have taken into account and carefully considered the issue of fraudulent concealment in this context, I think that any force in it is outweighed by the valuable Services performed by FRL for the Defendants, which were the subject of invoices in accordance with the Contracts, but which, wrongfully and in breach of contract, the Defendants failed to pay, either in the sum claimed or the lesser sum unarguably due. Interest is therefore due at the statutory rate, without remission.

8. CONCLUSIONS

84. For reasons set out in **Sections 2, 3 and 4** above, I have concluded that the fair proportion of the Fee pursuant to clause 16.3 is to be calculated by reference to the agreed percentage completion of the Work Stages. This calculation takes into account the only identified issue arising out of the fraudulent misrepresentation. The total sum due is **£550,218**, as set out in paragraphs 33-36 above.

85. For the reasons set out in **Sections 5 and 6** above, I have concluded that there should be no further deduction for fraudulent misrepresentation or for any of the other findings involving FRL.

86. For the reasons set out in **Section 7** above, I have concluded that the Defendants are entitled to interest from each of the Defendants pursuant to the **Late Payment of Commercial Debts Act 1998**. Interest is to be calculated at 8% over base rate without remission for the following principal sums and periods:

(i) On the instalments due under each Contract but not paid, from the final date that the instalment should have been paid down to 23.1.08;

(ii) On the sums found due in this Judgment and summarised at paragraphs 33-36 above, from 23.1.08 to 21.12.09.

87. I would ask the parties to agree the relevant calculations so that a final order can be made in this case by no later than 2pm on Thursday 14th January 2010. I propose that there will be a hearing on that date and at that time to finalise all issues of interest and costs.