Neutral Citation Number: [2017] EWHC 239 (TCC)

Case No: HT-2015-000195

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

Royal Courts of Justice

Rolls Building,

Fetter Lane, London, EC4A 1NL

Date: 22 February 2017

Before:

THE HON MR JUSTICE COULSON

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Between:

The Council of the Borough of Milton Keynes	**Cla**
- and -	
Viridor (Community Recycling MK) Limited	**Defe**

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- -

Mr Robert Clay (instructed by **Anthony Collins Solicitors**) for the **Claimant**

Mr Michael Davie QC (instructed by **Ashfords LLP**) for the **Defendant**

Hearing dates: 31 January, 1 and 2 February 2017

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Judgment Approved

The Hon. Mr Justice Coulson:

1. INTRODUCTION

1.
Pursuant to a contract dated 1 October 2009 the claimant Council engaged the defendant to carry out waste recycling in Milton Keynes for a period of 15 years. The contract recognised that waste recycling was a profitable business so it stipulated that the defendant was obliged to make both fixed and variable payments to the claimant. The fixed payment was sometimes referred to as rent, because it related to an existing recycling facility owned by the claimant and used by the defendant, referred to in the papers as “the MRF”. The variable payment was the product of a profit-sharing arrangement between the parties.

2.
The defendant’s final tender bid of May 2009 included an Income Generating Payment Mechanism (“IGPM”) which identified a fixed payment of £500,000 per annum “indexed for inflation”. When the

final contract documents were put together by the claimant's consultants, an earlier and incomplete version of the IGPM, which contained gaps and made no reference to indexation, was included in the contract documents. The claimant submits that this was either a common or a unilateral mistake, and therefore seeks rectification of the contract by the replacement of the earlier, erroneous version of the IGPM with the later, correct version, including its reference to indexation.

3.
The defendant took a range of points in resisting the claim for rectification, some raised for the first time at trial. In particular, the defendant concentrated on (i) the period before the tender was accepted (a surprising element of the case, addressed in **Section 3** below); (ii) the period after the claimant had accepted the defendant's tender but before the contract was concluded (to argue that, because there were further negotiations after the tender was accepted, the contract should not now be rectified back to the state it was in before those negotiations); and (iii) various post-contract events and delays in support of the submission that it would be inequitable now for the court to rectify the contract.

4.
The structure of this Judgment is as follows. In **Section 2** I set out the background to the contract. I deal in **Section 3** with the defendant's over-arching points concerned with events during and after the tender stage. In **Section 4** I deal briefly with the relevant principles of law applicable to claims for rectification. In **Section 5** I analyse the detail of the claimant's claim for rectification. In **Section 6** I set out the post-contract events and, in **Section 7**, I deal with the defences of laches and acquiescence. There is a brief summary of my conclusions in **Section 8** below.

2. THE BACKGROUND TO THE CONTRACT

5.
The tender process was governed by the Public Contract Regulations in their 2006 edition. Thus, there was an advertisement in the Official Journal of the EU, dated 21 June 2008, describing the proposed recycling contract, and noting that it would be for a period of between 5 and 15 years. In the event the contract that was let was for an initial term of 15 years.

6.
There was a meeting on 24 March 2009 when a timetable was identified. The review of contract documents was anticipated to be complete by 1 May 2009 "with exception of minor changes post dialogue". The minutes indicated a "meeting with Geoff Beck and Councillor Chris Williams on 7 May for authorisation of the final MKF contract documents". The closing of competitive dialogue was scheduled for 8 May, the return of bids on 26 May, and the decision of the claimant's Cabinet on 21 July 2009. Although the defendant's suggestion was that this timetable was not followed, in fact the summary below shows that, subject to the competitive dialogue stage being extended to 14 May, all the other dates were met.

7.
There was another meeting on 5 May 2009 where there was a reference to the Payment Mechanism becoming a schedule as part of the contract. It was said that "we [the claimant] are looking for methodology not figures in the contract schedule." At a meeting the following day, 6 May, it was noted that the claimant wanted to see "the shape of the Payment Mechanism" before the closure of the competitive dialogue stage.

8.

On 8 May, it was announced that the competitive dialogue stage was being extended to 14 May. In the days leading up to that date, there were discussions about the possibility of indexation (namely, allowing for inflation increases when calculating the fixed and variable payments). The defendant's original proposal was that indexation would not apply to the fixed payment to the claimant, but would apply to their profit margin (and therefore reduce the claimant's share of the profits). A clutch of internal emails dated 13 May, disclosed by the claimant, indicated that the defendant was being expressly invited (as part of its final tender package) to reconsider whether or not the fixed payment to the claimant should be indexed, and to reflect on the 20% profit share that they were then proposing to pay to the claimant. On behalf of the claimant, a figure of 30% had been suggested. These emails also indicated that, as far as the claimant's Mr Hudson was concerned, final agreement of these two matters (namely indexation on the fixed payment and the profit share percentage) "could come at the final tender stage."

9.
It is clear that these matters remained outstanding at the end of the competitive dialogue process: see the email from Mr Garcia (another of the claimant's advisors) on 13 May 2009 timed at 16:04 and Mr Hudson's email of the same day timed at 18:16. That email concluded:

"CWL [the defendant's previous name] also suggested a couple of minor tweaks to the wording such as to clarify indexation. But I am suggesting that I leave this to Gwen – it could be that we make these tweaks now (if we think they are okay), or leave it to CWL to 'mark up' (and either not score as they are minor or if we think they are significant score accordingly. If you could let me have your view on this please, Gwen, I can include this with the clarification note, whichever way we go."

10.
On 14 May 2009, the claimant issued an Invitation to Final Tender ("ITFT"). This incorporated a large number of documents, including the IGPM. The version of the IGPM that was sent out with the ITFT required completion by the tenderers. The most important part read as follows:

"**Calculation of Fixed Payment Element**

11. The fixed payment element shall be calculated as:

FP=X

Where:

X = £ [to be inserted in final tender] being the fixed rate per annum payable to Milton Keynes Council

Calculation of Variable Payment Element

12. The variable payment element shall be calculated as:

VP = Ts x OP x PS

Where:

Ts = being the total volume of tonnage sold by the Provider

OP = the operating profit per tonne payable to the Authority (calculated in accordance with Part B of this Schedule to Variable Payment Workings)

PS = [to be inserted in final tender] percentage profit share attributable to the Authority."

11.
On 22 May 2009, before the deadline of 26 May 2009, the defendant submitted its final tender. This included their completed version of the IGPM. The relevant parts are set out below (where the original has highlighting in red or yellow, I have used bold italics):

"**Indexation**

5. **The elements of IGPM that are indexed are: the Fixed Payment to MK, the Profit Margin to CW and the Performance Deductions payable to MKC**.

6. The Base Index Date shall be 1 April 2009. **These elements** should be adjusted by the relevant Indexation Factor on the anniversary of the Base Index Date with effect from the relevant anniversary of the Base Index Date until the following anniversary…

Calculation of Fixed Payment Element

11. The fixed payment element shall be calculated as:

FP = X where:

X = **£500,000** being the fixed rate per annum payable to Milton Keynes Council.

The fixed payment will be subject to annual inflationary increases and will be paid in 12 equal monthly instalments in arrears.

Calculation of Variable Payment Element

12. **The variable payment element shall be calculated as: 30% of the actual Operating Profit to be established on an Open Book basis at the end of each period.**

13. The variable payment will be paid **on account** on a monthly basis in arrears based on actual volumes input for that month **on the basis of the formula in Part B**…

Part 2 Section B Variable Payment Workings

FPT is fixed at **£500,000 per annum** for the duration of the contract **and will be subject to annual inflationary increases of RPix**.…

Part 2 Section D Commercial Arrangements

D1c

Rationale. Fair Fixed Rent Plus Variable Payment Based on Profit Share

The Fixed Payment is based on our estimate of a fair rent for the MRF, in the current market. **It is set at £500,000pa, indexed for inflation. This gives MK certainty for budgetary purposes.**

The Variable Payment relates to profits from all MDR **and non-MDR processed at the MRF** once gate fee revenue and Agreed Costs have been included. We include a Profit **Margin of £5 per t processed, indexed for inflation** for CW in the Agreed Costs. **CW's Profit Margin is based on tonnes processed rather than a fixed sum in order to give it a clear incentive to keep the MRF full**.

The Variable Payment splits the payment on a **30/70** basis between MK and CW. This is because CW takes all of the downside risks (input volumes, plant efficiency, sales prices etc) including the

commitment to a minimum Fixed Payment to MK. Therefore CW's Risk-Adjusted Rate of Return is much lower than on offer to MK."

12.
Two final tenders were received by the claimant, one from the defendant and one from another company with whom the claimant had also conducted the competitive dialogue process. The tenders were the subject of a detailed Evaluation Report prepared by PwC, the management consultants acting for the claimant. That report demonstrated that, by reference to the evaluation criteria, the defendant's tender was the winning tender. The report expressly noted, amongst other things, that:

"The proposed fixed payment to MKC is £500k each year, payable in equal monthly instalments, and is to be inflated annually in line with RPix."

That was a reference back to the defendant's final tender and the offer of £500,000 per annum, "indexed for inflation" (paragraph 11 above).

13.
On 20 July 2009 the evaluation report was sent by PwC to the claimant. On 21 July 2009 the claimant's Cabinet resolved to award the contract to the defendant "as the bidder with the highest score from the MEAT evaluation." [1] MEAT is an acronym denoting the Most Economically Advantageous Tender.

14.
Thus, on 22 July 2009, the claimant wrote to the defendant thanking them for their tender submission. The letter went on to say:

"Following evaluation of the tender submissions, the Council's decision at this stage is that the contract should be awarded to you.

In accordance with the Public Contracts Regulations 2006, the Council of the Borough of Milton Keynes is required to incorporate a minimum ten calendar day standstill period at the point information on the award of the contract is communicated to tenderers. This period is to allow unsuccessful tenderers to seek further information and clarifications from the Contracting Authority, and to enable them to seek their remedies as envisaged under Regulation 32(4) as well as other provisions of the Contract Procedure Rules 2006, before the contract is entered into…

It is important that you are aware that this letter is not an award of the contract and is not an acceptance by the Council of your tender. Your tender submission will only be deemed to be accepted by the Council when the council has issued a formal contract award letter. The council, subject to any of the legal remedies available to the unsuccessful Tenderers, proposes to issue a contract award letter after the expiry of the above mentioned mandatory standstill period."

15.
In late July/early August, preparations were being made to draw up the formal contract between the claimant and the defendant. Two elements of this process were the subject of evidence: items which were the subject of ongoing discussion/clarification (matters which the defendant's principal negotiator, Mr Hamblin, agreed in cross-examination were properly described as "minor tweaks and revisions"), and the putting together of the contract documentation itself.

(a)
The Minor Tweaks and Revisions

16.
Three of these were identified in the evidence. The first concerned clause 12.7.3C which came to be inserted into the executed contract, having not featured in the version sent out with the ITFT. The clause read as follows:

"For avoidance of doubt it is clarified that the Provider will be required to make available all the relevant information to the Authority, including not but not limited to accounts and contracts in connection with the MRF, [so that is confidential information about their contracts down the line], for review and to verify robustness behind the annual reconciliation. Any information provided under this clause shall be (or shall be deemed to be) Provider Confidential Information and (where indicated by the Provider) commercially sensitive information, and shall be subject to the provisions of clause 8.5"

17.
Although this provision post-dated the defendant's final tender, it was quite clear from the evidence of Mr Hamblin that this clause was the subject of proposal, consideration, amendment (for example, the words in square brackets were deleted) and agreement in the period between 7 July and 20 July 2009 (see the Schedule of Clarifications). Mr Hamblin said that the first part of the clause, dealing with making relevant information available, was suggested by the claimant; he said that the defendant confirmed that this was acceptable and, on 20 July, proposed the latter part of the provision dealing with confidentiality. On the basis of that evidence, this was not a post-contract clarification at all, but a term of the contract agreed prior to 22 July 2009.

18.
The second tweak concerned the financial model, which formed Part C of the IGPM. In her email of 4 August 2009, Ms Tasmyn Brittlebank, a solicitor working for Dentons, the claimant's then solicitors, advised that the IGPM should refer to the model in the following way:

'For the avoidance of doubt, this model is included for reference purposes only, and as an aid to reading the IGPM. It may be used to assist in providing information for monitoring purposes in accordance with clause 12.7 of the Agreement and accordingly may form the basis of the records held by the Provider in accordance with clause 12.7.2.'

19.
It was not disputed that Ms Brittlebank's proposed wording was agreed by both the claimant and the defendant, and was included in the version incorporated into the final contract. The agreed wording down-playing the significance of the model was perhaps understandable, because both parties were working on the basis that the detail of their financial agreement was in part B of the completed IGPM, noted at paragraph 11 above.

20.
Finally there was some debate as to the precise commencement date of the contract. That is common in cases of this sort, where various rights and responsibilities are triggered by the formal start date. A commencement date of 1 October 2009 was agreed between the parties.

(b)
The Contract Documents

21.
The putting together of the contract documents themselves was the responsibility of Ms Brittlebank. On 30 July 2009 she emailed Ms Gwen McKenzie of PwC, asking her, amongst other things, for the

final version of the IGPM. Ms McKenzie replied, reattaching schedules which had already been provided. Ms Brittlebank chased her again for the specific documents that she had sought.

22.
At 23:31 on 30 July 2009, Ms McKenzie sent Ms Brittlebank what she said was the final IGPM. It was that version which was incorporated into the final contract. But it was not the final version of the IGPM received from the defendant (paragraph 11 above). It was instead the earlier version to be completed by the tenderers with the "[to be inserted]" instruction still in place (paragraph 10 above). That is the alleged mistake at the heart of this case.

23.
On 6 August 2009, on the expiry of the 10 day standstill period, the claimant wrote to the defendant and said:

"I hereby accept your Tender including the Price and Schedule, on behalf of Milton Keynes Council ("the Council"). Your Tender and this acceptance letter now constitute a binding Agreement incorporating the following documents which shall be deemed to form and be read and construed as part of this agreement.

(a)
The said Tender;

(b)
The Conditions of Contract along with all its Annexures including the Price and Schedule and the clarification question;

(c)
The Lease Deed as well as its Annexures."

The letter then went on to say that, in accordance with the binding Agreement, the defendant was obliged to take various steps. The letter concluded:

"Please be aware that this contract will not commence until all documentation requested has been submitted. Completed documents should be signed, scanned and uploaded via the Award Stage of In-Tend, this should be no later than 12 noon 20 August 2009."

There was no objection, query or even reply to this letter from the defendant.

24.
As noted above, the final contract was dated 1 October 2009. It is common ground that the version of the IGPM included in the contract was not the version that was sent out by the defendant as part of its final tender (paragraph 11 above) but the earlier version that had been sent out by the claimant with the invitation to tender (paragraph 10 above). On the evidence before the court, that was undoubtedly because of Ms McKenzie's error in sending the wrong version to Ms Brittlebank when she was putting together the contract documents (paragraph 22 above).

25.
The effect of her error cannot be underestimated. Mr Hamblin said that, in its final (incomplete) version, the IGPM incorporated into the contract was "inoperable", because "there are so many vital parts that are missing".

26.

Despite this, Mr Hamblin suggested that he may have raised the error prior to the signing of the contract. He was vague about this: he could not be sure if this was before or after the contract had been signed. There were no documents that supported the suggestion that he had spotted the point before the contract was signed. There were, however, clear contemporaneous documents which indicated that he had spotted the error at the end of November 2009, after the contract had been signed (see paragraphs 80-82 below). On further questioning, it became apparent that, even on his case, Mr Hamblin had not raised the matter with the claimant, but with Mr Cutts, the defendant's principal director at the time that the contract was made.

27.
For the avoidance of doubt, I find on the facts that neither the claimant nor the defendant spotted the insertion of the wrong document prior to 1 October 2009, when the contract was concluded. In my judgment, that finding is self-evident: since on the defendant's own case the gaps rendered the contract "inoperable", if anyone on either side had spotted them before signing the contract, they would not have stayed silent. Moreover, the contemporaneous documents show that Mr Hamblin spotted the error in late November, after the contract was signed (see paragraphs 80-82 below) [2] .

3. THE DEFENDANT'S PRELIMINARY SUBMISSIONS

28.
In his oral opening, Mr Davie QC made entirely new submissions focused on the facts prior to the claimant's acceptance of the defendant's tender. The main argument went as follows. The process adopted by the claimant to consider the tender involved a competitive dialogue with the tenderers, including the defendant. It was said that, pursuant to the Public Contract Regulations, at the end of a competitive dialogue process, the methodology and terms of any proposed contract should have been agreed, with only the figures remaining outstanding. Here, in breach of the Regulations, it was alleged that the claimant failed to agree all the relevant terms at the end of the dialogue process and that, instead, the claimant sought tenders which allowed the tenderers to come back with much more than simply figures (such as the text relating to indexation). Thus it was said that the defendant's final tender bid was not in accordance with the Regulations and could not therefore form the basis of a rectified contract.

29.
In addition, there were related submissions to the effect that either, as a result of the competitive dialogue process, there was no consensus between the parties thereafter, or that the claimant did not have the authority to enter into the final contract.

30.
In my view these arguments faced certain fundamental difficulties. First, they were not pleaded. Although Mr Davie QC sought to argue that they did not need to be, because this was all part of the process of putting the claimant to proof, I made plain during the course of argument that I disagreed with him. This new case involved specific and potentially serious criticisms of the claimant: it was repeatedly said that something had "gone wrong" with the claimant's procurement process. Both that allegation, and the alleged legal consequences of it, would have had to have been pleaded in order to allow the claimant to deal with it. In the absence of such a pleaded case, I consider that this issue is not open to the defendant [3] .

31.
I draw some support for the conclusion that this new case was something of an afterthought by noting that Mr Davie QC's lengthy written opening, provided on Friday 27 January 2017 so that it could be

considered during the court's reading day on Monday 30 January 2017, made no mention whatsoever of any of these arguments.

32.
Accordingly, for this reason alone I dismiss the defendant's preliminary submissions. However, in case I am wrong to have formed that view, it is necessary for me to go on and deal with the substance of these arguments. For the reasons set out below, I consider that the arguments are fundamentally flawed for a variety of reasons.

33.
The relevant Public Contracts Regulations governing this procurement were those issued in 2006. Pursuant to Regulation 18(25), when the contracting authority (in this case the claimant) declared that the competitive dialogue was concluded, it had to request each participant to submit a final tender containing all the elements required and necessary for the performance of the project "on the basis of any solution presented and specified during the dialogue". At Regulation 18(26) the contracting authority was permitted to "request a participant to clarify, specify or fine-tune a tender… but such clarification, specification, fine-tuning or additional information shall not involve changes to the basic features of the tender or the call for tender when those variations are likely to distort competition or have a discriminatory effect."

34.
The defendant's suggestion was that, because important matters such as the precise percentage profit share and the question of indexation were both left incomplete at the end of the competitive dialogue process, their inclusion (by the defendant) in its final bid went beyond what was permitted by Regulation 18(26).

35.
I reject that submission in its entirety. In my view, the defendant's final tender complied with the Regulations. Competitive dialogue is a process which seeks to narrow the points in issue, so that the remaining tenderers can then return a final tender on a common basis. Ordinarily, following a competitive dialogue, the principal differences between the tenders will simply be the figures. In my view, that was the case here. The documents to which I have referred in paragraphs 6-9 above make plain that the claimant decided to leave it to the tenderers to come back with detailed proposals as to the mechanism for payment (including profit share and indexation). In my view they were entitled to do so. There was no breach of the Regulations.

36.
The fixed payment is a good example of the compliant nature of the process. It is common ground that the fixed payment to the claimant was to be £500,000 per year. Adding a note that, in respect of that payment, the figure was to be indexed for inflation, was not a significant change in the contract terms: it was simply a qualification of the figure itself. Thus, even on the defendant's restricted interpretation of the 2006 Regulations, no breach has been identified.

37.
Now assume that I am wrong, and there was some non-compliance because the changes to the IGPM went further than just changes to figures. What effect does that have?

38.
In my view it has no effect whatsoever. Provided that the claimant was treating both the defendant and the other tenderer equally, then there can be no criticism of the process adopted by the claimant.

On the contrary, the claimant was responsible for the process and could choose, if it wanted, to seek more information by way of the final IGPM than might ordinarily be allowed requested. The only thing that the claimant had to avoid was treating the two tenderers differently. That is the reason for the qualification in Regulation 18(26) ("likely to distort competition or have a discriminatory effect"). It is not suggested here that the claimant treated the tenderers differently, nor is it said that the claimant distorted competition or acted in a discriminatory way. Thus, however it is analysed, the point about the Regulations goes nowhere.

39.
The submission that there was no consensus after 22 July appeared to be based on the suggestion that anything that happened after the end of the competitive dialogue process was irrelevant, because the claimant had somehow signed off on the contract documents before the ITFT and/or that somehow the relevant Council officers were not involved after early May and had not authorised the contract that was concluded thereafter. In my judgment, these submissions fail at every level.

40.
First, there is nothing to suggest that the claimant had decided to let the contract to the defendant at the end of the competitive dialogue stage. On the contrary, at that point, the claimant wanted to see what the final tenders from the defendant, and the other tenderer, actually said (paragraphs 8-9 above). In addition, there can have been no consensus based on the version of the IGPM sent out with the ITFT, because that document was incomplete: all the relevant figures remained to be inserted by the tenderers.

41.
Secondly, subject to a short extension to the competitive dialogue stage, the claimant had kept to the timetable advertised at the meeting on 24 March 2009. In particular, that stated that the decision would be made by the claimant at the Cabinet meeting on 21 July, and that is what happened. There was nothing in any suggestion that, contrary to the minutes of the meeting on 24 March (paragraph 6 above), authorised officers ceased their involvement in May 2009. They were plainly involved throughout the process, up to 22 July and thereafter.

42.
At one point, Mr Davie QC went so far as to say that there was no evidence that the contract was ever authorised after 21 July. That submission was contrary to all the evidence, including the minutes of the Cabinet meeting on 21 July and the letters of 22 July and 6 August, which were both written on the authority of the Council. It was also contrary to the evidence of his own witness, Mr Hamblin, who confirmed that he had no reason to think that there was ever any problem with the Council's authorisation.

43.
Thus, on 22 July 2009, which was the date Mr Davie QC gave for there being a consensus which somehow excluded the defendant's final tender bid, the position was plain. The defendant's final tender bid had been considered, evaluated by PwC, and approved by the claimant. The minutes of the Cabinet Meeting on 21 July 2009 recorded that approval. That then led to the letter of 22 July 2009 (paragraph 14 above). The contract could not be let on that date because of the 10 day standstill arrangement with the other tender. Once that period expired, the contract was then recorded in the letter of 6 August 2009. At no time did the defendant ever object to or query either of the claimant's letters.

44.

Accordingly, the claimant's express approval and subsequent acceptance of the defendant's final tender included the version of the IGPM sent out with that tender. That led to the letter of 6 August 2009 (paragraph 23 above) which was unequivocal. It accepted the offer made in the defendant's final tender. That letter, on its face, recorded a binding contract between the parties, at the end of the 10 day moratorium. The absence of any response from the defendant showed the defendant's understanding and acceptance of this. In my view, no other interpretation of the facts is tenable.

45.
Accordingly, for all these reasons, I consider that the defendant's preliminary submissions must fail. As Mr Clay rightly summarised it in his closing submissions, 'there was no breach problem and no authority problem'. The fact that these submissions were raised so late and then argued so hard indicated to me that Mr Davie QC may have been aware that the points that were open to him on his amended pleading to try and avoid rectification were not strong.

4. RECTIFICATION: THE LAW

46.
The necessary requirements for rectification of a written contract on the grounds of common mistake were set out by Peter Gibson LJ in **Swainland Builders Limited v Freehold Properties Limited** [2002] EWCA Civ. 560; [2002] 2 EGLR 71, as follows:

"33. The party seeking rectification must show that:

(1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified;

(2) there was an outward expression of accord;

(3) the intention continued at the time of the execution of the instrument sought to be rectified;

(4) by mistake the instrument did not reflect that common intention."

47.
This formulation was expressly approved by Lord Hoffman in **Chartbrook v Persimmon** [2009] AC 1101 at paragraph 48 when he said:

"48. The last point is whether, if Chartbrook's interpretation of the agreement had been correct, it should have been rectified to accord with Persimmon's interpretation. The requirements for rectification were succinctly summarized by Peter Gibson LJ in **Swainland Builders Ltd v Freehold Properties Ltd** [2002] 2 EGLR 71, 74, para 33…"

48.
Although I was referred to a number of other authorities dealing with rectification, they seemed to me simply to reflect the application of these principles to the facts of the particular case. I should however note that, in my view, the word "continuing" in Peter Gibson LJ's first requirement seems to me to be superfluous: it is more accurate to say that there needs to be a common intention (requirement 1) which was continuing at the time that the contract was executed (requirement 3).

5. THE CLAIMANT'S CLAIM FOR RECTIFICATION

5.1
Common Intention

49.
The claimant had invited the defendant to identify the proposed fixed payment. In the IGPM completed by the defendant, that fixed payment was stated to be £500,000 per annum “indexed for inflation”. That was a feature of the defendant’s tender which was expressly referred to in the evaluation report. It was a particular feature of the tender which was accepted, without qualification, in the letter of 6 August 2009 (paragraph 23 above).

50.
Accordingly, I have no hesitation in saying that there was a common intention between the parties, at the time that the defendant’s tender was accepted, that the fixed payment made by the defendant to the claimant was £500,000 per annum “indexed for inflation”.

51.
There is no evidence to the contrary. Although Mr Serfaty of the defendant suggested that indexation was omitted from the defendant’s final bid (and he agreed that the entirety of his witness statement was based on this assumption), it can be seen from the documents – and the unequivocal evidence of Mr Hamblin, the defendant’s main negotiator – that he was quite wrong about that, and the opposite was the case.

52.
In his final submissions, Mr Clay submitted that paragraph 53 of the defendant’s closing submissions appeared to accept that requirement 1 had been made out. I agree with that.

5.2
Outward Expression Of Accord

53.
There can be no doubt that there was an outward expression of accord. The fixed payment indexed for inflation was part of the defendant’s tender which was expressly accepted by the claimant in unequivocal terms in the letter of 6 August 2009 (paragraph 23 above). There can be no doubt that there was therefore the necessary outward expression of accord: indeed, there was a binding contract at that date to that effect. Again, I consider that paragraph 53 of the defendant’s closing submissions accepted that there was the necessary outward expression of accord. Requirement 2 was therefore made out.

5.3
Continuing Intention

54.
It is the defendant’s case that there was no continuing intention in respect of indexation because, by the time that the contract was concluded, it was in a different form to that which purportedly existed as at 6 August 2009. On a proper analysis of the facts, it seems to me that this argument is hopeless.

55.
First, I note that it is pleaded by the defendant that the continuing intention cannot be demonstrated because, after 6 August 2009, and before the contract was concluded, there was a continuing negotiation about indexation. Indeed, it is the defendant’s pleaded case (paragraph 8 of the defence) that the omission of indexation in the final version of the contract was not a mistake, but was a result of this negotiation.

56.

There was no evidence of any sort – no oral evidence, and no contemporaneous documentation – to indicate that indexation was ever the subject of further negotiation after 6 August. The three witnesses called by the defendant did not say that they were involved in any such negotiations. On the contrary, Mr Hamblin confirmed that the defendant's tender offer included for indexation on the fixed payment; that he was aware that that offer had been accepted by the claimant; and that he understood that the contract was signed off on the basis of that agreement. The claimant's witnesses said the same thing.

57.
Despite this complete lack of evidence, in his closing submissions, Mr Davie QC maintained that the defendant entered into the contract in the belief that indexation did not apply to the fixed payment. In my view, given Mr Hamblin's evidence, which completely contradicted any such suggestion, that submission should not have been made. I reject it for the reasons I have given.

58.
In any event, there was another plain and obvious answer to this (unfounded) suggestion. If indexation had been the subject of further discussion after 6 August, and it had been agreed that indexation would not apply to the fixed payment, then the final version of the contract would have reflected that discussion. If so, the IGPM sent with the defendant's final tender would have been amended to make clear that, whilst everything else, such as the 30%/70% split, remained the same, indexation did not apply to the £500,000. Of course, there was no such document.

59.
Further negotiation and agreement that indexation would not apply to the fixed payment would not have resulted in the version of the IGPM that was included in the contract, which contained no reference at all to the £500,000 itself, let alone indexation. Contract negotiations do not lead to a concluded position whereby the relevant figure is stated as "[to be inserted in final tender]". In other words, the document itself confirms that there were not any further negotiations about indexation.

60.
Secondly, the defendant has a broader point that there were other changes to the contract after 6 August which means that rectification back to the 6 August version should not be permitted. I reject that too. There were no negotiations about anything in the period between 6 August and 1 October 2009. As far as both parties were concerned, they had a binding contract no later than 6 August (when the defendant's tender was accepted), and there was no contrary evidence.

61.
In any event, this came down to the nebulous argument that, because there were what Mr Hamblin agreed were "minor tweaks and revisions" between 6 August and before 1 October, the claim for rectification could not succeed. In my view that argument is wrong in principle. However, even if it were right, it has not been made out on the facts.

62.
Mr Davie QC relied on **Pindos Shipping Corporation v Fredrick Charles Raven ("The Mata Hari")** [1983] 2 Lloyd's Rep 449 in support of the proposition that, if the executed contract did not merely record an agreement previously reached but expressed terms in a new way, then rectification of the contract might not be appropriate. That of course is common sense because, in those circumstances, the claim for rectification would be an illegitimate attempt to rely, not on the final agreement, but on matters which had previously been agreed but subsequently altered. It was therefore a case on its own particular facts and is not authority for a general principle that any

subsequent changes prevent rectification (as the Court of Appeal pointed out in **Dunlop Haywards Ltd v Erinaceous Insurance Services Ltd** [2009] EWCA Civ. 354, at paragraph 82).

63.
In **The Mata Hari** the contract had been the subject of extensive changes so that it was a different agreement. That is manifestly not the case here. For the reasons set out in paragraphs 16 to 20 above, the 'minor tweaks and changes' relied on by the defendant in support of this proposition were no such thing. The clarification in respect of clause 12.7.3C pre-dated 6 August; the words of clarification in relation to the financial model were agreed because the IGPM had been agreed in the form which the claimant now seeks to add back into the contract; and the discussion about the precise commencement date (which was not in any event a pleaded issue) was entirely typical of contracts of this sort.

64.
Finally, at one point in the early stages of the hearing, it was suggested by Mr Davie QC that the contract had not been agreed as at 6 August because some elements of the Performance Bond had not been filled in, and could not be completed until the value of the contract was known. This seemed to me to be an irrelevant (and unpleaded) issue, because the Performance Bond involved a third party and was not said to have anything to do with the terms of the contract itself.

65.
It was also suggested that Mr Hamblin had spotted the gaps in the contract before it was executed because he was trying to work out what the contract was worth for the purposes of completing the Performance Bond. Again that seemed implausible, given that, because of the nature of this contract (with the contractor actually paying the employer), this was not a contract with a value in the conventional sense at all. That was a point I raised in argument and I asked to see the completed Bond. I was originally told it was unavailable. However, when it was provided by the defendant, as I had suspected, no value was entered. No link was identified between the bond and Mr Hamblin's alleged spotting of the gaps. Again it was another red-herring raised by the defendant which went nowhere.

66.
Accordingly, I have no hesitation in concluding that the common intention to use the version of the IGPM completed by the defendant in its final tender and accepted by the claimant on 6 August, continued to 1 October 2009, when the contract was signed. Thus the third requirement for rectification has also been made out.

5.4
Mistake

(a)
Introduction

67.
I have explained at paragraph 22 above how the mistake happened. There is no doubt that it was sloppy work by PwC, the management consultants and, to a lesser extent, by Ms Brittlebank, the solicitor. PwC's error is perhaps a sad reflection of the fact that modern day contracts of this kind are so complicated that nobody (not even the consultants) bothers to check the actual documentation being signed.

(b)
The Obvious Nature Of The Mistake

68.
Mr Davie QC made much of the fact that this was such an obvious and major mistake that an explanation was called for as to how it was missed. His suggestion was that those advising the claimant cannot have been that incompetent, and that there should have been evidence about the failure to pick it up on review prior to execution. He said in consequence that it should not be inferred that this was a mistake at all. I reject that submission for a number of reasons.

69.
First, it is in the very nature of a mistake that it is not picked up by those who should have spotted it. It cannot be said that, merely because the mistake was so glaring, that it cannot have been a mistake at all. Secondly, there was compelling evidence as to how the mistake happened, and the fact that it was not spotted by either side. That is sufficient to demonstrate that a mistake was made. Nothing further is required. The next question is whether it was a common mistake or a unilateral mistake sufficient to justify a claim for rectification.

(c)
Common Mistake

70.
For the reasons already noted, it is plain that the claimant made a mistake in that it signed off a version of the contract which, because of PwC's error, included the ITFT version of the IGPM, rather than the version completed and sent back by the defendant. In addition, I consider that precisely the same mistake was made by the defendant. I have already noted at paragraphs 26-27 above that, on the evidence, Mr Hamblin did not raise the question of "the gaps" until after the contract had been signed.

71.
It is important to note here Mr Hamblin's own oral evidence. He noticed the gaps (as I have found, after the contract had been signed) and was immediately aware that the wrong document had been included in the contract. As Mr Hamblin himself said, the gaps were "unacceptable" because they rendered the contract "inoperable". On this basis, therefore, I conclude that there was a common mistake and that all of the ingredients are in place to permit rectification.

(d)
Unilateral Mistake

72.
For completeness, I should deal with the claimant's alternative claim that it is entitled to rectification as a result of a unilateral mistake (i.e. a mistake that it made but which the defendant did not). The ingredients of unilateral mistake rectification are set out in the judgment of Buckley LJ in **Thomas Bates & Son Limited v Wyndham's (Lingerie) Limited** [1981] 1 WLR 505, 516A-516C where he said:

"…first, that one party (A) erroneously believed that the document sought to be rectified contained a particular term or provision, or possibly did not contain a particular term or provision which, mistakenly, it did contain; secondly, that the other party (B) was aware of the omission or the inclusion and that it was due to a mistake on the part of (A); thirdly, that (B) has omitted to draw the mistake to

the notice of (A). And I think there must be a fourth element involved, namely, that the mistake must be one calculated to benefit (B). If these requirements are satisfied, the court may regard it as inequitable to allow (B) to resist rectification to give effect to (A)'s intention on the ground that the mistake was not, at the time of execution of the document, a mutual mistake."

73.
In the present case, this only becomes relevant if I am wrong in my primary conclusion that Mr Hamblin did not notice the gaps until after the contract had been signed. On the assumption that he noticed the gaps before the contract was signed, he said that he informed Mr Cutts, the relevant director of the defendant at the time. Mr Hamblin did not alert the claimant. There is no evidence that Mr Cutts did anything about it either; he certainly did not alert the claimant to the problem.

74.
In those circumstances, it seems to me that the ingredients for a unilateral mistake have been made out. If Mr Hamblin (and therefore Mr Cutts) was aware of the mistake prior to entering into the contract, and Mr Cutts omitted to draw the mistake to the claimant's notice, then it was because Mr Cutts considered that the mistake was calculated to benefit the defendant. And of course, it manifestly was: it allowed the defendant to say (just as the note subsequently provided to Viridor claimed: see paragraph 92 below) that no indexation was payable on the fixed payment for the whole period of 15 years.

75.
Accordingly, if I am wrong to conclude that Mr Hamblin did not notice the mistake until after the contract was signed, and had instead drawn the mistake to the attention of Mr Cutts before the contract was signed, then it is a straightforward conclusion that Mr Cutts deliberately failed to draw it to the attention of the claimant because he considered that he could gain a financial advantage by avoiding the tender offer of indexation. On this basis, the alternative case of unilateral mistake has therefore been made out.

(e)
The Entire Agreement Clause

76.
The contract contained an entire agreement clause at clause 17.6. That provided that the executed contract "constitutes the entire agreement and understanding between the parties…and supersedes, cancels and nullifies any previous agreement between the parties…"

77.
The defendant relied on the existence of the clause as a factor militating against the rectification of the contract. I was reminded of what Tuckey LJ said in **Phillips Petroleum Co. UK Limited v Snamprogetti Limited** [2001] 79 Con LR 80: "where there is an entire agreement clause this may tend to show in fact no inconsistent governing intention has subsisted and that hence no basis for rectification has arisen because the parties have intended to be bound by the document in the material respects regardless of prior or other intentions." I respectfully agree that, in some cases, an entire agreement clause like this might be relevant to the issue of rectification. But I am confident that that is not the case here.

78.
As Cooke J noted in **LSRF III Wight Limited v Mill Valley Limited** [2016] EWHC 466 (Comm), where there is a strong case for rectification, the agreement which constitutes "the entire agreement"

is to be found in the contract as rectified and not in the contract which, ex hypothesi, does not reflect the true intention or agreement of the parties. I consider that that is the position here. Thus the entire agreement clause is immaterial.

(f)
Summary

79.
Accordingly, for the reasons set out above, either on the basis of common mistake or, in the alternative, on the basis of unilateral mistake, the claimant has been able to demonstrate all of the relevant ingredients for rectification. Indeed, I consider that the claimant has made out an overwhelming case to that effect. But before the court grants the equitable remedy of rectification, it is then necessary to look at the two further arguments put forward by the defendant (acquiescence and laches), to the effect that the events post-contract, and/or the claimant's delays, mean that the remedy should not be granted.

6. THE POST-CONTRACT EVENTS

6.1
The Performance Of The Contract

80.
It is common ground that the contract could not have operated without the use of the completed IGPM (or at least the figures in it) submitted by the defendant in its final bid: it was that document which made the contract work and, as Mr Hamblin said, the contract was "inoperable" without it. One way to demonstrate that proposition is by reference to the fixed payment of £500,000 per annum. That figure only appears in the version of the IGPM that was attached to the final tender. It does not appear in the version of the IGPM that was bound into the contract. If the latter was the appropriate contract document, there was nothing to indicate what the correct fixed payment was.

81.
That is the background to the events in November 2009-January 2010, after the contract was up and running. On 30 November 2009, Ms Brittlebank queried with Mr Sheikh (the claimant's in-house lawyer) a matter that had been raised by CWL (as we now know, originating with Mr Hamblin). She said:

"CWL have also raised some queries as to the payment mechanism under the contract. What PWC have provided includes an 'X' where CWL were expecting it to be completed with the agreed figure. CWL have asked us to clarify what the figures marked as an 'X' should be.

As the payment mechanism was put together by PWC, I am unable to answer this query. Would you be able to speak to CWL with regard to this query or arrange for PWC to deal?

If I receive any further queries from CWL, I will pass these on to you."

Ms Brittlebank made plain that this was the first time that this query had been raised. It is the obvious query arising out of the failure to use the correct IGPM in the contract documents. It confirms my conclusion that the point had not been spotted before: if it had been, then Ms Brittlebank would have been alerted prior to this date.

82.

There were further exchanges on this topic and, on 20 January 2010, Ms McKenzie of PwC sent a further version of the IGPM. This time she sent the right payment mechanism (i.e. the one sent with the defendant's final tender). However, even then, it does not appear that either side realised what had gone wrong. Instead, Mr Sheikh thought that the problem was not about the income mechanism at all but a point about plant (see his email of 21 January 2010). And the defendant did not pursue the matter any further, notwithstanding the fact that, as Mr Hamblin said, the contract was unworkable in its present form. As Mr Clay put it in his closing submissions, mixing his metaphors rather too freely, 'the balloon nearly went up', but then 'ran into the sand.' Neither side realised what precisely had gone wrong, and the query fizzled out.

83.
How were the parties able to proceed? The answer is simple. They used the figures in the correct version of the IGPM which set out all the £500,000 and the 30%/70% profit share, but they ignored the text. That covered the position until well into 2010. From 1 April 2010 (the first relevant date) the claimant invoiced the defendant for the fixed payment but did not include any claim for indexation.

6.2
The Events In October 2010

84.
On 26 October 2010 Mr Serfaty of the defendant sent Mr Hudson of the claimant some figures in advance of a proposed meeting on Friday 29 October 2010. The meeting was to discuss the precise mechanism for the calculation of the variable payment to the defendant (the 30%/70% split). Mr Serfaty's email after the meeting on 1 November made it plain that the parties had reached an agreement in respect of calculation of the profit-share. His attachment included the calculation of the profit sharing arrangement.

85.
Neither Mr Hamblin nor Mr Serfaty [4], who attended this meeting, suggested in their witness statements that there had been any discussion about the fixed payment, still less any discussion about indexation. There is no suggestion on the face of the contemporaneous documents (which the defendant prepared and sent) that this was a topic that was even raised.

86.
However, in his oral evidence, Mr Hamblin suggested that indexation on the fixed payment was something that had been discussed. The absence of any reference to it in the contemporaneous documents, and the absence of any reference to it in his witness statement, were both put to him. He said that he saw the force of both points (a reflection of the fact that, in my view, Mr Hamblin was a fair witness who was doing his best to assist the court at all times). I concluded that he could not remember the meeting very clearly, and had persuaded himself that indexation on the fixed payment would have been the sort of thing that he would have discussed in October 2010. In my view, the contemporaneous documents make plain that indexation on the fixed payment simply never arose at the meeting in October 2010.

6.3
The December 2010 Invoices

87.
The following month, in December, the defendant sent the claimant invoices in relation to the profit share. This included indexation on their £5 per tonne profit margin (a point expressly noted in the

IGPM sent with the defendant's final tender, in the same sentence as the offer of indexation on the fixed payment). The inflation rate that was identified was 4.76%. It appears that this led the claimant to invoice the defendant for the fixed payment at £125,000 (being a quarter of the annual sum of £500,000), expressly indexed for inflation at the same rate of 4.76%. That was the first time that the claimant had invoiced for this additional amount; the earlier quarterly invoices had just been for the one quarter of the annual fixed payment of £125,000.

88.
It is not entirely clear what happened thereafter. There are no meeting minutes or any notes of any telephone conversations. Mr Hudson, who was dealing with the project overall on behalf of the claimant, said that the invoicing was a matter for Wendy Richardson, the relevant officer at the claimant dealing with invoices. In his second statement, he said that "it would have appeared to Wendy on a simple check of the documents that indexation did not apply". That was the best explanation he could give as to why, on 21 December 2010, a credit invoice was issued, cancelling the claim for indexation.

89.
Mr Hudson was criticised by the defendant for being less that frank about this part of the story. I consider that this inference of dishonesty was unfair. It was not put to him directly and there was no objective evidence to support it. Indeed, I note that paragraphs 39 and 40 of Mr Hamblin's statement contained a very similar account to that given by Mr Hudson, to the effect that Wendy Richardson revised the invoice, having been told that the contract as concluded did not include indexation.

90.
In any event, what is clear is that I cannot find, as at one point I think the defendant was urging me to find, that in December 2010 a binding agreement was reached, or some common understanding achieved, that indexation would not apply to the fixed payment. Mr Hamblin did not say that in either of his witness statements. He did not say that in his oral evidence. The contemporaneous documents do not suggest any such agreement or understanding. There is simply no evidence to support such a conclusion. All that happened is that indexation was included in an invoice and then, once the (incorrect) contract had been checked, it was removed.

6.4
Events Thereafter

91.
In early 2012, the original owners of the defendant company sold their shares to Viridor. It appears that Viridor paid £13 million for the defendant and that this contract was seen as one of the defendant's principal assets. Of course, the claimant was not involved in this sale and had no control over any of the information provided by the vendors to Viridor.

92.
However, included in the trial bundle was a short note that apparently constituted the information provided to Viridor relating to the contract. It read as follows:

"Fixed charge for the tem of the contract of £500,000 pa not subject to inflationary increase. Quarterly payments.

Once a year, we calculate a 70/30 profit share (i.e. 70% to CWR) on the basis of the costs of the MK MRF plus an initial margin for CWR of £ per T input. This £5 margin is adjusted up in line with RPIX.

No issues with contract although the Fixed Payment is left blank."

93.
That was an unsatisfactory and incomplete record for a number of reasons. If it was intended to be a summary of the contract documentation (and that seems likely because there is a reference to the fixed payment being "left blank") then it is misleading, because it makes no reference to the fact that it is not only the fixed payment that was "left blank", but that it was instead everything of any significance (including the 30%/70% profit share) that was "left blank", because the wrong document had been inserted into the contract. If on the other hand it was intended to be a record of the process that had been adopted to get round the difficulties within the contract documents, then it was incomplete because it made no record of the fact that this was an ad hoc agreement that bore no relation to the written contract. Indeed, it could be argued that it is a "best of both worlds" summary which took some information from one place, and some from another, and was designed to make the contractual arrangement with the claimant appear as profitable as possible to the potential purchaser.

94.
But one thing this note does do is to confirm my conclusion (paragraphs 84-90 above) that neither in October nor in December 2010 were there any discussions, and certainly no agreement, that indexation would not be charged on the fixed payment. If there had been such a discussion or such an agreement, the note provided to Viridor would have said so in unequivocal terms.

95.
I should add that, very belatedly, Viridor sued the vendors of the defendant company on the basis of misleading information. However, the claim was rejected by Senior Master Fontaine on grounds of limitation, as recorded in my earlier judgment in this case at [2016] EWHC 2764 (TCC). It seems that those delays were the fault of Viridor; it is (rightly) not said that they were the responsibility of the claimant.

96.
In early 2012, the claimant was the subject of a detailed audit. The emails of 3 February 2012 make clear that the auditor had been provided with the incomplete IGPM, and had asked for the completed version. It was clear that this was not readily to hand. Mr Hudson explained how the contract had operated in practice following the discussion in October 2010. He made no mention of the fixed payment because, for the reasons that I have already given, that had not been the subject of the discussions with the defendant, either then, or at any subsequent date.

97.
In consequence of the audit it became apparent that the claimant had not previously sought indexation on the fixed payment. On 15 March 2012, Mr Hudson wrote to Mr Rowland of the defendant to point out a number of consequences of the audit. On the relevant point he said:

"A second issue is that of indexation on the 'Fixed Payment' – we've not charged any since contract commencement. I attach the IGPM (schedule 2) submitted with the final tender, which is clear that the fixed payment should be indexed and I don't know why we haven't! We'll clearly need to rectify this but you may need to potentially claw back monies from CWL – not sure if the retention has been sorted yet?"

Mr Hudson wrote again on 13 April 2012. His email demonstrated, for the first time, a full understanding and an explanation as to how the mistake occurred. The defendant was therefore

aware of the issue that now arises in these proceedings. Indeed, it appears to have been this exchange which gave rise to the unsuccessful claim against the vendors.

98.
Once the claimant had notified the defendant of the point, matters proceeded slowly. It appears that delays occurred on both sides. Certainly there were delays by the defendant, because they were very slow to respond to the stages of the pre-action protocol process and often sought lengthy periods in which to respond. They also expressed the hope on more than one occasion that the matter could be resolved informally.

99.
Accordingly, it was not until January 2014 that the claimant sent the formal letter of claim. However, confirming the conclusion above that the defendant was just as culpable, if not more culpable, in relation to delay, the substantive response was not provided until October 2014. The claim form was issued in April 2015.

7. DELAY AND ACQUIESCENCE

7.1
Overview

100.
The defendant relies on laches (delay) and acquiescence as defences to the claim for rectification. Before dealing with them, it is right to note that they arise as competing equities: should they trump the prima facie entitlement to rectification? Moreover, it is important to keep in plain sight two other elements of the story, in respect of which the merits are firmly on the claimant's side.

101.
The first is the obvious point about holding the defendant to its original promise. The defendant offered that the fixed payment to the claimant, and the profit margin that would accrue to the defendant, would both be index-linked. It is possible to view at least some of the events in this case as an attempt by the defendant to avoid its obligation to pay the fixed payment together with inflation, but to retain the benefit of having inflation added to its own profit margin. Given that in its tender, the defendant did not differentiate between the two, I find that to be an unattractive and unmeritorious position.

102.
The second matter concerns commercial reality. The fixed payment was, as I have said, the equivalent of rent on the facility owned by the claimant. If indexation did not apply to the fixed payment then it meant that the claimant was allowing the defendant a lease of that facility for 15 years, with no break clause, and no opportunity to increase the rent. Unless there was a clear agreement to that effect, it is a proposition that might be thought to be contrary to commercial common sense.

7.2
Delay

103.
Delay in rectification cases was dealt with generally in **Lindsay Petroleum Company v Hurd** [1873] 5 AC 221 at 239-240. Lord Selborne LC said that it must be shown that the subsequent delay in seeking rectification meant that:

"…it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted…

Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."

104.
In citing this passage in **KPMG LLP v Network Rail Infrastructure Limited** [2006] EWHC 67 (Ch), Blackburne J said:

"197. That merely leaves the laches defence. As to this, it is well established that the doctrine does not come into play before the person against whom it is raised as a defence has discovered the material facts, in this case the mistake."

105.
In my view, there is nothing in the laches defence here. On a proper application of the principles, as summarised by Blackburne J, the relevant period to which laches could attach is from March 2012 onwards, because it was only then that the claimant realised the mistake. The claimant immediately put the defendant on notice of the mistake and its consequences. Thereafter, any delays were, at worst, a shared responsibility. No detriment to the defendant has been identified. It is plain that it was the defendant's own delay during that period, and its own failure to pursue the original vendors, which was directly responsible for the failure of that claim.

106.
Accordingly, I reject the defence of laches to the rectification claim. That leaves the defence of acquiescence.

7.3
Acquiescence

107.
The first question is to try and identify what it is that is said to have been acquiesced in. Although the defendant was a little unclear on this, it must be its case that the claimant acquiesced in the proposition that indexation would not be charged on the fixed payment for the full 15 years of this contract. Was that something in which it could fairly be said that the claimant acquiesced?

108.
In my judgment, the answer to that question is No. I have already pointed out that the discussions in October 2010 did not deal with the topic at all, so acquiescence could not arise then. The fact that an invoice was presented claiming indexation after the meetings in October 2010 was, as Mr Clay suggested in his closing submissions, the opposite of acquiescence, because it meant that the claimant thought that indexation did apply.

109.
True it is that a claim was made for indexation and then withdrawn in subsequent invoices in December 2010, but for the reasons noted in paragraphs 87-90 above, there was no evidence before the court to conclude that there was acquiescence by the claimant in the proposition that, contrary to the accepted tender, the fixed payment would not be subject to indexation.

110.
Furthermore, there was no detriment to the defendant in any event. All that has happened is that the defendant has not paid the sums that were due under the contract (as rectified). That is not a detriment, particularly as, if the contract is rectified and indexation becomes due on the fixed payment, there would plainly be arguments open to the defendant as to the extent (if at all) to which those sums should attract interest.

111.
Accordingly, I find on the facts set out in **Section 6** above that acquiescence has not been made out.

7.4
Nature of Any Rectification

112.
For completeness I ought to deal here with a dispute which arose between the parties on the last afternoon of the hearing, concerned with the precise nature of any rectification. Mr Davie QC said that the court ought to be careful to ensure that, if the contract was rectified, that did not cut across the agreement reached at the meeting in October 2010 (paragraphs 84-86 above).

113.
I am confident that the rectification of the contract, whereby the completed version of the IGPM replaces the incomplete version of the same document, does not cut across what was agreed in October 2010. I take the view that the agreement that was reached on that occasion was essentially an agreement to operate the contract as it was intended to be. Mr Hamblin agreed in cross-examination that the mechanism agreed in October was essentially the same as the correct IGPM. It was emphatically not, as Mr Davie QC put it, “a third way”.

114.
It is true that the parties agreed a slightly different regime for the calculation of payments on account, which was designed to get round the more cumbersome mechanism in the IGPM. That change did not go to any questions of entitlement: it went solely to the most efficient way of calculating payments on account. It was in any event very close to what was in the IGPM completed by the defendant in its final tender.

115.
In those circumstances, I do not consider that the discussions in October 2010 are or can be a bar to rectification. Once the contract has been rectified both parties will, I am confident, continue to calculate the payments on account in the way that was identified in October 2010, because that suited them both.

116.
Mr Davie QC raised one specific issue with which I ought to deal expressly. It was plain that in October 2010 the parties agreed a methodology for calculating the shared profit which allowed the defendant to take off the figure of £5 per tonne before the profits were then shared 30%/70%. He was anxious to ensure that that agreement survived the rectification. I understand and agree with that. However, it seems to me that there is no difficulty. In my view, the correct IGPM provides for just such a calculation, a point expressly emphasised by PwC in their tender evaluation report. In other words, the rectified contract preserves, rather than undermines, that agreement.

117.

Moreover, if there were any doubt about it, Mr Clay on behalf of the claimant expressly confirmed that it was their understanding of the contract that the £5 per tonne was to be deducted before the 30%/70% profit share calculation. Either way therefore, the rectification does not cut across the defendant's rights.

8. CONCLUSIONS

118.
For the reasons set out in **Section 5**, I conclude that the claimant is entitled to the rectification of the contract as a consequence of a common mistake. In the alternative, I conclude that the claimant is entitled to rectification as a result of unilateral mistake.

119.
For the reasons set out in **Section 7** above, I reject the defence to the claim of rectification based on either laches or acquiescence.

120.
The contract will be rectified by the replacement of the wrong IGPM (paragraph 10 above) with the correct IGPM (paragraph 11 above). I am confident that the contract will then properly record the parties' rights and liabilities, including the defendant's entitlement to calculate the profit share by deducting the £5 per tonne before the 30%/70% split.

121.
If there are any further detailed points as to the rectification, I will deal with those when judgment is handed down. I will also deal at that stage with any consequential matters.

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[1] This quotation is taken from the minutes of the Cabinet meeting on 21 July. There was an issue about the late disclosure of these minutes.

[2] Mr Davie QC suggested that there was something suspicious about the lack of documents from the claimant in this period, so that the fact that there were no documents indicating that the error had been spotted before the contract was signed was somehow a factor in the defendant's favour. I reject that. The absence of any documents from either side referring to the error until November 2009 is the best evidence that it was not spotted until then.

[3] This conclusion has to be considered against the background of my earlier decision at [2016] EWHC 2764 (TCC) in which I allowed certain amendments made by the defendant, but refused others as being hopeless.

[4] Somewhat surprisingly, in his closing submissions, Mr Davie QC raised the issue of Mr Serfaty's credibility, even though he had little of relevance to add to the more detailed evidence of Mr Hamblin. I should say, therefore, that (on the limited matters to which his evidence went) I considered Mr Serfaty was an unsatisfactory witness. He agreed that his entire written statement was based on the incorrect belief that the defendant's final bid did not allow for indexation. He confirmed that he assumed, both then and now, that the correct contract documents had been submitted, an answer that was unhelpful to the defendant and engendered some stilted re-examination. And although at one point he attempted to say that Mr Hamblin had told him about the errors in 2009, that was not in his statement and he could not explain why not. It was also contrary to his assumption noted above.