Neutral Citation Number: [2018] EWHC 1602 (TCC)

Case No: HT-2014-000177

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 06/07/2018

Before :

THE HONOURABLE MRS JUSTICE JEFFORD DBE

- -

Between :

1. CASTLE TRUSTEE LIMITED	**Claimant**
2. ENOLA LIMITED	
3. LIBERTY NOMINEES LIMITED	
4. LIBERTY PROPERTY (GP) LIMITED	
- and -	
BOMBAY PALACE RESTAURANT LIMITED	**Defendant**

- -
- -

Miss Chantal-Aimee Doerries QC and Mr Marc Lixenberg (instructed by **Morgan LaRoche**) for the **Claimants**
Mr Adrian Williamson QC and Mr Thomas Lazur (instructed by **Glovers Solicitors LLP**) for the **Defendant**

Hearing dates: 16th – 19th October & 23rd – 26th October & 8th November 2017

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Approved Judgment

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

.....

THE HONOURABLE MRS JUSTICE JEFFORD DBE

Insert Judge title and name here :

Introduction

1. This case arises out of a project to refurbish and update property located at the corner of 2 Hyde Park Square ("2HPS") and Connaught Street.

2. The freehold owners of the property are the Church Commissioners. The leaseholders of 2 HPS are Liberty Property Limited Partnership. The Fourth Claimant, Liberty Property (GP) Limited acted as "a general partner" of the Liberty Property Limited Partnership. Whilst I set out below how there come to be four Claimants in this action, little or nothing has turned on this. In this judgment, I shall refer to the principal party to the agreement set out below as "Liberty" and I draw no particular distinction amongst the Claimants. The property was an 8 storey building. The ground floor of the property, with an entrance at 50 Connaught Street and identified by that address, was and is occupied, pursuant to a lease from the Church Commissioners, by the Bombay Palace Restaurant (which operates though a company, the Defendant, which I shall refer to as "BP"). The upper storeys are principally residential apartments.

3. From about 2006, Liberty wished to carry out works to 2HPS which involved extensive works both internally and externally to redevelop the residential flats. In order to do so, they needed the co-operation of BP as the restaurant would not be able to operate for some or all of the time such works were being carried out, not least because the entrance would be closed. In short, a deal was done: BP would vacate the restaurant for a period of time and, in return, Liberty would carry out works to the restaurant which would refurbish and update the premises. An Agreement was entered into dated 8 April 2010 between BP and Liberty Property (GP) Limited (a company registered in the Isle of Man and the Fourth Claimant), called "Liberty" in the Agreement, and Liberty Nominees Ltd. (also registered in the Isle of Man and the Third Claimant).

4. The works to the restaurant were ultimately carried out between January and May 2012 and form the subject matter of the dispute that ultimately reached this Court.

The Claimants

5. All the Claimants are companies registered in the Isle of Man. It is pleaded that:
   (i) on or around 3 September 2014, Liberty Property (GP) assigned to the First and Second Claimants the claim or claims it had arising out of the subject matter of the Particulars of Claim. Notice of that assignment was given to BP on or about 20 October 2014, alternatively 5 November 2014.
   (ii) On or around 5 July 2014, the First and Second Claimants re-assigned back to the Fourth Claimant the claim or claims that had been assigned to them. Notice of the second assignment was given to BP on or about 5 July 2016.

6. There has been no explanation for these assignments and BP formally put in issue the validity of the assignments. The end result is that the Third and Fourth Defendants are entitled to make the claims in this action.

The Agreement

7. Before I turn to the dispute itself it is helpful to set out the relevant terms of the Agreement.

8. Clause 1 set out Definitions:

(i) ""Approved Plans" means the plans drawings and specification ("the Specification") relating to the Restaurant Works (including as there are from time to time made any permitted or agreed variations alterations or additions to or revisions of the same) annexed as Annexure 1."

(ii) ""Architect" means Hawkins Brown Limited …"

(iii) ""BP's representative" means Mr John Woodcock of …"

(iv) ""Building Contract" means such building contract as Liberty shall enter into with the Building Contractor for the carrying out of the Restaurant Works."

[Liberty did enter into such a contract with Pochin Ltd. as contractor. This contract included what was described as an "undefined Provisional Sum" for the internal fit out of the Bombay Palace Restaurant. The provisional sum was £150,000.]

(v) ""Building Contractor" means such building contractor appointed by Liberty to act and employed in that capacity to carry out the Restaurant Works in accordance with the provisions of this agreement."

(vi) ""Building Period" means the period during which the Restaurant Works are to be carried out as specified in a Restaurant Works Building Programme."

(vii) ""Building Programme" means the programme for the carrying out of the Restaurant Works which is to be annexed to a Commencement Notice.

[Notice was given on 25 October 2011 and a Building Programme showing a 4 week duration for the Restaurant Works was annexed.]

(viii) ""Development" means the redevelopment of the Second Property for residential purposes".

(ix) ""Development Works" means the works of carrying out the Development (including, for the avoidance of doubt, the Restaurant Works)"

(x) ""First Property" means the Property known as Number 50 Connaught Street London being the property registered under Title Number LN242668 at HM Land Registry"

(xi) ""Liberty's Representative" means the person from time to time being appointed to act as Liberty's Employer's Agent in connection with the Development Works"

(xii) ""Restaurant Works" means any works of enhancement refurbishment or redevelopment to be carried out to or on the First Property by Liberty in accordance with the Approved Plans."

(xiii) ""Restaurant Works Completion Date" means the date upon which the Architect issues a sectional completion certificate pursuant to the Building Contract ("Sectional Certificate") certifying that the Restaurant Works have been practically completed in accordance with the Building Contract."

(xiv) "Second Property" means the property known as Number 2 Hyde Park Square London W2 being the property comprised in and demised by the Second Lease and registered at the Land Registry under title number NGL9047470"

9. Clause 3: LICENCE TO ENTER THE FIRST PROPERTY AND THE CONSERVATORY

"3.1 BP grants licence to Liberty and the Building Contractor and their agents servants and workmen including sub-contractors at all times to enter the First Property for the purposes of fulfilling Liberty's obligations hereunder with effect from the date which

is specified in the Commencement Notice as being the date upon which Liberty requires such licence for the purposes of commencing and executing the Restaurant Works."

10. Clause 5: THE APPROVED PLANS

"5.1 Restrictions on Variations
Liberty shall not make any material variation alteration or addition to or omission of anything from the Approved Plans nor permit the use of any materials in substitution for those specified in the Approved Plans without the consent of BP (which shall not be unreasonably withheld or delayed).
5.2 Permitted variations
Liberty may make variations without BP's consent so long as:
5.2.1 the variations are insubstantial or immaterial and of routine nature and do not alter the design or external appearance or standard of finish of the Restaurant Works do not alter the headroom of the First Property nor reduce its gross internal area nor alter or reconfigure any of the escape routes and/or are required to comply with any Requisite Consents which Requisite Consents have been approved by BP (such approval not to be unreasonably withheld or delayed).

11. Clause 6 was concerned with Requisite Consents to be applied for and obtained by Liberty. The Requisite Consents were defined as "those permissions, consents, approvals, licences, certificates and permits in legally effectual form as may be necessary lawfully to commence, carry out, maintain and complete the Restaurant Works". These were to include, without limitation, planning permission and Building Regulations consents.

12. Clause 7: THE DEVELOPMENT WORKS AND COMPENSATION FOR DISRUPTION

(i) "7.1 The Development Period and Extensions of Time
7.1.1 On or before 31 October 2010, Liberty shall issue the Commencement Notice to BP if it intends to commence the Development Works and if such notice states that it does so intend then Liberty shall attach to such notice a programme for the carrying out of the Restaurant Works and the Development Works. The Restaurant Works must be commenced in January 2012 if a Commencement Notice is served.

7.1.3 In the event that the Commencement Notice specifies that Liberty intends to commence the Development Works, Liberty shall use all reasonable endeavours to procure the commencement of the Restaurant Works in accordance with the relevant Building Programme and having commenced the Development Works shall use its best endeavours to complete the Development Works in accordance with the Building Programme
7.1.4 The Building Period specified in a Building Programme may be extended by such period as shall be certified by the Architect to be reasonable by reason of:-
7.1.4.1 any event which under a JCT form of Building Contract 2005 (with Contractors Design) would entitle the contractor under that contract to an extension of time
7.1.4.2 such other events or matters giving rise to delays which are either caused by BP or are beyond the control of Liberty."

(ii) Clause 7.2 set out Liberty's "General Works Obligations" and provided amongst other things that Liberty should use its best endeavours to procure that the Restaurant Works were carried out in accordance with the Approved Plans.

(iii) Clause 7.7 then provided (under the heading Disruption)

"7.7.1 On the date upon which construction of the Development Works commences Liberty shall pay to BP the sum of £100,000.00 as compensation for any disruption caused to the business carried on by BP at the First Property and whether or not any claims for such disruption can be made against Liberty. Subject to the proviso to this clause 7.7.1 the said sum of £100,000.00 shall be in full and final satisfaction (as BP here declares) of all claims that BP may have against either Liberty for disturbance pursuant to the carrying out of the Development Works and/or the Restaurant Works save for the sums payable to (sic) pursuant to clause 7.7.2. Provided that such compensation shall not apply to any claim BP may have if BP are required to close as a result of act or omission on the part of the Building Contractor in the carrying out of the Development Works.
7.7.2 BP will be obliged to cease trading from the First Property as a direct consequence of the carrying out of part of the Restaurant Works and the Building Programme anticipates such closure will be for a period of 4 weeks and Liberty shall pay to BP the sum of £40,000.00 for each week that BP is closed and so in proportion for a period of less than one week during which the First Property remains unopen for trading due directly to the carrying out of the Restaurant Works. For the purposes of this clause "unopen for trading" means that the whole of the First Property cannot by any objective and reasonable opinion trade as a restaurant by reason of the carrying out of the Restaurant Works. Any dispute as to whether or not the First Property needs to be unopen for trading shall be determined in accordance clause 15.

13. Clause 14: SECURITY FOR LIBERTY'S OBLIGATIONS
"14.1 On or before commencement of the Development Works, Liberty will either deposit the Cash Deposit in a joint bank account in the names of Liberty's Solicitors and BP's Solicitors ("the Deposit Account") which shall be held by them upon the terms set out in the Second Schedule or enter into a bond for a sum equivalent to the Cash Deposit ("the Bond Sum") in the form agreed between the Parties (both acting reasonably) with a bondsman ("the Surety") approved by BP (such approval not to be unreasonably withheld or delayed).

…
14.3 Upon the issue of the Sectional Certificate, save as to £50,000, the Bond will automatically be discharged and save as to such sum of £50,000 all liability of the Surety will automatically determine.

14. Clause 20: COMPLETE AGREEMENT
"This agreement constitutes the complete understanding between the parties in relation to the subject matter hereof and supersedes all prior negotiations and agreements between them."

15. Despite the wording of clause 20, it is common ground between the parties that the Agreement also incorporated what has been referred to as the Side Letter. This letter was dated 26 March 2010 and was from Liberty Nominees Ltd. to BP in the following terms:

"…

3 Any finishes that have to be replaced within the restaurant front of house area, will be done so using materials appropriate to a first class restaurant that would be specified in 2010/2011. In this regard, the Partnership will work cooperatively with the restaurant.

4. The works at the restaurant and Hyde Park Square generally, will be carried out in accordance with the prevailing applicable EC and UK legislation.

5. The ceiling lighting and electrical outlets to be replaced within the restaurant shall be of equivalent number to the existing, but in locations to be advised by the Bombay Palace Restaurant.

The Specification

16. The Specification referred to in the Agreement was produced by MDA Consulting Ltd. and dated November 2008. It is necessary to set out parts of the specification at some length:

"2.0 **GENERAL**

2.1 The works described listed in Section 3.0 and shown on the drawings contained in Appendix A of this Developer's Specification are to be carried out by the Developer, Liberty Property Limited Partnership, on behalf of and to the existing Bombay Palace Restaurant defined as the Bombay Palace Works.

2.2 The works will be carried out as part of the overall redevelopment works for the site known as 2 Hyde Park Square, London

2.3 Whilst the Bombay Palace Restaurant will continue to trade during the currency of the construction works, the Developer's Works will be carried out during the period illustrated on the overall programme included in section 5.0 [That programme showed a "closure period" of 4 weeks.]

2.4 The Bombay Palace will close for an agreed period during the period referred to in 2.3 above.

2.6 It is also noted that the Bombay Palace intend to carry out their own refurbishment works to the restaurant facility – the programme for these works is to be determined.

2.9 The drawings listed in Appendix A at "A3" are to be read in conjunction with Section 3.0 of the document

2.11 Notwithstanding the scope of Bombay Palace works as detailed in Section 3.0 the Developer confirms that all works will be carried out in accordance with the approved planning consent, current building regulation and relevant construction standards and codes of practice.

*3.0 **SCOPE OF BOMBAY PALACE WORKS***

The works listed below are to be carried out by the developer at the developer's cost.
To be read in conjunction with the drawings included in A3 format in Appendix A.
MECHANICAL & ELECTRICAL WORKS
To enable the proposed alterations to the main building it will be necessary to relocate plants and divert services associated with the Bombay Palace as follows: –
Refer to HPF drawing 6458 – 4101

1. Kitchen Extract System (technical information to be provided to Bombay Palace)
The existing kitchen extract plant is to be relocated to a plant room positioned on the first floor of 2 Hyde Park Square. The ductwork from the kitchen is to be replaced from the point of roof penetration and up to the connection to the new extract plant and is run beneath the green roof. The exhaust duct from the AHU is to discharge through a louvered facade via an attenuator at first-floor level over the proposed green roof…
Restaurant Extract System

The restaurant extract is to be adapted to allow relocation of the point of discharge. Relocation is required to avoid short circuiting of restaurant supply and extract air as the introduction of a green roof will enclose both points of inlet/outlet in the same "room". The extracted restaurant air is to discharge across the green roof through an acoustic louver which forms the upstand of the elevated green roof section. Where possible, plant is to be retained and relocated.

2. Ventilation Intake

Extend the ventilation system inlet at the rear of the building to take into account the extension of the roof over the ground floor. The intake louvres shall terminate above the green room. The internal ductwork shall be modified to suit the new restaurant layout and comply with the latest standards. The work shall be completed during the restaurants closure period.

3. Cold water storage

Remove the cold water storage cistern, presently located in the roof plantroom and replace with a new cistern and booster sets to be located within the basement of 2 Hyde Park Square. The booster set shall consist of run and standby pumps. …

5. New Boiler

The existing boiler plant serving the kitchen/restaurant AHUs are to be retained and a new wall hung boiler is to be installed within the same room to provide LTHW to new water heaters positioned within the basement vaults. The installation of the new boiler shall take place prior to closure of the restaurant, final connections to restaurant systems to be completed during the closure period. Refer to HPF drawing 6458/4002.

6. VRF/VRV System

The existing VRF plant providing heating and cooling to the front of house areas consisting of internal ceiling mounted cassette units and external condensers have come to the end of their useful working life and will therefore be replaced. New condenser units shall be located within the Basement as identified on the services engineers drawing 6458/S/201-P1.

…

8. Electrical Supply

A new suitable sized three phase and neutral supply direct from the Regional Electricity Supplies network shall be provided to the restaurant. The changeover is to be completed during the closure of the restaurant.

9. Gas

The existing incoming building gas supply is to serve the Bombay Palace only. The pipework is to be simplified within the basement and the current penetration and supply to the kitchen is to be maintained. An additional supply will be provided directly to the store room currently housing the wall hung boilers to provide gas to an additional wall hung boiler (the proposed hot water system). The modified pipework will connect to the existing main, downstream of the gas meter and regulator room.

10. Fire Alarm

Existing fire alarm system shall be retained and modified to suit the new layout. …

11. Lighting

New lighting to be installed throughout the Bombay Palace Restaurant including all necessary escape lighting in accordance with current Building Control requirements.

21. Construct a sealed Crash Deck and demolish the concrete rooflights to the Bombay Palace. Demolish the concrete roof to the bottle store.

…

"Back of House "areas

…
24. Demolition of existing and installation of new rooflights. Layouts to be co-ordinated with existing roof light locations and room layouts. The rooflights will substitute for the existing windows and the level of natural light will be maintained. …..
25. Removal of existing public toilet accommodation (as WC's, wash basins, vanity units, etc) and refit in accordance with the agreement between Liberty and the Bombay Palace Restaurant.
26. Carry out minor demolition and reconstruction to the kitchen area. Final details to be in accordance with the agreed requirements between Liberty and the Bombay Palace Restaurant.
….
"Front of House" areas
35. Removal of existing suspended ceiling, including existing light fittings (during closure period)

37. Removal of all existing floor finishes to the restaurant and public toilet facilities.
…
39. Installation of new suspended ceiling, including sound attenuating insulation as required, access panels and light fittings
40. Install new floor finishes to the restaurant and public toilet facilities to match or equal to those removed including the installation of an acoustic mat if necessary
…
43. Removal of existing and installation of new entrance doors to the restaurant (during closure period) drawing 00200
44. Existing wall finishes to be repainted and or re-papered in accordance with the proposed new scheme which is to be agreed with the Bombay Palace Restaurant
…
46. Removal of all existing windows and installation of new fenestration, including glazed doors (during closure period) drawing 00200, drawing 00241, drawing 00242, drawing 00243
47. Demolition of metal balustrades and installation of new balustrade…drawing 00200.
…
48. Laying of stone paving to external areas with interspersed metal grating for car park ventilation as required….
…
53. Installation of new entrance structure, including natural slate flooring, drainage to restaurant (during closure period) drawing 00200
…
55. Allow for necessary repairs to existing perimeter dwarf boundary wall including replacement of copings with like for like.
56. Removal of existing external canopies and replace with new to existing locations

The history of the dispute

17. As I will describe more fully below, both before and during the carrying out of the Restaurant Works, there were, to put it neutrally, discussions between Liberty and BP about the scope of works to be carried out. Ultimately, disputes arose between them as to Liberty's entitlement to be paid for what Liberty characterised as additional or varied works and as to BP's entitlement to closure compensation under clause 7. There was a relationship between these two issues. It was Liberty's case that the scope of the work which it was obliged to do under the Agreement was limited to that in the Specification

and drawings. BP, however, decided to undertake a complete refurbishment of the restaurant including the kitchen (which Liberty in its pleadings called "the BP works"). That had a knock on effect to the work that Liberty was undertaking and caused delay so that the restaurant remained closed for longer than it would otherwise have done. Liberty denied that it could be liable to closure compensation during a period of delay caused by the BP works.

18. The disputes then had a long and somewhat unhappy history.

19. In late November 2012, BP referred the disputes to adjudication. The adjudicator was Mr Charles Pimlott, barrister. The adjudicator gave his decision on 23 January 2013. In relation to closure he decided that Bombay Palace was entitled to the sum of £737,142, which represented closure compensation for the whole period of closure of the restaurant from 11 January 2012. In relation to the claim for varied works, he broadly, and with some exceptions, preferred Liberty's evidence to that of BP and he found that Liberty was entitled to the sum of £594,932.54. There was, therefore, a balance due to BP.

20. Nothing was done to challenge that decision until a Claim Form was issued in December 2014 although the litigation again did not proceed substantively for some time thereafter. There appears to have been an agreement to stay proceedings until early 2016 for the parties to engage in an Early Neutral Evaluation but that did not result in a settlement between the parties.

21. The case finally came before Coulson J. for a case management conference on 18 November 2016. The orders made at that CMC are of some significance in understanding a number of the issues that arose at trial.

22. At this stage, Liberty had served its Particulars of Claim and BP had served a Defence. In the Particulars of Claim, the main claims related to additional/varied works and closure compensation. The Particulars of Claim was also accompanied by a Scott Schedule running to 52 items. The vast majority of these were Liberty's claims in respect of individual items of additional work plus a handful of consequential claims (for fees and bank charges):

    (i) Liberty pleaded implied terms (a) that Liberty would be entitled to payment of such costs as it had incurred in carrying out additional or varied works requested by BP and (b) that BP would not hinder or prevent Liberty from completing the Restaurant Works within the Building Period. Liberty made its claims for additional/varied work (in a total sum of £1,126.178.15) on a quantum meruit basis, pursuant to the implied term (a) or for breach of the implied term (b).
    (ii) Liberty set out its case, as a matter of construction of the Agreement that, in light of the additional works, BP was not entitled to be paid closure compensation at all or for the period by which the Building Period was extended. In broad terms, Liberty's case was this:

    (a) prior to the commencement of the works, BP had made extensive additions and variations to the Restaurant Works (identified by reference to the Scott Schedule). Pochin had issued a revised programme in December 2011 which showed the increased duration from 4 weeks to 9 weeks and prolonged the works to 14 March 2012.

(b) During the carrying out of the Restaurant Works, BP had requested further additional works which had prolonged the works to 13 April 2012.
(c) Further additional works (items 41 to 44 in the Scott Schedule) had then further prolonged the works to 27 April 2012.
(d) BP then delayed the submission of its kitchen equipment subcontractor's operation and maintenance manuals, further prolonging the closure of the restaurant to 1 May 2012, when the restaurant re-opened for trading by reason of operating a takeaway service.

23. In its Defence, BP took issue with the entirety of Liberty's case as to closure compensation both in principle and in relation to causes of delay. BP averred that the restaurant was closed as a direct result of the carrying out of the Restaurant Works until 19 May 2012. As to additional/varied works, BP said:
    (i) BP had no power to instruct Liberty to carry out work under the Agreement and, if work was requested by BP, Liberty was not obliged to carry it out.
    (ii) If BP requested additional work and Liberty agreed to carry out work for payment of an agreed sum, Liberty was entitled to payment of that sum pursuant to a variation to the Agreement, alternatively was entitled to a variation to the Agreement.
    (iii) If BP requested additional work and Liberty agreed to carry out that work but no sum was agreed, Liberty was entitled to a reasonable sum for the additional work.

24. The Scott Schedule went through a process, as one would expect, of BP's inserting its Responses and Liberty's inserting its Replies. Unusually, by the time of trial virtually all of the individual items were still in dispute either in whole or in very large part.

25. At the CMC, a trial date was set of 17 July 2017. The time estimate was 4 days plus 1 day for closing submissions. The time estimate no doubt reflected the relatively modest value of the claims and the hope and expectation, as commonly happens in claims involving additional work and delays, that, by the time the matter reached trial, the issues between the parties would have been significantly narrowed.

26. At the CMC, Liberty made an uncontroversial application to amend the Particulars of Claim to add the Fourth Claimant. BP therefore had permission to make consequential amendments to its Defence. When BP served its Amended Defence, Liberty took issue with whether the amendments were truly consequential and issued an application to strike out, or otherwise have ruled inadmissible, parts of the Amended Defence. That application came before Coulson J on 31 March 2017. In giving judgment, Coulson J identified first that, in its claim, Liberty drew a distinction between the original Restaurant Works and what it called "the BP works", that is, works requested or instructed by BP outside the scope of the Restaurant Works. Liberty said that these works could not be a variation to the Restaurant Works (since there was no provision for BP to instruct variations) and that they were entitled to payment on a quantum meruit basis. He referred to BP's defence which I have summarised above and BP's case that additional works might take effect as a variation to the Agreement.

27. Liberty's complaint about the proposed Amended Defence was twofold: (i) that BP now sought to plead a positive case that, for BP to be liable, there had to be a distinct agreement that BP would make a financial contribution to any additional work and (ii)

that BP now contended that additional works took effect as a variation to the works under the Agreement.

28. On the first point, Coulson J accepted that this was not a consequential amendment and would require a separate application for permission to amend. No such application was ever made.

29. On the second point, Coulson J was satisfied that the case that the "BP works" were not a variation to the Restaurant Works was "front and centre" of the Amended Particulars of Claim so that any response to that by BP was consequential. At paragraph 17, he then said this:

"… it does seem to me that, standing back from this case, a perfectly plausible outcome would be that these works were variations to the contract. I understand that the claimants are concerned that if these works were treated as part of the contract works, albeit as variations, there would be a concern that that would then mean that the restaurant closed for more than four weeks because of the works that Bombay Palace had requested, and that because they were variations to the contract, the contract provisions would kick in and that the claimants would then be obliged to pay Bombay Palace £40,000 a week. But that simply cannot be right as a matter of basic contract law. If a defendant orders works which delays a contract, then unless there is an extension of time provision which covers it – and here there is not – time is rendered at large and the sort of payment of a sum due as a delay, such as the £40,000 would not be due. So the claimants concern is completely ill founded."

30. These observations encapsulate the argument as to the application of the prevention principle (which I address below in relation to closure compensation). I make it clear at this stage that I do not regard this as a decision on any issue: these were clearly remarks made by the learned judge at an interlocutory stage in the context of the application being made and without full argument.

31. Returning to the CMC, Coulson J gave directions for: (i) the service of witness statements by 17 March 2017; (ii) permission to each party to call a programming expert and a quantum expert; (iii) meetings and joint statements of the experts by 7 April 2017; and (iv) reports by 28 April 2017. In respect of the reports, the judge further directed "*The programming experts' reports to be strictly limited to matters of programming expertise."*

32. The parties agreed to extend the dates for service of witness statements and experts reports to 27 March 2017 and 19 May 2017 respectively. BP failed to comply with the directions in respect of both of witness statements and experts' reports. Liberty made an application on 17 May 2017 for summary judgment on the basis that BP was not entitled to call any evidence at trial, the sole evidence available to the court would thus be Liberty's and Liberty's case was bound to succeed. That application was heard by Mr Jonathan Acton Davis QC, sitting as a Deputy High Court Judge, on 26 May 2017. There was before him on that occasion a statement from Mr Eyre of Glovers, BP's solicitors, explaining the circumstances in which his firm had come off the record (and which had led to the failure to comply with the Court's directions) but there was no application for relief from sanctions. The judge did not grant summary judgment. What he did was give BP permission to defend on two conditions, namely, a payment into court by 9 June 2017

and the lodging and serving of an application for relief from sanctions by 2 June 2017. At this stage, Liberty had filed its witness statement but not its experts' reports. The judge ordered that, in the event BP satisfied both conditions, the date for service of the claimants' experts' reports was extended to 23 June 2017. If BP failed to comply with both conditions, then judgment would be entered in favour of Liberty.

33. In the event, BP complied with both conditions and I heard the application for relief from sanctions on 21 June 2017. In the meantime, BP had, on 9 June 2017, served (subject to being granted relief) the one witness statement of Stephen Brown on which it sought to rely. BP told me on that application that they had only one expert and were in a position to serve his report by 23 June 2017 and, in the meantime, BP had been offering for its expert to attend experts' meetings. I granted relief from sanctions and gave directions, with a view to the trial proceeding on the date fixed.

34. The matter came before me again on 10 July 2017. By this time it was evident that the case was nowhere near ready for the trial. Further, the time estimate remained 4 days. I found it impossible to see how all the issues including over 40 Scott Schedule items could conceivably be dealt with in 4 days. The approach of the parties seemed to be that 4 days would be allocated to some broad issues or perhaps sample items and the balance would then be dealt with by the trial judge on paper. Despite that there was no identification of key issues that would unlock the disputes on individual items nor were there any proposals for the items to be addressed in detail or any other proposals that might have made the case triable in that way. I took the view that, in those circumstances, the trial estimate was far too short and, having made inquiries about Court availability, I adjourned the case to 16 October 2017 with a time estimate of 8 days (including one Court reading day) with closing submissions to follow as Coulson J had directed.

35. In anticipation of a trial in July 2017, a hearing had been fixed for 24 August 2017 for oral closing submissions. I retained that date for a Pre-Trial Review. Although well in advance of the hearing date, that seemed to me prudent in the context of a case with this tortuous history. In the event, that hearing was largely taken over by yet further applications by both parties. BP made an application for further security for costs, security having previously been ordered in July 2015 and Liberty sought to make an application for specific disclosure (for which there had been inadequate notice). It was apparent that no progress had been made in defining or narrowing the scope of the issues to be determined at trial and I made further orders to seek to do so. It was only at trial that any attempt was identify such key issues and even then the parties' cases did not in any meaningful sense draw on those issues to focus or streamline the matters to be decided.

36. I have set out this procedural history for a number of reasons:

    (i) The decision that Coulson J took in relation to the amendments was of some relevance to the arguments available to BP at trial. It was not in my view a key issue but set the scene for some of the arguments that were advanced.
    (ii) The directions, and compliance with the directions, in relation to expert evidence also sets the scene for issues that in due course arose with the expert evidence.
    (iii) The issue of how to try this diffuse case with its multifarious Scott Schedule items refused to go away. By the time of Closing Submissions (which in writing

alone ran to over 250 pages), BP, at least, was of the view that the Court was left with an impossible task and that a further hearing or further submissions might be appropriate particularly in respect of quantum. Other than in relation to some specific issues, I regard this as inappropriate. The case had a lengthy history and the Court had sought, at all stages, to promote good case management and made directions that would focus and narrow the issues to create a triable case. If the parties were unable to do that, it would be quite wrong for them to regard that as a reason to invite a further hearing. The Court is simply left in the position of having to do the best it can with the evidence before it.

Dramatis personae

37. The trial took place between 17 and 16 October 2017 with voluminous contemporaneous documentation put before the Court. Closing Submissions were then exchanged in writing with a further oral hearing on 8 November 2017.

38. In the various submissions and the copious documentation, numerous people and companies were referred to. It will assist in understanding what follows, if I identify the following:

(i) David Harris, Liberty director
(ii) Philip Morris, Liberty
(iii) Sean Gatehouse, MDA, Liberty's quantity surveyors
(iv) Robert Page and Greg Moss of Hawkins Brown
(v) Tony Guest, Hurley, Palmer Flatt ("HPF"), Liberty's M+E engineers
(vi) Sean Costello and Joe Tudor, also HPF
(vii) Eilir Jones and Jonathan (or Jon) Woodcock, Pochin
(viii) Tony Shaw and Graham Egerton, Thermatic, Pochin's M+E sub-contractor
(ix) Stephen Brown, WT Partnership, BP's quantity surveyor
(x) John Woodcock, a chartered surveyor and BP's Representative under the Agreement
(xi) Peter D'Silva, BP director
(xii) Nitesh Goyal, BP director
(xiii) Tony Salmon, DSD Partnership, BP's interior designers
(xiv) John MacLean, BMS, building contractor
(xv) Lockhart, BP's kitchen designer

Factual witnesses

39. Despite the number of people involved in these works, each party served only one short witness statement:

(i) Liberty relied on the statement of David Harris. He was now retired. He was trained as a quantity surveyor but had moved into project management. He had formerly been a director (from 1995 to 2015) of Liberty Properties plc and said that Liberty Properties plc had been engaged by Liberty Property (GP) Limited to project manage the redevelopment works. His statement addressed events in 2011. In very short summary, his evidence as to the effect that, after the Agreement had been concluded in 2010, it had become apparent during 2011 that BP wished to carry out more extensive works than were provided for under the Agreement and take the opportunity to completely refurbish both the restaurant (or front house) and the kitchen (back of house). Against that

background he addressed Scott Schedule items numbers 6, 7, 11, 18, 26, 28, 29 and 43. He said nothing at all about events in 2012 or delay to the carrying out and completion of the works to the restaurant.

(ii) BP relied on the statement of Stephen Brown. His statement addressed the causes of delay relied on by Liberty and many of the Scott Schedule items.

40. Each party criticised the other for failing to adduce relevant evidence from material or potentially material witnesses and lack of proof of Liberty's case was a primary theme of BP's submissions. I shall deal with those submissions on an item by item basis. It is plainly open to me to have regard to the contemporaneous documentation as part of the relevant evidence but I bear in mind that I am doing so without the benefit in many instances of the evidence of those responsible for the documents.

41. In any event, neither Mr Harris nor Mr Brown was a satisfactory witness. They were, of course, giving evidence about events that had happened 6 or more years earlier and, in some instances, going back nearly a decade. Both may have been tempted to reconstruct what had happened, putting the best gloss on the documents available to them. But, in my view, they both went far further than that. They were both too inclined to act as advocates not witnesses and to purport to give evidence about what others had said or done or meant which they were not in a position to give evidence about. On occasion they both showed themselves unwilling or unable to give a simple answer to a straightforward question. I approach their evidence with suitable caution.

The expert evidence

42. The expert evidence was even more remarkable and, in many respects, unsatisfactory.

Faye Allen's report

43. On quantum, Liberty relied on the evidence of Ms Allen. I have no doubt that Ms Allen was an independent and honest witness doing her best to assist the Court. She was open and helpful in giving her oral evidence. I make it clear that, in many respects, she was an impressive witness and that I have no personal criticism of her. She had, however, served a report which extended to approximately 8 lever arch files of material. The reason her report was so lengthy was that on the Scott Schedule items she had set out what was, in effect, a narrative addressing (i) the basis on which works were said to be additional, (ii) what works were said to be additional and (iii) what works fell within the scope of the Agreement, as well as the valuation of (ii) and (iii). BP understandably expressed concern that Ms Allen was attempting to give factual evidence, although in due course Mr Williamson QC recognised that what Ms Allen may have been seeking to do was work through her own understanding of the items. Having said that, in the joint statement of the experts, Ms Allen recorded that she had been asked to provide a view as to whether items were to be considered as variations or not. In any event, Ms Allen's report could not be evidence of fact although it may have provided assistance to both parties and the Court in identifying relevant documents.

44. In relation to quantum, Liberty's claims were for the (additional) costs it had incurred in carrying out the works. Liberty was not itself a contractor but had engaged Pochin as main contractor for the works and it followed that its principal claims were for the amounts it had paid to Pochin. Ms Allen's primary source of material was, therefore, rates and prices built up from amounts paid to Pochin final account, although she had also used price books and other quotations.

45. That raised two problems:

    (i) Firstly, on a number of items Ms Allen either had identified what had been paid to Pochin or had been unable to do so and she had instead carried out a pro-rating exercise. That pro-rating had been carried out on items 1,3,6,7,9,11,12,17,18,26,29 + 34 which were some of the biggest value items in the Scott Schedule accounting for nearly £400,000 of Liberty's claim.

    (ii) Secondly, the rates and prices were derived from Pochin's final account but the use of Pochin's final account to ascertain the cost of works and to carry out a pro-rating exercise suffered from an apparent flaw. What, to use a neutral term, I shall call the Bombay Palace works, were covered by a provisional sum in Pochin's contract and were, in the Final Account, the subject of a Pochin's RFV no. 146 in the sum of £798,000. That total itself comprised amounts attributable to Liberty and "others" as well as BP. The amount attributable to BP was £607,706.40. There had then been a settlement between Pochin and Liberty under which £632,000 appeared to have been paid against RFV 146.

46. It followed, as Mr Williamson QC submitted, that, if a pro-rating exercise started from the total value of the RFV, it would inevitably produce values that were overstated. In written closing submissions, BP invited me to deal with this issue in one of two ways: either to make a further pro rata reduction (albeit no reduction was suggested) or to make a lump sum deduction of £166,000 (being the difference between the amount applied for and the amount paid). I shall return to this below when I deal with the Scott Schedule.

47. I note, for completeness, that an application was made at the start of the trial to adduce a supplementary report of Ms Allen. That report had been provided to BP only on or about 10 October 2017 and I refused that application.

Ronan Champion's report

48. I referred above to the application on 21 June 2017 for relief from sanctions, at which time BP said that it was in a position to serve its expert evidence by the extended date for Liberty's evidence, namely 23 June 2017. In the event, BP did not serve a report from a programming expert but served a report of Dr Ronan Champion on quantum, which covered all the Scott Schedule items.

49. Dr Champion recited his instructions as being "to assess the value of the claimed variations on a figures-as-figures basis". His report said that he had adopted the following approach:

> *"In order to assess the value, if any, of a change it is necessary to understand (a) what it is the contractor was originally obliged to carry out under the agreement; (b) the work in fact carried out; (c) how or why the change arose and (d) any matters agreed between the parties as to the basis upon which the original work or changes were to be carried out. Hence, ordinarily it would not be sufficient to identify an additional amount incurred. ….."*

50. All of that is plainly right and makes it clear that Dr Champion fully understood the issues that arose and the significance, or otherwise, of identifying the additional amount incurred. In the balance of the assessment that he then carried out, he gave short views on a number of items but on a good number opined that he was unable to express an

opinion because the Claimants had not (satisfactorily or at all) identified "the reference baseline value for the unvaried works".

51. What became clear in cross-examination was that Dr Champion had been instructed at a much earlier stage, he thought shortly before the service of the Defence his instructions being in the nature, as he put it of "help". He had at that stage prepared a report in which he valued as much as he could (which was very little). He was insistent in cross-examination that, if his report appeared to add little to what was in the Scott Schedule, that was because what BP had said in their response came from him rather than the other way around and that he had not then set out the basis for his valuations because they were already set out in the Scott Schedule.

52. I formed the clear impression from Dr Champion's evidence that after his initial involvement in the Defence/ Response to the Scott Schedule, he had been asked for little or no further input until the application for relief from sanctions was about to be heard. Indeed the report which was served on 23 June 2017 may well have added nothing to the initial report. I say that because of this exchange in cross-examination:

"Q: I suggest to you that at the time that you prepared your original report, let us put it this way, the report was far from ideal in terms of its content: would that be fair?
A: At the time I prepared this report, I was asked on the Tuesday night to prepare it and I finished it on the Friday. So, in the two or three days I had, I did not have time to add the cross-references that I would ordinarily like to make to witness statements and documents and to look closely at whether there were points on liability that I needed to make …."
I have no doubt that in doing this Dr Champion was trying to do his best in what were challenging circumstances not of his making. However, it had the result that what was before the Court was a report that dealt at a very high level with the quantum issues, did not set out clearly or at all the basis for Dr Champion's assessments, and which cannot fully have taken into account all the available evidence, including the documentary evidence. I attach very little weight to it. Perhaps more importantly, it reinforces the importance of the views that Dr Champion then expressed in the joint statement of the experts when he had had the benefit of further time and the discussion with Ms Allen.

The joint statement of the experts

53. Following the meetings of these two quantum experts on 29 June and 5 July 2017, the first version of the joint statement was dated 7 July 2017. As one might expect from two experienced experts, it was set out in such a way as to make clear what was agreed and what was not agreed. In it, Ms Allen was referred to a FA and Dr Champion as RC.

54. The Joint Statement contained the following statements:

"1.4.2.1 FA Comment: the Joint Statement is intended to be read alongside the respective individual reports of the Quantum Experts
1.4.2.2 RC comment: matters agreed replace those in my report unless otherwise stated."

55. Sections 2.5 and 2.6 are important in the context of this dispute and I quote them also at some length:

*"**2.5 Items agreed between the Experts***

2.5.1 Refer to Appendix 1 – Experts have prepared a joint schedule on quantum matters attached at Appendix 1.
2.5.2 For each of items 1 to 45 the claim made is for an additional amount due to the alleged variation. Each amount claimed involves two parts:
a) The cost of the work in fact done: Experts have agreed this amount for each item: see Column A
b) An amount (or "credit") for what was required under the Agreement: see Column B.
2.6 Items not agreed by the Experts
Credits – Not agreed see below
2.6.1 The Experts agree that there are disputes between the parties as to what work was required under the Agreement and, in particular, whether the alleged variations are additional or changes at all.
2.6.2 Experts disagree on the amount of credit. Our respective views are set out here:
2.6.2.1 FA view: In my analysis of the various Scott Schedule items there are for some items allowances for Liberty works that would have been required in any event under the original agreement and specification
2.6.2.2 While the claimant has not supplied a build-up of the original BP works to be undertaken, FA's assessments have been undertaken as follows: ….
[I summarise by saying that Ms Allen then set out different bases of assessment based on drawings and photographs, using invoices and quotations and her own assessment using measures, Pochin's rates, price book rates and reasonable allowances. For three items, 10, 12 and 17 in the absence of supporting information, she had simply followed Liberty's claim.]
2.6.3 RC view: the claimant or Pochin has not produced any price build-ups for the original BP works. Hence, I cannot identify original allowances made by Liberty or Pochin (if any), nor easily identify work required, and hence cannot confirm that the amount of the credit adequately reflects what was required under the agreement.
2.6.4 Notwithstanding this difficulty, and without prejudice to liability, I agree with the amounts of the credit set out in Column B enclosed as being the amount represents the claimant's case (as adjusted and agreed by the experts) on each item.

56. There was then a schedule to the joint statement which dealt with each Scott Schedule item. It contained columns for or headed: (i) Item no and description; (ii) Liberty valuation; (iii) "FA Quantum Report Figure"; (iv) RC Valuation; (v) Column A headed "Cost of the "additional" work Agreed"; (vi) Column B headed "Credit (See explanation in covering note); (vii) Col A less Col B; and (viii) "Comments both experts".

57. It was abundantly clear from this joint statement that the two experts were saying that they had agreed the "cost of the work in fact done" as set out in Column A, that is the cost of the (allegedly) additional works. Despite the issue that I have referred to above as to the amounts actually paid to Pochin, Dr Champion also repeatedly said or accepted in cross-examination that what was agreed was the amount "spent". Although BP's complaint about Ms Allen's starting point is not ill-founded, in my view, the best evidence before me of what was 'spent' on the additional works is what has been agreed between the experts.

58. It also appeared that where a credit was "agreed", it was, to put it bluntly, agreed and that there was, therefore, a very large measure of agreement of the value of Liberty's claim subject to liability. BP's position was that that was not what Dr Champion had meant or

agreed. As best I could understand it, the point of paragraphs 2.6.3 and 2.6.4 of the joint statement was that Dr Champion was emphasising that he could not identify what was allowed in the Agreement (or the Building Contract) for the works within the scope of the Agreement but, if Liberty's case as to what was within the scope of the Agreement was right, he was agreeing the value of (and credit for) that work. As a generality, that makes a considerable degree of sense; it makes sense of the joint statement; and I do not regard Dr Champion as trying to resile from an agreed position. Having said that, however, the wording of the comments column in the schedule to the joint statement varied and, in addressing each Scott Schedule item, I will consider what was agreed in respect of each item.

59. There was a revised and corrected version of the schedule agreed by Ms Allen and Dr Champion on 23 October 2017 and the figures that I refer to in the balance of this judgment are taken from the corrected schedule.

David Bordoli's report

60. In a case of fairly remarkable reports, this was the most extraordinary.

61. As I have indicated above, there was a dispute as to the payment of "closure compensation" by Liberty to BP. This dispute formed the single largest value item in issue. In very brief summary, the nature of the dispute was as follows, although I emphasise that I summarise it at this point only to put Mr Bordoli's evidence in context and not to pre-judge the issues that I address in detail below.

62. Under the Agreement, BP was entitled to be paid closure compensation during the period of closure of the restaurant (which was estimated to be 4 weeks). BP claimed (and indeed recovered in the adjudication) the closure compensation for the entirety of the period the restaurant was closed from 11 January 2012. Liberty's case is that BP was only entitled to be paid the closure compensation for the period when the restaurant was closed for the carrying out of the Restaurant Works (as defined). If BP requested or instructed additional works (the "BP works" referred to above), which prolonged the carrying out and completion of the Restaurant Works, BP could not be entitled to be paid closure compensation for any period of prolongation. It was also argued that that was an act of prevention - in consequence, BP would have no entitlement to closure compensation at all, alternatively for any period beyond that which had been estimated for the completion of the Restaurant Works.

63. Those defences, therefore, involved both the assertion that BP had instructed or requested additional works and that those works had caused delay to the completion of the Restaurant Works. For that reason, Liberty adduced expert evidence as to the effect, in terms of time, of additional work.

64. Coulson J.'s directions had explicitly limited such evidence to evidence that truly involved the exercise of expertise in programming. It is, of course, commonplace in proceedings in the TCC (particularly those that involve claims for extensions of time) for there to be expert evidence on causes of delay. On one view the cause of delay is entirely a matter of fact but expert evidence may be admissible and may assist the court in a number of ways. For example, there may be a complex programme for the works produced using programming software. There may be issues as to the validity of a baseline programme which involves expertise either in programming as such or in the

construction process. Assessment of the impact of a factual event on the programme may involve running or manipulating or adjusting the programme which itself involves an expertise (not to mention software) which the court does not possess. The programme may have been adjusted on numerous occasions over the course of a lengthy project and that itself may be the subject of expert opinion. The programme and impacts of events on the programme may involve analysis of logic links and dependencies which again may involve expertise in programming and/or the construction process.

65. The present case is not one that involves a particularly complex construction process or sequence; there were no computer generated programmes for the works to be manipulated; and, so far as I am aware, no programmers at work on the project.

66. I infer from Coulson J's direction that he regarded this case as one in which there were unlikely to be any particularly complex programming issues and any issues relating to delay were likely to be questions of fact, a view with which I wholeheartedly agree. Secondly, I infer that he recognised that, as a matter of case management, it was appropriate to express in the directions the need to ensure that the expert evidence was not diffuse and was properly focussed on matters of expertise rather than recitation of the facts.

67. In the event, as I have said, BP did not adduce any such evidence.

68. Liberty had obtained a report on delay from Mr Ben Burley which was relied on in the adjudication. It appears that very little was then done to obtain a report for the purposes of the litigation until I gave BP relief from sanctions. Mr Bordoli's report explained that Mr Burley had left the firm in December 2016. Mr Bordoli was first involved on 19 January 2017. Up to 29 March 2017, he carried out 41.5 hours works, attending two meetings with Mr Harris and familiarising himself with documents including Mr Burley's reports. He was then instructed to cease work and that remained the position until 13 June 2017. He said that he was then made aware of a draft report of Mr Burley. Mr Bordoli's report continued:

> *"I have considered Mr Burley's report, the document he has referred to, the methodology he has adopted and the conclusions he has reached. I agree with Mr Burley's approach and have independently reached the same conclusions in respect of cause(s) of delay to the Building Programme and the extent of such delays. Sever limitations of time, the requirement for me to submit my report by Friday 23 June [2017] and as a proportionate response I have adopted the findings of Mr Burley …."*.

69. What Mr Bordoli then did was reproduce Mr Burley's report in its entirety and without any material amendment. He in no way attempted to disguise what he had done. Despite Mr Williamson QC's complaints about that, I do not see that there is anything objectionable in itself about adopting another expert's report. If expert A reads expert B's report and completely agrees with it, as say two doctors might commonly do as to a diagnosis or prognosis, it is clearly open to expert A to say that his opinion is the same as expert B's for the same reasons and even adopt expert B's words rather than reinvent the wheel.

70. Having said that, it is right that the Court should adopt a healthy scepticism in a case such as this where one programming expert adopts wholesale the views of another. Where it is done, as Mr Bordoli expressly stated it had been, because of pressure of time, it must call into question the extent of the expert's investigations and the care taken in forming his opinions.

71. In fact, in this case, it seemed to me that Mr Bordoli had formed no independent view at all. I am frankly at a loss to understand on what basis he could possibly have formed such a view. Quite extraordinarily, Mr Bordoli had not even seen, and had apparently not thought it relevant to see, the parties' pleaded cases or any disclosure. He had, therefore, paid scant regard to BP's case – indeed he did not have BP's pleaded case or evidence before him. He had however been provided with (and to some extent relied upon) Liberty's witness statements in the adjudication – or at least Mr Burley had - even though no statements from these witnesses had been served in the litigation and their evidence was not before me. I fail to see how, in those circumstances, Mr Bordoli can have thought that he was providing the court with an independent view.

72. Secondly, and despite the order of Coulson J., it was quite clear that Mr Bordoli's report to a large extent recited facts. It is, of course, necessary for an expert in these circumstances to set out the factual assumptions on which his opinion is based but it seemed to me that Mr Bordoli's report on many occasions went far further. To give one example, his report, included a lengthy section on "Pre-Closure Delays". The thrust of this section was that variations to the kitchen area in 2011 increased the duration of the Building Programme from 4 weeks to 9 weeks. He set out various documents/ correspondence that related to the kitchen design during 2011, expressing the opinion that BP's failure to appoint a design consultancy for the additional kitchen installation appeared to be affecting progress to the kitchen and restaurant design works in 2011. Those were matters which could not have affected the duration of the works carried out or the closure period. The core of the evidence was then found in 3 paragraphs which amounted to a broad expression of opinion as to a programme duration for carrying out of the kitchen works including what are (for these purposes) assumed to be variations and which amount to all of the variations claimed by Liberty.

73. As became clear in cross-examination, Mr Bordoli had also given no consideration to whether the period of 4 weeks, which he treated as the period for completion, was in any event realistic. Any delay analysis has to proceed by reference to a baseline programme – that is what it was intended should be done. The process of establishing a baseline programme includes verifying that the planned programme was realistic and achievable, otherwise it provides no basis from which to assess the effect of delay. If the programme in use was, in fact, unrealistic, then one of the exercises a delay expert may properly undertake is the establishment of a credible baseline programme, that is one that sets out what could have been done (rather than the recorded intent).

74. No doubt again for lack of time, Mr Bordoli had given not a moment's thought to this at the time of his report. In cross-examination he agreed that the contract between Liberty and Pochin did not require all the works to the Bombay Palace to be carried out in a 4 week period. In August 2011, Pochin submitted a programme (rev 1) which showed a week's set up in January followed by a 4 week programme. Mr Bordoli had not seen this programme and accepted that he had not considered whether the 4 week duration was feasible. In December 2011, Pochin submitted a revised programme with a total duration

of 10 weeks for the carrying out of the works to the Bombay Palace. BP had pleaded that this was a more realistic programme and that it showed works which were unarguably within the scope of the Specification, spanning the entire 10 week period. Mr Bordoli had not considered this.

75. It was overall difficult to see what programming expertise had been brought to bear at all. To make matters even worse, it appeared that Mr Bordoli had attempted to rectify his position by producing a further report, having seen further documents, but that report was not produced until 11 October 2017, days before the start of the trial. I refused the very late application to rely on that report, although I subsequently allowed some corrections on points of detail to be made to the original report. The conduct of Liberty in relation to both these reports compounded my impression that little real attention had been paid to the delay case throughout these proceedings.

76. I will consider the matters relied on by Liberty and Mr Bordoli further below but I place no reliance on Mr Bordoli's evidence as such. It was not expert evidence; it did not comply with the Court's Order; Mr Bordoli had not acted in accordance with CPR Part 35; and it could patently not stand as factual evidence.

Additional Works

In what circumstances, if any, might Liberty be entitled in principle to payment for additional works

77. I referred above to the way in which Liberty had pleaded its case as to its entitlement to payment for additional works. Mr Williamson QC, on behalf of BP argues that for there to be a claim on a quantum meruit basis there must be an agreement between the parties for work to be done but no price fixed. He submits that neither of the implied terms relied upon is necessary and that they should not be implied.

78. Without any disrespect to the elegance of these legal arguments, I agree with the view expressed at the interlocutory stage by Coulson J that where one party requests another to carry out additional work, the expectation is that some reasonable sum will be paid for that work. There was no variations provision in the Agreement but that did not mean that it was not the contemplation of the parties that there would be any additional works which were not within the scope of the Agreement. If such work was requested by BP, then Liberty was entitled to be paid for it either pursuant to an implied term of the Agreement or pursuant to an entitlement that arose outside the Agreement on a quantum meruit basis.

79. It seemed to me that the point of BP's submissions was not so much that it could have no liability at all for additional works but rather that the Court should be cautious in assuming either that additional works had been carried out or that they had been requested by BP against the background of this project.

80. Mr Williamson QC identified the questions to be asked on each item as follows and I adopt his analysis (subject to what I say below about the words in italics):

> "(i) Is the work actually carried out within the scope of the Agreement, *read in the light of the admissible background material?* If so, the item fails. If not, go to question (ii).

(ii) Is the work actually carried out within the scope of the Agreement *as developed by design development* or as varied in accordance with clause 5? If so, the item fails. If not go to question (iii)
(iii) Have Liberty identified in evidence a request from BP for additional work? If not, the item fails. If so, go to question (iv).
(iv) What elements of the work actually carried out were required as a result of this request?
(v) What is the value of the work identified in answer to question (iv)?
(vi) What credit, if any, is required against such value to reflect what Liberty were obliged to do under the Agreement in any event?"

The scope of the Agreement and the background material

81. One of the broad issues between the parties was the proper approach to be taken to the definition or identification of the scope of the Restaurant Works under the Agreement.

82. At one end of the scale, Liberty's case was that the scope of its contractual obligations was precisely identified and circumscribed by the terms of the Specification and the Drawings. As I consider below, the position must be more nuanced than that at the very least because in a number of instances the Specification itself contemplated further agreement as to the works to be undertaken.

83. At the other end of the scale, and as reflected in the words that I have put in italics in Mr Williamson QC's formulation, BP's case was that the Agreement should be construed against the background of material that demonstrated that the parties contemplated a process of design development and that much or all of what was argued by Liberty to amount to additional works was, in fact, such design development.

84. It cannot, I think, be disputed that the Specification was not by any measure as detailed as it might have been. At the time the Agreement was entered into, it had been in existence for some time and had not been developed further. BP argues broadly that the parties must have contemplated that the Specification would undergo some level of development or refinement as the project progressed.

85. BP relies firstly on 4 matters that preceded the Agreement:

(i) Mr Morris' letter of 12 February 2007. This was marked 'Subject to Contracts'. It listed "in general terms" the works Liberty proposed to undertake to BPs property.
(ii) the HPF specifications produced in December 2007 and May 2008, the latter being provided by Liberty to BP as the agreed "basis of our proposed work"
(iii) BP's email of 9 October 2008 in which BP identified additional work which Mr Morris had agreed Liberty would do at no extra cost
(iv) Mr Morris's letter of 17 October 2008 in which he confirmed that at Liberty's cost BP were to receive "nearly a fully fitted restaurant".

86. Further, BP relies on discussions that then took place in the latter part of 2011 about design development and whether works were within the scope of the Agreement:

(i) By email dated 15 June 2011 Mr Guest (HPF) confirmed his view that he was close to agreeing the scope of services replacement works including the kitchen upgrade works. He suggested that the MDA specification should be updated and

formally signed off by BP. He also noted that he would need to re-issue a specification and drawings to Pochin.

(ii) Mr. Harris responded**:**

"I do not really want to alter our specification at this point in time with the Bombay Palace, as this must be the benchmark from which any changes are established. I'd prefer if we could agree the changes amongst ourselves first, and then reach the same agreement with the restaurant."

(iii) By 25 July 2011 Mr Brown and Mr Gatehouse had met to discuss various disputed items including the valuation of the works needed to increase the extract rate from the kitchen, the amount of hot water provision, the volume of cold water storage, kitchen alterations, the extent of the restaurant refurbishment works and other issues. It was clear that BP did not agree to many of the proposed costs as it considered that many of these were covered by the Contract and Side Letter.

(iv) Mr Brown followed this up with a long email to Mr Harris dated 2 August 2011 setting out a number of BP's concerns about individual items and responsibilities for the design of the works more generally.

(v) Mr Morris then became involved. Mr D'Silva recorded his understanding of what was discussed between him and Mr Morris in an email to Mr Brown dated 12 August 2011:

"To broadly outline the expectation let me define:
1. Kitchen & Back Area – Bombay Palace's contribution will be the new hood and the service spine, the remainder forms the scope of Liberty's contribution.
2. Further minor alterations to walls and doors etc. are positively intended to be contributed by Liberty as originally committed (even though not earlier specified)
I would suggest that this premise is recognised and frozen prior to the Tuesday meeting, so as to allow the role or responsibility to be better defined."

(vi) Mr Morris' email dated 15 August 2011 noted that he had spoken with Mr Harris 'at length' regarding all matters.

(vii) Following this Mr Harris noted in his email dated 31 August 2011 that "*a certain amount of criticism*" had been levelled in his direction at the meeting between Mr D'Silva and Mr Morris for not responding formally to Mr Brown's earlier email dated 2 August. Before responding to the issues raised in Mr Brown's email he wrote:

"…I feel it is very important to emphasise, but I'm sure you already know, that a lot of the issues we now find ourselves facing, and the perceived problems emanating from them, are not catered for within the Agreement. The

Agreement, for example, does not permit the Bombay Palace to vary the "Restaurant Works" or our exiting planning permission, it provides no mechanism for Liberty to be paid for such variations, it largely doesn't recognise the works proposed by the Bombay Palace to either the kitchen or the fit out enhancement to the restaurant area and, therefore does not recognise the engagement of any other contractors, other than Liberty's building contractor, on the site. Notwithstanding all of this, I've tried to turn a blind eye to this dilemma in the interests of achieving our mutual goals. The frustration of trying to get to a position where we can freeze, once and for all, these matters is clear for all to see, but to be perfectly honest, it isn't a position we'd ever thought we would be in."

(viii) Mr Brown responded by email dated 6 September 2011.

"We were very disappointed in the comments/statement made at the recent meeting and we understand The Bombay Palace is expecting a first class restaurant to be delivered in 4 weeks in accordance with DSD Designs drawings and at Liberty's cost with the exception of the items indicated above as being the responsibility of the Bombay Palace."

(ix) At the same time, HPF produced its updated Mechanical and Electrical specifications for the Bombay Palace works. These specifications provided detailed descriptions of the works that Pochin would be instructed to provide. In broad terms Pochin would have to strip out all mechanical and electrical services on the premises and reinstate according to the new design. BP submits that although aspects of this design were different from the scope of works envisaged at the time of the Agreement, there had been no suggestion that this would require a contribution from BP, save for the limited issues noted above.

(x) Mr Harris responded to Mr Brown's 6 September 2011 email by a letter dated 21 September 2011 commenting on Mr Brown's conclusion that BP expected Liberty to produce a first class restaurant in 4 weeks in accordance with DSD's design and at Liberty's cost. He said "*Hopefully these ambitions can be realised by Liberty's interpretation of their obligations, viz being in accordance with the Agreement, the "Approved Plans" (the specification and drawings appended to the Agreement) and the Side Letter dated the 25th March 2010. There may well be further matters that will have subsequently been agreed between Peter and Philip, but this will all become apparent on Friday*".

(xi) Shortly after this Messrs D'Silva, Woodcock, Brown, Gatehouse and Harris all met. The result of that meeting was recorded in Mr Morris' email dated 26 September 2011. He confirmed that the meeting was approached with a constructive attitude and set out certain specifics. He continued: "*Turning to specifics, I am happy that we shall reinstate the shell kitchen post our work with all appropriate floor, wall and ceiling surfaces, bearing in mind the use of the area. Obviously the ceiling would include lighting. It would be most helpful for you to strip out as much fixtures / fittings, equipment and indeed any other partitions or items that can be stripped out, in the first week of January. This*

will simply help the programme and all concerned. Thank you for confirming that post the shell construction, the specific kitchen equipment, ducting and all other mechanical and electrical services within the kitchen, will be undertaken by yourselves and your contractor, to be of course connected to our external extract and ducting system as appropriate".

(xii) Throughout October and November detailed design continued. The parties returned to the issue of the division of responsibility between the parties at this time. Picking up on Mr Morris' 26 September 2011 email, Mr Brown noted by email dated 22 November 2011 that a point had to be clarified with respect to ductwork and services works in the kitchen:

"To clarify one point in your email The Bombay Palace will be carrying out the extract for the kitchen canopy and providing the service spine to the kitchen.

Pochin will be carrying out the services in relation to the kitchen installation and that will be a cost payable by the Bombay Palace

The remainder of the ductwork installation in the kitchen, ventilation, lighting and all other mechanical and electrical services will be the responsibility of Liberty.

(xiii) Mr Brown further explained by e-mail on 29 November 2011 that he was referring to the following 'other services'

(1) Drainage from the kitchen);

(2) The fresh air and extract ductwork from the bar, toilets and restaurant area which pass through the kitchen (which was being replaced under HPF's revised specification and had not been raised as an additional cost for BP to date) although he noted that there may be a liability for the increase in size of fresh air to the kitchen as a consequence of the increase in extract capacity;

(3) Heating, cooling and ventilation for the offices and staff rooms due to the loss of windows;

(4) The boilers which were to be located in the bottle store;

(5) Plumbing to the staff room;

(6) Power and data to the office;

(7) Work to fire alarms."

(xiv) Mr Morris responded that there was a lot in that email that had not been envisaged but said "let's look at it and see where we get to".

(xv) Alongside this discussion, Mr Woodcock, BP's Representative suggested that these matters could be dealt with by a side letter. A draft was provided by

Liberty which contemplated that BP & Liberty would agree a set of drawings and / or specifications for additional works and that their respective quality surveyors should "determine the price that Bombay Palace Restaurant should pay us for them".

(xvi) This process then culminated in Mr Morris' email to Mr Woodcock on 12 December 2011 in as follows:

"I thought yesterday's meeting was very productive…
Sean [Gatehouse] and Stephen [Brown] can, at the appropriate time, agree what is fair, proper and equitable, in terms of contributions to the costs we are incurring, and the manner by which these monies can be paid over to us.

There will be certain grey areas, I am sure, but a lot of things will be self-explanatory and I am entirely confident that they will be able to reach an accommodation that accurately, but more particularly equitably reflects the original specification and requested variations.
[One] thing I would, however, like to agree, is the number of weeks that you are prepared to waive the £40,000 compensation for closure payment for. If you look at the programme, it is patently clear that we are undertaking a vast amount of work, more than was originally envisaged and this will obviously cost us significantly more money than originally budgeted.
This is noted and accepted (subject to my comments above)"
"What we cannot accept, however, is a situation where we are not only spending more time and money, but are being penalised in the process".

(xvii) Mr Woodcock responded on 13 December:

"… I can confirm that we will be increasing our "closure" time due to additional works: but as agreed we have to leave this to the two surveyors subject to our guidelines. I know that Stephen will fair."

(xviii) Mr Woodcock also sent Mr Morris a text message on Christmas Eve in which he recognised that the 4 week period was "not going to happen".

87. As I understand it, BP relies on this material (both pre-and post contract) for the following reasons:

(i) it evidences the intention of the parties that there would be design development.

(ii) It highlights the evidential difficulty in identifying what is within the scope of the Agreement and what is additional. As BP put it in its closing submissions, the Court is left with the "difficult and unenviable" task of seeking to identify additional work from a series of drawings, meeting and emails and this is a problem entirely of Liberty's making.

(iii) Mr Morris's approach was not to demand payment for what might be regarded as additional work but was rather to indicate that Liberty would absorb the costs.

(iv) Any suggestion that BP was requesting additional work at its own cost has to be seen in that light. That, submits BP, does not subvert the ruling of Coulson J on the amendment application. What it does is highlight that there may have been an understanding that Liberty would carry out "additional" work at its own cost or that there was no common understanding that BP was requesting work to be at its cost.

88. BP further submits that to have regard to these matters does not offend against clause 20 because it is part of the commercial background to the Agreement and its operation and properly taken account of in construing the Agreement and/or the conduct of the parties.

89. There is undoubtedly some merit in these submissions but they are not sufficient for me to conclude, if indeed BP seeks to go this far, that the Agreement was one for some sort of open-ended design development at the conclusion of which whatever was asked for by BP was to be regarded as within the scope of the Agreement. What these exchanges seem to me to show is that the parties were trying to agree what was to be done by Liberty or BP and who was to pay but that was entirely consistent with there being a specified scope of Liberty's works within the Agreement.

90. The starting point must be the Specification and drawings – whatever their inadequacies, they defined the scope of the Works. In some instances, the Specification expressly contemplated that there would be further agreement or may properly be construed as referring to some other matter agreed. Where there was no such express reference, it is a question of fact on an item by item basis whether the parties were identifying what was to be done within the scope of the Agreement or whether BP was requesting additional work. Similarly, the proper approach, in my view, is to consider on an item by item basis whether there was a specific agreement as to who would bear any additional cost. There is no single answer to these questions.

91. In any event, and contrary to BP's case, Mr Morris was not agreeing to absorb the additional costs. Rather he was anticipating that BP would make at least some contribution and that that would be discussed between the quantity surveyors.

92. Liberty, in its opening, submitted that that exchange between Mr Morris and Mr Woodcock gave rise to an estoppel, either by representation or convention. That argument appeared to extend both to payment for additional work (which was not pleaded) and to closure compensation (which was pleaded). Liberty submitted that it was led to understand that when it proceeded to procure the carrying out of the additional/ varied work requested by BP, it was doing so on the basis that there would be an increased closure period for which Liberty would not be held liable.

93. I do not accept either of these arguments. There was no concluded agreement, about either varied works or closure compensation, that can be spelled out of this exchange and similarly no representation or convention. At best, Liberty thought that additional works could be dealt with by the quantity surveyors (and BP did not disagree) and what happened about closure compensation was, so to speak, in play but not concluded.

94. What these exchanges do do is evidence BP's understanding at the time of what were additional works for which Liberty was entitled to be paid. Those are not binding agreements or matters that give rise to an estoppel but some evidence of how BP saw things in the context of the less than detailed Specification.

The Scott Schedule Items
General observations

95. Scott Schedule cases, in which the parties and the Court work their way, item by item, through claims or defects or whatever it may be, are comparatively rare in the Technology and Construction Court, despite the origins and the name of the Scott Schedule lying in what was formerly Official Referees' Business. Such cases can be inordinately time-consuming and the Court, with the assistance of the parties, will always try to find ways to focus the arguments and reduce the scope of the issues. Unfortunately, in this case, by the time the matter came to trial, virtually every item of 52 numbered items was still largely in issue and it is necessary in this judgment to address each item separately.

96. I record that I am grateful to both parties who responded to my request to take me through each item in their written Closing Submissions, rather than leaving me to piece narratives together. Counsel clearly went to great efforts to spell out the facts and their cases from a morass of material. That has made my task easier if not shorter. In addressing each item, I have sought, wherever possible, to extract from this material what in my judgment amount to the key points determinative of the dispute.

VAT

97. In the following paragraphs of this judgment and in respect of the individual Scott Schedule items, where sums are admitted due or I consider that some sum is due, I will give a figure that is exclusive of VAT.

98. There is a point of principle between the parties on whether VAT is to be added to these sums or not. Liberty's case is that, if it carried out additional work, that was a taxable supply: Liberty is VAT registered and should therefore charge VAT on the taxable supply and is, accordingly, entitled to recover the VAT in these proceedings. BP argues that Liberty's claim is one for the cost of additional work and that Liberty has not in fact incurred the cost of VAT. Assuming that Liberty paid VAT to Pochin or others in respect of the additional works, since Liberty is VAT registered, it will have "recovered" the VAT by off-setting it against its output tax. Thus, BP argues Liberty has incurred no relevant cost.

99. On this issue, I take the view that Liberty's position is the correct one. On its case, what Liberty is seeking to recover is a reasonable sum for the additional work it has carried out. The cost of that work is a means of assessing the reasonable sum. It does not change the fact that the carrying out of the additional work is a taxable supply, so that VAT should be charged on the reasonable sum. In the final calculation of the amount due to Liberty, VAT will, therefore, need to be identified and added.

The Scott Schedule items

Item 1: Kitchen extract plant

100. Liberty's case, as pleaded, was founded on the terms of the Specification item 3.1. Liberty's case was that it was only obliged to relocate the kitchen extract plant together with the replacement of some ductwork but under no obligation to upgrade the plant. Liberty asserted that the existing plant exhausted air from the kitchen at a rate of up to $2.1m^3$/second. In the event, BP required greater extraction capacity both because of additional kitchen equipment and in order to "future proof" the design.

101. BP's case on this issue has had a number of strands the interrelationship of which is frankly unclear. In its Scott Schedule response:

(i) BP admitted that it had requested an increase in capacity of the AHU plant and related ductwork from an increase in the capacity from 2.7m^3/sec to 4.5m^3/sec and that it had agreed to pay the extra over cost.

(ii) BP disputed the cost claimed by Liberty on the basis that Liberty had represented, at the time of the decision to increase the capacity of the plant, that the total cost of the work would be *"approximately £12,000 as an extra over cost"*. BP said that it had accepted this cost, alternatively relied on it as a reasonable extra over cost for the work.

(iii) BP also contended that the ductwork had to be re-routed for planning reasons and BP denied that it was liable for the costs of the elements of the works that related to that re-routing. That argument would appear to arise only, therefore, if BP failed in its argument that there was an agreed cost of the works.

102. In its submissions, BP re-iterated that last part of its case arguing that the re-routing was, therefore, a clause 5 variation. BP went further in appearing to argue that the whole of the works would have been a clause 5 variation including the increase in capacity. If that is what BP intended to argue then that position is unsustainable in the light of its acceptance that it requested the increase in capacity, whether because of additional equipment (which BP denied) or for "future proofing" which BP accepted. In any case, BP continued to accept that it had agreed to pay the extra over cost but that that was limited to £12,000.

103. I draw attention to this argument because it is relied on by BP as an example of an instance in which there would have been a clause 5 variation for which it would not have been liable to make any additional payment unless there was a "side agreement" to that effect. BP appear to attach some importance to this in identifying, later in the Scott Schedule, instances where there was no such side agreement. In my view, this contrast provides little assistance to BP and each instance needs to be considered on its own merit.

104. It is unnecessary to set out the arguments that then developed as to the starting point but, in due course, Liberty's claim in the sum of £30,908.19 was based on an increase in capacity from 2.7m^3/sec to 4.5 m^3/sec.

105. BP's position that there was an agreement of cost at £12,000 could, on its own case, be narrowed down to 3 e-mails:

(i) By e-mail dated 3 May 2011 to Peter D'Silva, Mr Harris pressed for BP's decision:
"Your dilemma is simple – do you live with the 2.7 at no extra cost to yourself, or do you pay the extra to fulfil all your possible future ambitions for your restaurant. I thought I had spelled this out last week."

(ii) Mr Brown responded the same day expressing the view that Liberty could not reasonably have expected to provide more than 2.7m^3:
"Liberty are saying that they can meet the revised load of 4.50m^3. There is, however, a cost attached to this. We understand the cost could be circa £12,000 but this has still to be confirmed. Liberty need an urgent answer.
We believe that assuming this is the load The Bombay Palace require and allowing for future proofing that Liberty should put in the higher level equipment and ductwork."

(iii) Mr Woodcock confirmed by e-mail dated 5 May 2011 that BP had decided to "go for the bigger unit – 4.5 capacity" noting that the difference between 3.6 and 4.5m^3/sec was only about £4,000.

106. It seems to me clear from Mr Brown's e-mail that the cost had not been agreed and Mr Brown accepted in cross-examination that it was at best his impression that the extra over cost would be £12,000. BP, however, relies on the absence of any response from Mr Harris disputing the estimated additional cost of £12,000 to make good its case that Liberty should be bound by that figure.

107. In my judgment, the facts do not come close to establishing an agreement that the additional cost would be £12,000 or that Liberty should, on some other legal basis, be bound to that figure. It seems to me that this was a straightforward example of Liberty identifying additional work requested by BP and stating for the avoidance of doubt that BP would have to pay for it. In the absence of any agreed sum, the amount to be paid would be a reasonable amount. Accordingly, I find that Liberty is entitled to be paid a reasonable sum for the additional work and is not limited to a claim for £12,000.

108. The figure now claimed by Liberty in Ms Allen's report is less than that pleaded and is £28,029.66. As set out in the experts' joint statement, that sum is derived from the difference between the cost of "additional" work (which is agreed) and a credit. The credit is the subject of the covering note to the experts' joint statement.

109. In the schedule to the joint statement, there is a final column headed "Comments both experts". In this column against a number of items, there is comment in relation to credit, for example, specifically agreeing the amount of the credit. Against others, including this item 1, there is simply the word "Agreed". It seems to me that the natural reading of that is that where the single word was used all aspects of the item were agreed so that it was not necessary to refer to individual columns.

110. In respect of this item 1, BP argues that Liberty has failed to prove that two elements of the additional cost, namely a contribution for builders work due to duct size increase" and a "new acoustic door needed to allow access for maintenance" are part of the claimable cost. BP draw attention to the fact that they have put Liberty to proof of the extra over cost in the Scott Schedule. As I observed above, that related to the contention that the re-routing of ductwork was required in any event and should not form part of the extra over cost. The issue now taken with different elements of the cost merely adds to the confusion.

111. Whilst I bear in mind that the burden of proof lies with Liberty, these costs clearly form part of Liberty's claim. Other than by belatedly putting Liberty to proof, BP has advanced no case as to why these elements are not part of the additional works which BP agreed to pay for; Dr Champion's report does not provide any explanation for why they should not form part of the additional cost; and in the joint statement of the experts he says this item is agreed. I am, therefore, satisfied on the balance of probabilities that the reasonable sum which BP is liable to pay to Liberty in respect of this item is the sum of £28,029.66. For the avoidance of doubt, as I have said, this figure and all other sums that I find due are exclusive of VAT.

Item 2: Internal Kitchen Extract Ductwork

112. Liberty's claim under this item is, on its face, a simple one. The Specification at item 3.1 referred to replacing the kitchen ductwork "from the point of roof penetration and up to the connection to the new extract plant". There was no provision for work to internal kitchen ductwork. The existing ductwork was shown on HPF drawing PUR/3402/SK 4100. On 12 August 2011, DSD issued a drawing, Lockhart Drawing HAR 11/4241 – 02, showing the layout of BP's new kitchen, sent to HPF. At an M&E co-ordination meeting on 16 August 2011, Liberty contends that BP accepted that its new kitchen layout would require major replacement works to the internal kitchen ductwork, although I have not identified any evidence about this meeting. Further drawings were then issued to Liberty that showed the ductwork required. Thus, says Liberty, it was instructed to provide that ductwork which did not form part of its contractual works.

113. BP's pleaded case, in its response to the Scott Schedule, was threefold. Firstly, BP's case was that as a result of planning requirements or for aesthetic reasons, ductwork which was to have been routed about the first floor level and above the so-called green roof, had to be re-routed internally. Secondly, Liberty installed acoustic insulation across parts of the kitchen roof which would have required all of the existing kitchen ductwork to be taken down and replaced. Lastly, BP said that had the ductwork been left in situ, only a short length of additional ductwork would have been required to accommodate the new kitchen design (at a cost of £1500).

114. By the time of BP's closing submissions, these last two points did not appear to feature further. BP's case was simply that the main changes had come about because of the concealment in the roof void of ductwork that would otherwise have run across the green roof. BP's also said, in summary, that the chronology of events showed that Liberty's plans for the kitchen ductwork had changed before the DSD drawing was produced in August 2011:

    (i) Liberty's original plan in 2010 is shown on drawing 6458/4501.
    (ii) By 8 June 2011, HPF's drawings all show a suggested new penetration for kitchen extract designated "Dotted box indicates suggested new penetration position during Bombay Palace kitchen refurbishment". BP suggests that this was done because an upstand in the green roof prevented the ductwork from passing between the green roof and the kitchen roof as planned. The extent of the evidence to support that suggestion seemed to be a sketch prepared by HPF PUR/3402/SK/4100 titled "HVAC modifications required due to the extending green roof and ceiling replacement" and which showed "Restaurant Extract to exhaust via upstand in green roof." Mr Harris accepted that the extension of the green roof had nothing to do with BP or DSD.
    (iii) That drawing was mistakenly relied on by Liberty as showing the originally intended ductwork route.
    (iv) Liberty rely on BP's acceptance at the time that the design of the kitchen necessitated a change in the ductwork. As I have said above, I have not been able to identify any evidence of such acceptance. Although it is far from clear, there is some evidence that a change to the ductwork was the product of Liberty's design for the external ductwork. Both Mr Harris and Mr Brown were questioned about these issues but their evidence did not take matters further.

115. On this item, BP has admitted a claim for £1500 for the reasons given in the Scott Schedule. I am simply not satisfied on the balance of probabilities and on the evidence before me that any further work was the consequence of BP's kitchen design and requested by BP in circumstances that would attract any additional payment and I reject Liberty's further claim on this item.

Item 3: Internal restaurant ductwork

116. On this item, the parties' cases have largely passed as ships in the night. I start with a summary of those cases.

117. Liberty's case is that the Specification (at item 3.2) provided only for the modification of internal ductwork in the restaurant and not for replacement. What, in fact, happened was that the ductwork was replaced and, on Liberty's case, as a consequence of BP's request (through DSD) to raise the ceiling heights. As a consequence, the ventilation ductwork was moved away from the periphery of the building to a central service core adjacent to the kitchen.

118. BP's case, as pleaded, was that under the Specification, Liberty was to remove the existing suspended ceiling (item 3.35) and fit sound attenuating insulation and a new suspended ceiling (item 3.39). Under clause 5.2.1 of the Agreement, Liberty was not permitted to alter the headroom without BP's permission. BP then averred that Liberty chose to install a deep layer of sound insulation to the underside of the slab to the entire restaurant with two consequences: (i) Liberty had to remove all existing services and (ii) after the fitting of the insulation, the floor to ceiling height would have been significantly reduced. On BP's case, that reduction in height would have been a clause 5 variation for which BP's consent was required; that consent was refused; and the works had to be varied to maintain the ceiling height which was itself, therefore a clause 5 variation.

119. By the time of trial, there was a considerable shift in BP's case. It is easiest to explain that shift by quoting from BP's closing submissions:

> *"BP's case is that, as part of the design development process that was expressly anticipated by the Agreement, it presented a design proposal for the new restaurant ceilings Liberty had agreed to provide at its cost.*
> *Without any suggestion that there would be an additional cost to pay (either for the ceiling itself or for the mechanical and electrical works that are the subject of this item) HPF produced a revised design for the air conditioning and ventilation works to the front of house areas that was different to the scheme envisaged by the Specification*
> *… BP's case is that this was a variation to the scope of work that had already been allowed for under the Agreement specification. ….. The work was therefore a clause 5 variation and, absent any agreement to pay for this variation as there was for Item 1, this was a cost that Liberty is liable for under the Agreement."*

120. The sound insulation had therefore taken a back seat and the clause 5 variation argument had taken on a different guise. I note that shift in case because it means that I approach BP's case with some degree of circumspection. What BP now says is this:
    (i) Liberty had agreed to provide new ceilings. The detailed design of the ceilings was a matter for design development under the Agreement and such design development could not give rise to a claim for additional payment.

(ii) DSD did propose minor changes to ceiling heights in its drawing 5644/15 at the perimeter of the main dining area but the pre-existing ceiling height was maintained at the ceiling coffers at 2544mm with the recess into the lighting coffers at 2744mm.

(iii) Relying on Mr Gatehouse's e-mail to Mr Brown on 25 July 2011, BP submits that Liberty expressed concern about the extent of work in DSD's proposals but with no suggestion that anything to do with the ceilings, air conditioning or ventilation was additional work. BP submits that Liberty did not do so because it was aware that a substantial redesign would have been necessary to accommodate the acoustic ceiling and new drainage pipework from the flats above.

(iv) The bulkhead at one side of the main dining area was a compromise whereby Liberty could enclose a substantial part of its drainage works in the ceiling while giving BP the feature ceiling that it wanted.

121. To address these arguments, I turn next to the sequence of events:

(i) In the minutes of a meeting held on 18 April 2011, it was recorded that DSD was proposing a variation to the ceiling heights in the restaurant.

(ii) The minutes of meeting on 16 May 2011 record that DSD are to provide Hawkins Brown and HPF with sketch proposals for the ceiling in the restaurant area.

(iii) The minutes of meeting on 25 May 2011 record that "*the existing input of fresh air to the perimeter of the restaurant will have to be lifted up to match the new proposed ceiling height. The new air conditioning units will have to be relocated to fit the new ceiling proposal*."

(iv) The minutes of meeting on 14 June 2011 recorded that DSD had proposed ceiling plans for Peter D' Silva's consideration and approval. In cross-examination, Mr Brown agreed that when they were issued these DSD drawings would effectively be the BP approved requirements.

(v) The proposals were issued at a meeting on 12 July 2011 (comprising DSD's drawings 5644/15 and 5644/20). The minutes record that it was agreed at that meeting that the QSs would discuss the impact of the proposals.

(vi) BP dispute that there was any significant change in ceiling heights but I accept on the evidence that these drawings showed a general raising of the ceiling throughout the restaurant, even if only, on BP's case, by around 100mm.

122. In cross examination, Mr Brown clearly accepted that these drawings amounted to BP's requirements as to ceiling heights and his attempts to correct himself and refer to them as "desires" or "wishes" did him no favours.

123. As I have said, the key element of BP's case now is that this was all part of design development and, absent an express side agreement, Liberty's responsibility. I do not accept that that is the right way of looking at this item. Under the Agreement, Liberty had agreed to provide new ceilings – the most obvious interpretation of the Agreement is that what they were to provide was to be, at least in broad terms, like for like with the existing. Within limits that might have involved something that could be referred to as design development but that did not extend to changes in the ceiling heights. Once DSD presented its proposals, as BP's requirements, the issue is whether the consequences of those requirements were at BP's risk or whether it was incumbent on Liberty to spell out the consequences and seek further express agreement to any additional works. Put

another way, had BP requested only the increase in ceiling heights or the additional works that flowed?

124. In my view, it must be the case that BP had requested not merely the specified ceiling heights but the works that flowed from that. The very fact that there was an agreement that the QSs should discuss the impact demonstrates that. I find in favour of Liberty on this item in principle.

125. Against this item the sum in the schedule to the joint statement is £24,863.21. In this instance, the comments column records that *"If Liberty is correct on liability, the planned value of the expenditure under the agreement, to be deducted from the cost incurred was £8,184.22."* It seems to me that this goes beyond agreement of what Liberty's case is and amounts to an agreement of the amount of the so-called credit.

126. BP further raise a number of issues on quantum in relation to this item. Firstly, it is not an item that Ms Allen has valued but is one that she has pro-rated. Secondly, BP identifies a number of issues that it says have not been addressed, including the cost of the original scheme in the Specification, the cost of taking down the existing extract ductwork and reinstating it and whether that was practical with the installation of the acoustic ceiling. It seems to me that all these arguments are met by the agreements in the experts' joint statement. Even if, as BP argues, these cannot bind a party, they provide the best evidence before the Court from competent quantity surveyors of the reasonable cost of the additional works.

127. I find that Liberty is entitled to the sum of £24,863.21 under this item.

Item 4: Internal Kitchen Intake Ductwork/ Fresh Air Supply

128. Under this item, Liberty claims the cost of upgrading the fresh air intake system as a result of two matters: firstly, the increase in extraction capacity (item 1) and, secondly, BP's new kitchen canopy design. In its response to the Scott Schedule, BP accepted that it is liable in respect of the first element but its primary case was that that was covered by the agreement of cost at £12,000 relied on under item 1. BP denied liability in respect of the second element.

129. Although Liberty argued that BP no longer pursued its primary defence, that was plainly not the case. However, I have already rejected BP's case that there was an agreed cost of £12,000 for item 1 and the same must follow in respect of this item.

130. In relation to the kitchen canopy, Liberty relies on the requirement for a new kitchen canopy which was shown on DSD's drawing 5644/00 Rev C (issued on 27 September 2011) and Lockhart's drawing HAR 11/4241-02 (issued on 27 July 2011). The difficulty with Liberty's case on this item is that there is simply no evidence of the consequences of the introduction of a new kitchen canopy and I accept BP's submission that Liberty's case is based on mere assertion that ductwork modifications were necessary because of the new kitchen canopy.

131. In my view, BP is right to emphasise that Liberty's pleaded case relies on both the matters at paragraph 128 above as resulting in the claim under this item. It seemed to be suggested to Mr Brown in cross-examination that the additional work might be solely

attributable to the increase in air extract capacity. It seems to me far too late to be advancing a new case and it was, in any event, a proposition he did not accept.

132. That leaves Liberty with the difficulty that, whilst there might be a claim in principle, I have no evidence before me on which I can assess what sum might be reasonable for the ductwork for which BP accepts liability. BP very fairly, in its written submissions, suggest that that might still be a matter for agreement between the experts. I do not, however, consider it appropriate to seek further evidence at this stage. There may be cases in which it is appropriate to do so but where a party's claim has clearly relied on two matters, it seems to me that the claiming party ought to have identified its discrete claims or given the Court a basis on which to apportion cost and that to invite further submissions after trial is not to be encouraged. Any failure by Liberty to do so cannot be laid at BP's door.

133. I, therefore, find that Liberty has failed to prove the sum claimed and on this item I find in BP's favour.

Item 5: Cold water storage

134. The Specification at item 3.3 provided for the removal of the cold water storage cistern in the roof plantroom and its replacement with "a new cistern and booster sets to be located within the basement of 2 Hyde Park Square." Liberty then relies on two drawings enclosed with the Specification, HPF drawing 6458/5/201 and 6458/1101 as showing the location in the basement for the tank and the dimensions of the tank as 1m x 1m x 1.5m providing 1,000l of cold water storage.

135. BP asserts in its response to the Scott Schedule that the existing tank had a capacity of over 1,000l. It is not in dispute that BP required a tank with a capacity of 4000l. But BP argues, in short, that this is a further instance where the size of the cold water tank was to be the subject of design development to provide what was appropriate for the restaurant. In answer to Liberty's reliance on the specification and the drawings, BP relies on the fact that the drawings were not expressly referred to in the Specification and that the capacity of the tank was not identified.

136. I have some sympathy with BP's position that it might have expected the old cold water cistern to be replaced with one of equivalent or appropriate capacity. Having said that there is no evidence, beyond a passing reference in Mr Brown's statement, as to the capacity of the existing tank. On the other hand, the drawings were incorporated into the Agreement and showed the capacity of the tank which Liberty was undertaking to provide. I can see no basis for finding that the Agreement did not mean what it said or showed.

137. This is unfortunately another item on which the quantum claimed appears to be utterly confused. Liberty's pleaded claim is for £9,044.24. Ms Allen, in her report, said that she was unable to ascertain how that figure had been arrived at and she had carried out her own analysis of the documents provided and "formulated what I believe to be the basis of Liberty's build up". She valued the item at £4,100.99. That figure still appears in the schedule to the joint statement. However, the agreed valuation of the additional work then appears in the vastly increased amount of £16,152.35. After an apparently agreed credit of £7,289.70, that leaves a claim of £8,862.66.

138. BP rightly submits that there is no explanation for this increased figure and that it was not explored with Ms Allen in cross-examination simply because this trial was run to a tight timetable in which cross-examination was necessarily limited. Without any explanation and despite the apparent agreement of the experts, I therefore find myself with a claim that is not supported by any evidence other than this agreement. I am unable to accept this figure and I find for Liberty on this item in the sum of £4,100.99.

Item 6: Boilers

139. The starting point for Liberty's claim under this item is specification item 3.5 set out above. Liberty contends that, pursuant to that item, the existing boiler plant was to be retained and that a new wall hung boiler was to be installed to provide low temperature hot water (LTHW). Liberty contends that the scope of its work was detailed on (i) HPF drawing 6458/4002 which was referred to in the Specification and annexed and showed the new boiler and (ii) HPF drawing 6458/1101 Rev P1 also annexed and which showed a 32.5kW condensing boiler to supply 2 Megaflo cylinders of 210l each.

140. Liberty contends firstly that as a result of the kitchen redesign there was a chance both to the capacity of the LTHW boiler and to the MegaFlo cylinders with three cylinders providing greater storage capacity being supplied. This was recorded in the minutes of a meeting between BP and Liberty on 14 June 2011 as follows:
"21. The proposed changes to the kitchen redesign will necessitate an increase to the hot water storage. It is proposed that this will be served by 3 cylinders providing 750 litres storage capacity.
22. There will be a corresponding need to upgrade the existing boiler to satisfy this increased demand."

141. Secondly, Liberty contends that BP's requirements for air extraction to the kitchen area meant that the existing boilers were inadequate and, rather than being retained, two new wall hung boilers were installed to replace existing.

142. BP's response in the Scott Schedule was that HPF's design was not sufficient to provide like for like replacement and was, in any event, to be the subject of design development. BP put liberty to prove that the kitchen design caused the changes relied upon. BP said further that the relocation of the boilers was Liberty's decision in order to clear space in the basement for parking. Liberty responded that its claim did not include any costs of relocation of the boilers.

143. So far as the LTHW boiler and hot water cylinders are concerned, I can see nothing in the specification from which it can be inferred that the boilers were to be the subject of design development (whether because HPF's design was inadequate or otherwise). BP submits that during 2011, BP was asking Liberty to demonstrate that the changes required resulted from the design of the kitchen. The documents relied upon by BP for this submission do not seem to me to make good that contention but, even if that were the case, the minutes of the meeting set out above confirm Liberty's position and there was no disagreement with those minutes.

144. So far as the change of the existing boiler plant is concerned, Liberty relies on the following:

(i) in his email of 5 May 2011 (referred to under item 1 above), Mr Woodcock had confirmed that BP was fully aware of the implications of the increase in capacity of the air intake system.

(ii) In any case, BP was unhappy with the existing boilers. In an email to Mr Guest and Mr D'Silva on 13 July 2011, Mr Woodcock said that the kitchen boilers were "pretty useless as the heat exchangers were inadequate". Mr Guest responded that they could be replaced subject to BP's agreement. In an internal email from Mr Brown to BP on 25 July 2011 Mr Brown asked *"do you wish to do anything with your two existing boilers. This will be an addition to Liberty's obligations."*

(iii) Subsequently by email sent on 5 September 2011 to Mr Woodcock, Mr Guest said:
"Whilst reviewing the gas loads my colleague Joe Tudor has also discovered that the existing boilers providing the fresh air heating loads are undersized, we are currently proposing that these boilers are replaced under the new scheme and moved to the bottle store but would appreciate your comments on this issue.…"

(iv) Mr Brown responded:
"We have reviewed the gas calculations and only have one question.
Assume the gas related to AHU's is for heating fresh air. If that is correct please order meter
In relation to these fresh air heating boilers we would prefer them not to be in the bottle store and we will need to agree a location …"

(v) Although not expressly instructing Liberty to provide the new boilers, it is implicit in Mr Brown's response that that was what was going to happen. It is not open to BP to characterise this as a change driven by Liberty since BP was well aware that new boilers would be an addition to Liberty's obligations.

145. BP submits that this item is one of the most factually complex claims. In my view, BP is simply seeking to obfuscate the issue. The key point now on BP's case seems to be firstly that HPF's May 2008 report itself contemplated the possible replacement of the boilers and secondly that in or about October 2011 HPF produced a drawing (PUR3402 / SK/ 4100 referred to above) which BP submits showed what was allowed for under the original scheme which included a single replacement boiler with a 100kW capacity. I take it that BP draws that inference because the boiler is not shown in a modification 'bubble'. BP then submits that the evidence strongly suggests that, before any kitchen redesign was prepared, HPF had planned to provide a single 100 kW boiler to replace all three boilers. The drawing was sent from HPF to Liberty under cover of an email dated 4 October 2011 which attached "our mechanical report which identifies the changes to the scheme from the information issued in 2008". That document included a comparison of the base scheme and the current scheme, reflecting the proposals of DST and Lockhart. In relation to boilers, the base scheme was identified as two 60 kW boilers and the current scheme as three 60 kW boilers (with pumps and controls). That is entirely consistent with Liberty's case (since it only refers to the boilers for the LTHW) and inconsistent with the inference BP seeks to draw.

146. BP put Liberty to proof that the additional boiler works were caused by the redesign of the kitchen. The documentary evidence provides a body of proof. BP's response that Liberty might have been planning to replace this boiler in any event, as to which I am not satisfied at all, is not an answer to the claim.

147. In the schedule to the joint statement, the experts have agreed the cost incurred in providing "the new boiler etc" and the amount of the credit giving a total sum due to Liberty of £44,596.61.

148. Nonetheless BP takes a number of issues with this item: it is one of the pro rated items and it is argued that it claims the total cost of relocating and installing the boilers together with various other items that would have been required in any event. It is suggested by BP, that I could direct the quantum experts to ascertain a cost for the plant cost only to be awarded under this item. I see no reason to do so. Although I accept that BP is not bound by the figures agreed by experts, the best evidence before me is the sums agreed by the experts. I find in favour of Liberty on this item in the sum of £44,596.61.

Item 7: Fan Coil Units

149. Para. 3.6 of the Specification recorded that the ceiling mounted units in the front of house area had come to the end of their useful working life and were to be replaced. Liberty's case is that instead of replacing old with new ceiling mounted units, new concealed units were installed in revised locations and that that change was a consequence of DSD's revised ceiling design. Liberty also claim that BP required an additional FCU in the kitchen. At trial, both parties therefore treated this item as forming a pair with item 3.

150. BP's pleaded response in the Scott Schedule, in fact, raised three matters:

    (i) Liberty had to redesign these works following the installation of acoustic insulation which affected the ceiling heights. I have already rejected this argument in relation to item 3. Mr Brown's witness statement addressed this case and also argued that Liberty decided to conceal the FCUs in the bulkhead that covered the ceiling mounted drainage.
    (ii) Any change to the location, number and specification of FCUs was at Liberty's risk because the functional requirements of the system remained the same. Under clause 5, Liberty was obliged to replace to an equivalent or superior standard. The Specification was not framed in terms of functional requirements and this argument was not supported by any evidence.
    (iii) The need for an additional unit in the kitchen was to achieve required temperature and conditions within the kitchen which had been adversely affected by the restaurant works. Again there was no evidence in support of this contention.

151. By the end of the trial, it was frankly unclear whether the latter two points were relied upon at all and, in closing submissions, BP simply repeated the submissions made in respect of item 3. I attach some significance to the apparent abandonment of defences in this manner because I am left with the impression that BP was, in its response to the Scott Schedule, willing to put forward all manner of contentions which were not well-founded in fact and I have, therefore, to approach aspects of BP's case with circumspection.

152. As set out under item 3, the minutes of the meeting on 25 May 2011 recorded that *"The new air conditioning units will have to be relocated to fit the new ceiling proposal"*. In cross-examination, it was put to Mr Brown that BP did not want ceiling mounted boxes protruding on what was to be a feature ceiling. His answer was this:

> *"I presume that, but there was never an alternative provided by HPF to show how the designs would work. So, the answer is, yes, it was a desire of Bombay Palace to have the coffer on the feature lighting and as much higher ceilings as they required. Yes, that would have an effect on the mechanical and electrical, but no one ever came back and said HPF has said, "Actually you have to work around these parameters"*."

153. In other words, the evidence and argument Mr Brown was advancing was a variation on the theme that the onus was on Liberty to set out the consequences of any change for BP (which I have already rejected) and comes close to advancing the case that BP's agreement to additional cost was required - the argument that is not open to BP without the amendment that was refused.

154. I, therefore, find in Liberty's favour on this item. The schedule to the joint statement records the agreed value of the additional work as £32,879.61. Under the comments column, what is recorded is *"Cost of the credit for work required under the agreement (which experts value based on amounts claimed to be £4,665.75) assuming liability."* This is slightly different wording from what appears in other comments and seems to me at least consistent with Mr Champion's saying, in this instance, that he agrees that amount on the basis of what Liberty contends to be the scope of the work under the agreement but does not agree the scope of the work. Nonetheless, no alternative evidence about the credit or credit figure is put forward and the best evidence I, therefore, have is the agreed value of the credit. I, therefore, find that Liberty is entitled to be paid £28,213.86 against this item.

Item 8: Three phase power supply

155. Paragraph 3.8 of the Specification required Liberty to provide a new electrical power supply. This was described as "a new suitable sized three phase and neutral supply direct from the Regional Electricity Supplies network."

156. In simple terms, Liberty's case is that it was required to provide an uprated power connection because of the increased loading requirements of BP's kitchen re-design. In its Scott Schedule response, BP accepted that if the redesign increased the loading requirements significantly above that which would have been required had there been no kitchen re-design, then BP would be liable for the extra-over cost.

157. BP put Liberty to proof that the kitchen design increased the loading requirements from 70 kVA to over 136 kVA as alleged. That is the case that BP maintained at trial arguing that although Liberty's consultants took the view that an increased supply was required this was never demonstrated and that Mr Brown did no more than ask for proof of the required additional capacity which was never provided. It is right that there was no factual witness or expert evidence to support Liberty's case.

158. Having said that, BP's case is simply inconsistent with the evidence that Mr Brown gave in cross-examination. He accepted (i) that the kitchen and restaurant design required greater electrical loads; (ii) that he sent details of the kitchen equipment to HPF asking them to calculate the gas and electrical loads; (iii) that he sent an e-mail (on 6 September 2011) asking for HPF's recommendation for the incoming electrical supply; (iv) that HPF responded the same day telling him that a supply capable of meeting a load of 136KVA was required; and (v) that Liberty told BP that they were going to proceed on that basis.

He was then asked "And you agreed with that, did you not?". His answer was "I believe so."

159. From that, in my view, BP was not asking HPF or Liberty to justify their position that a greater load capacity was required but asking what should be supplied and agreeing to what was proposed. Accordingly, I find in favour of Liberty on this item in the sum of £6,642.39 being the agreed amount in the schedule to the joint statement.

Item 9: Gas supply

160. Liberty's case is that its obligations under item 3.9 of the Specification were to make certain adjustments to the gas supply. In fact, a completely new supply (including a new meter) was provided as a result of BP's increased load requirements. BP accepts, in this instance, that if the kitchen redesign resulted in significantly increased loading requirements, then it would be liable for the extra over cost. However, BP puts Liberty to proof and its case at trial was that, set against a vaguely worded Specification, there was simply no evidence of what the supply would have been, and how the kitchen design had increased it, and thus no evidence that what had been done went outside the Specification. BP further says that there was no explanation for the relocation of the gas meter which would, in any case, have incurred an additional cost.

161. There is, however, evidence that HPF calculated the original loading requirements as 6.9l/s and I have no reason to reject that as an appropriate calculation. The vagueness of the Specification does not change that. HPF were then asked by Mr Brown to calculate the loads for the new kitchen equipment (by e-mail sent on 27 July 2011). As with the electrical supply, there can have been no purpose in doing that other than to provide the appropriate supply.

162. I find in favour of Liberty on this item. In the schedule to the joint statement, the cost of additional work is valued at £25,738.92 and the nil credit it simply "agreed" with no reservation for any issue, if there is one, about the location of the gas meter and despite the fact that BP submits that Ms Allen has not considered BP's case on the credit to be given. In those circumstances, I find for Liberty in the sum of £25,738.92.

Item 10: Fire alarm system

163. It is common ground that the Specification at item 3.10 provided for the existing fire alarm system to be retained but that, in the event, a new burglar and fire alarm system was installed. It might be thought to be an obvious inference, at the lowest, that Liberty would not have undertaken such work if not asked to do so by BP. In its submissions, BP points to the terms of the HPF specification dated 6 September 2011 which asked the Contractor to provide prices for both a new system and retaining the existing. BP suggests that Liberty was concerned about the practicalities and cost of reinstating the existing system but that does not seem to me to amount to evidence, if that is the point being made, that Liberty took its own decision to replace.

164. By e-mail sent on 30 September 2011 BP told HPF that it had asked Capital Fire and Security to recommend what "will be required to be done" about wiring and installation of fire and burglar alarms and that "*once we have the requirements from Capital Fire and Security with us, I will e-mail the same to you and [DSD] to incorporate in your plans*". In the Scott Schedule, Liberty pleaded that at a meeting on 15 November 2011, BP advised HPF that the security and fire alarm systems were to be replaced because they had reached the end of their natural life. BP observes that that is not recorded in the

minutes of the meeting and that there was no witness evidence to support that assertion. The same day, however, Mr Goyal of BP e-mailed HPF, the email including: *"You will contact Trevor Denby of Capital security and e-mail him the fire and burglar alarm system that we discussed for his comments on the same."*

165. BP's case is that the fire alarm was stripped out by Liberty when the initial strip out works were carried out to install the acoustic installation. It is quite clear from the documents relied on that the replacement of the fire alarm system (and burglar alarm system) had been decided upon by BP well before the initial strip out works and were not a product of those works and that there is sufficient in the e-mails above to amount to an express request for a replacement system (including the burglar alarm) or to support the inference that such a request was made.

166. BP's further or alternative response in the Scott Schedule was that to the extent that the current system did not comply with current regulations this was Liberty's risk. That does not seem to me to follow from the terms of the Specification but there was, in any event, no evidence on the basis of which I could conclude that the system required replacement because of any regulations. This amounts to BP putting Liberty to proof of something that was not in issue.

167. On this issue, I find in Liberty's favour on liability. The cost of the additional works and the credit for the works in the Specification is agreed and the sum due to Liberty is £15,069.24.

Item 11: Lighting

168. This is a substantial claim for (as agreed by the experts) a sum of £43,497.90. It falls into 4 parts: (i) Light fittings to the front of house area; (ii) Kitchen lighting; (iii) Bin Store Lighting and (iv) Lighting controls.

169. Liberty relies on item 3.11 of the Specification which it contends only allowed for the provision of lighting to the front of house areas. The item provided for "new lighting to be installed throughout the Bombay Palace Restaurant". In the Specification the term "Bombay Palace Restaurant" although not defined was a term that naturally referred to the whole of the premises. There were sections of the Specification which expressly covered front of house or back of house but this item preceded those sections which supports the view that it was not limited to any particular area. The Side Letter made express reference to the number of ceiling lights with the "restaurant" but that did not serve to limit the item in the Specification.

170. The evidence that I have is that the existing lighting consisted of recessed halogen lights. So far as the "new lighting" to be provided was concerned, there is not express reference to like for like (as there is elsewhere in the specification) and this was an instance where I consider that the parties must have anticipated some further identification of what would amount to "new" lighting. Having said that, that does not seem to be to have imposed an open-ended obligation on Liberty to install whatever BP wanted and, as I consider, the feature lighting was, in my view, significantly different and not within the scope of the Specification item.

171. The first element of the claim relates to the lighting installed in the restaurant area. Liberty submits that Ms Allen has carried out a careful analysis of the lighting installed

as compared with what was existing which was not seriously challenged. I accept that. It is fair to say that Ms Allen has assumed in that analysis that the Specification item provided for replacement like for like but in the absence of any alternative case as to what was existing and whether what was installed was additional, it seems to me that her analysis is the best evidence I have both that there were additional works (which a quantity surveyor can properly identify) and of their value. This aspect of the claim is agreed in the sum of £21,561,71 and I find that that amount is due to Liberty.

172. In principle, the installation of new lighting in the kitchen was within the scope of the Specification. Liberty submits that even if that is right, replacement of existing would have involved only a few fluorescent strips at minimal cost. As I have said, I do not take the view that the Specification strictly limited Liberty's obligations to the replacement of like with like but, firstly, the photographic evidence supports Liberty's case and, secondly, the value attached to the works carried out is clearly greater than it could be anticipated would have been incurred in installing something similar. I find in Liberty's favour in the sum agreed in the schedule to the joint statement of £6,516.70.

173. The external bin store is not referred to at all in the Specification and does not seem to me to be part of the restaurant on a natural reading of the Specification. However, Mr Brown's evidence was that this was nothing to do with BP. No doubt because the sum involved was only £331.56 that evidence was not challenged. I am not satisfied that Liberty has provide its case on this small item.

174. In respect of lighting controls, BP's pleaded case was that it admitted liability for an upgraded system and, in the absence of any further information, it accepted a liability of £10,000. BP now asserts that the upgrade was the provision of controls front of house when previously they had all been in the kitchen. No evidence was adduced to that effect and Mr Brown said that BP wanted an upgrade of Lutron controls for the feature lighting. That may have amounted to the same thing but it is impossible to know. In any case, it is common ground that some additional work was requested and that BP is liable to pay for it. The schedule to the joint statement records an agreed value and a nil credit without any qualification and I, therefore, find for Liberty on the sum of £18,087.93.

Item 12: Small Power

175. As set out above, the Side Letter provided for the electrical outlets within the restaurant to be replaced with an equivalent number to the existing in locations to be advised. Liberty's case is that BP, in fact, required more extensive small power outlets, including to a new office. That case is based on DSD's drawing 5644/15 Rev A and HPF's drawings PUT 03402/5020 rev C3 and PUT 03402/5021 Rev C3.

176. BP's Scott Schedule response was that it admitted that it had instructed Liberty to provide additional electrical points and to pay for the same. BP said that, during the course of the works, it had been told that the cost would be £7,670 (as to which there was no evidence) and that was the only sum it would admit because the claim was inadequately particularised and excessive.

177. In short, BP's point was that Liberty completely rewired the whole of the BP premises according to a specification produced by HPF in September 2011. It was put to Mr Harris that this specification was produced for the purposes of the contract with Pochin and had

nothing to do with BP's requirements. Mr Harris sought to argue that it did because it had been developed to reflect BP's requirements but that was not something on which he could himself give any evidence.

178. Liberty claims the following heads of costs from BP: (i) small power for sockets and isolators throughout the property; (ii) electrical mains and sub-mains in the kitchen; (iii) distribution of conduit; (iv) distribution of electrical mains and sub mains for lighting and power; (v) LV trunking containment; (vi) LV tray containment; (vii) kitchen conduit; (viii) distribution of earthing. It seems to me that there was a dearth of evidence that these works arose out of any requirements of BP and that Liberty has just assumed that it can claim for an additional scope of works because what was required under the Side Letter was limited.

179. BP is then right in this instance to say that there is no evidence on which it is possible for me to assess the increase in the number of sockets or the additional cost thereof. The agreed valuation does not assist because it is an agreement of the value of the broader scope of additional work and the credit must by definition only relate to the lesser scope of work in the Side Letter. Given BP's admission, however, I find for Liberty on this item in the sum of £7,670.00.

Item 13: Voice, data and AV services

180. This claim comprised a number of elements. Liberty no longer pursues its claim in relation to CCTV installation and BP had admitted a sum of £2,045.70 for additional data/ comms services.

181. The first item still in dispute is the cost (£581.40) of installing a new disabled toilet alarm. BP says that it had a disabled toilet before the works but the ceilings (and thus the cabling for the alarm) were removed by Liberty and needed to be reinstated. It is common sense, and no doubt a matter for regulation, that a disabled toilet has to have an alarm and I can see no reason why BP should pay for this work.

182. The second item in dispute relates to the audio-visual system. BP's case and Mr Brown's evidence is that there was an audio visual system in place but that was stripped out as part of the works to replace the ceilings and install the acoustic system. That evidence was not challenged. BP accepts that the Specification says nothing in terms about AV but submits that it follows from the works Liberty carried out to the ceilings and that it is obvious that it should have been reinstated. I agree – it is self-evident that the nature of the deal between BP and Liberty was one in which BP should not be worse off than they were before. There is very little evidence about this but if BP wanted an AV system to replace what was there before I cannot see how Liberty can spell out of that a request for additional work or one that carries with it the consequences that BP would pay for that work.

Item 14: Grease traps and dosing units

183. It is not in issue that the Specification made no provision for the installation of grease traps.

184. In the Scott Schedule, Liberty relied on the minutes of a meeting between BP and Liberty which recorded that: *"Liberty requested early access to the restaurant kitchen area to install grease traps …."*. Whilst that might not, as such, amount to a request from BP to install grease traps, BP's response was that it agreed to these works "expressly on the basis that no contribution would be required by them". Liberty rightly points out that in 2012, Mr Brown was advising BP that it should be paying for additional grease traps (in an e-mail to Mr Woodcock dated 13 November 2012).

185. BP points firstly to the fact that the installation of grease traps was referred to in the HPF's 2008 Report. I do not regard that as construing the Agreement by reference to a pre-contract report but rather as setting the scene for what was then discussed. There was a sequence of e-mails in which HPF put proposals to BP for dosing units or grease traps, culminating in an e-mail from Mr D' Silva to Mr Brown (copied to Mr Guest) stating that Liberty had made provision for the cost of the grease traps. Liberty asked for early access to install the grease traps (as recorded in the minutes of a meeting on 10 March 2011).

186. When these matters were put to Mr Harris, he sought to explain that the e-mails were referring to one grease trap but that additional grease traps were installed because of the kitchen design. That was pure speculation or wishful thinking on Mr Harris' part.

187. It does appear to me on the evidence that this was something Liberty decided to do for its own purposes or at its own cost and that BP was merely expressing its preference for dosing units or grease traps. Mr Brown's internal acceptance that BP should make a contribution does not change that position. I, therefore, find for BP on this item.

Item 15: Pipework and Drainage.

188. This item is agreed and Liberty is entitled to be paid the sum of £8,916.85.

Item 16: Glass Block Wall

189. The starting point is item 3.24 of the Specification which provided for the demolition of existing and installation of new rooflights. The item expressly provided that the rooflights would substitute for existing windows and that the level of natural light would be maintained.

190. Liberty's case was that there was a change in the number (from 11 to 8) and layout of rooflights. BP then asked for glazed blocks in the staff room wall (to allow more light). This was provided and Liberty claims the extra cost over that of the omitted rooflights. BP's pleaded response was that the changes to the rooflights were caused by changes to the intake and extract ductwork which were covered by items 1 to 4 and 7 and were clause 5 variations (a case I have already addressed) and on which I have not found wholly in favour of either party.

191. By closing submissions, there seemed to be little between BP and Liberty. BP said that the Specification and drawing showed 11 rooflights; that drawings were produced showing only 3 rooflights; that BP protested and the drawings were revised. Mr Brown accepted that but also "commented" that he was *"expecting also for glazed blocks in the staff room wall into corridor"* which Liberty agreed to provide. BP's case then was that this was not a variation but that BP was merely asking to retain the natural light, as they were entitled to do.

192. The evidence is less than clear but the Specification provided for the level of natural light to be maintained. That was intended to be by means of the rooflights but that changed and the glazed block wall provided a substitute for the intended rooflights. Mr Brown's "comment" implies that there must have been some prior discussion about this and I am unable to accept that it amounted to a request by BP for additional work for which Liberty was entitled to payment.

Item 17: Public Toilets

193. As BP has submitted, this item turns on an issue of contractual interpretation. Although set out above, it is easiest to recite the terms of Clause 3.25 of the Specification again and as follows:

> *"Removal of existing public toilet accommodation (WCs, wash basins, vanity units, etc.) and refit in accordance with the agreement between Liberty and the Bombay Palace Restaurant."*

194. There is, therefore, no issue that Liberty was obliged to refit public toilet accommodation but the issue is the scope of that work and the meaning, therefore, of the expression "in accordance with the agreement between Liberty and the Bombay Palace Restaurant." There was clearly no pre-existing agreement and it follows that the agreement must be one that was to be reached (in the future) between Liberty and BP. This is one instance, therefore, where the parties expressly intended the kind of design development that BP has relied upon elsewhere. It must have been the contemplation of the parties that they would reach an agreement and that Liberty would undertake what was agreed.

195. Liberty's case, however, is that what it was required to do went beyond removal and refitting of the sorts of items listed and, as pleaded, extended to taking down and replacing ceilings; removing and reconstructing blockwork walls to a revised layout; replacing joinery items; and revisions to drainage, electrical works and lighting. Liberty now claims only the amounts relating to demolition of partitions and the vanity units and sanitary ware.

196. BP says simply that whilst there may have been a reorganisation of the toilet area that does not go beyond Liberty's obligations. I do not agree with that. As a matter of construction, it seems to me that the Specification contemplated removal and refitting of sanitaryware and not the reconfiguration of the toilets.

197. In relation to the sanitaryware itself, however, the position is different. Liberty contends that it was only obliged to replace like with like and that the superior units that it installed did not fall within the scope of the Specification. There is no justification in the terms of the Specification for the assertion that the obligation was to replace like with like. The Side Letter provided that any finishes that had to be replaced within the restaurant front of house area would be replaced with materials "appropriate to a first class restaurant that would be specified in 2010/2011". Although not directly applicable to the sanitary ware, that agreement gives an indication as to the standard of finish that was contemplated in the restaurant and it would make no commercial sense for the public toilets to be refitted

to a lesser standard. To that extent the parties can be taken to have anticipated an agreement as to replacement of an appropriate first class standard.

198. On this item, therefore, save for the cost of relocating partitions, I find in favour of BP. BP has admitted a sum of £400 in relation to the partitions. In the draft of this judgment, I invited Liberty to identify a greater figure it was possible to do so without further evidence if and the parties have agreed the sum of £923.58.

Item 18: Kitchen demolition and building works

199. As pleaded in the Scott Schedule, Liberty's case on this item was that under cl. 3.26 of the Specification it was only obliged to carry out minor demolition and reconstruction in the kitchen area of which "final details to be in accordance with the agreed requirements between Liberty and the Bombay Palace Restaurant." Liberty said that the extent of those works was shown on certain drawings. It is not in dispute that the kitchen was redesigned and that more extensive works were carried out and, in its response to the Scott Schedule, BP admitted liability for a sum of nearly £60,000. BP does not seek to withdraw that admission.

200. 66 items of work or heads of costs were set out in Annex 2 to the Particulars of Claim and BP identified those items which it denied liability.

201. Having stated that dispute shortly, it seems to me that the development of both parties' cases has obfuscated, or failed to focus on, the material issues.

202. Firstly, Mr Harris in his witness statement disavowed the case that the drawings defined the scope of Liberty's works but asserted that the "minor demolition and reconstruction works" related only to BP's desire to reconfigure two walls to create a staff area. He advanced that case on the basis of the pre-contract letter from Mr Morris of Liberty dated 10 October 2008 which referred to the construction of a new staff area.

203. BP disputes this and, in my view, was right to do so. Mr Harris' construction of the Specification completely disregards the terms of the Specification. As in the case of the toilets, the Specification contemplates a future agreement and that would be inconsistent with the scope of works being defined by existing drawings, let alone being confined to the reconfiguration of two walls identified in a letter (and which could, in any event, have easily been stated in the Specification).

204. BP on the other hand points to a later e-mail from Mr Morris dated 26 September 2011 which records that Liberty will reinstate "*the shell kitchen post our works with all appropriate floor wall and ceiling surfaces, bearing in mind the use of the area. Obviously the ceiling would include the lighting.*" On that basis, BP submits that Liberty agreed to carry out demolition works and reinstate the shell.

205. It is then wholly unclear how that "agreement" (if that is what it is said to be) relates to the items of work for which BP disputes liability and why and how BP says they are included in the agreement reached as contemplated by the Specification. That encapsulates Liberty's position as well. However that then ignores the fact that Liberty has identified no agreement as to the scope of the work pursuant to cl. 3.26 and no basis on which the Court can determine what was within the specification.

206. That is wholly unsatisfactory and, on this item, I conclude that Liberty has failed to prove the balance of its case. Further, this was an item where Ms Allen had simply used Liberty's claimed figures. Those appeared to be derived from a quotation from BMS Contractors who were not then appointed. Liberty's claim, if I had upheld it in principle, would therefore, in my judgment, have failed for lack of proof on this further basis. I, therefore, find for Liberty in the sum of £59,790.09

Item 19: Remove services above ceiling

207. This is a small claim for £500. Liberty's case, as pleaded, relies on cl. 3.35 of the Specification which covers removal of the existing suspended ceiling and removal of ductwork and cables. As I understand it, Liberty says that its claim is for additional demolition work that arose from the quotation obtained by Mr Brown from BMS in December 2011. Mr Brown's evidence in his witness statement was that the demolition scope of works was produced to assist Liberty and that Liberty made no comments at the time. This was not expressly challenged by Liberty; the claim is not addressed in Mr Harris's evidence; and BP argue that there is simply no evidence to support Liberty's claim. I should say that I attach limited significance to the absence of challenge given that the trial was conducted in a short time frame and not every point could be put in cross-examination.

208. It does seem to me that this was additional work and that the demolition quote was, in effect, a request for that work. I find in Liberty's favour in the sum of £500.

Item 20: Remove floor finishes

209. This item has not been pursued by Liberty.

Item 21: Feature coffers

210. The Specification at cl. 3.39 provided, as set out above, for "*installation of new suspended ceiling, including sound attenuating insulation as required, access panels and new light fittings"*. The Side Letter expressly provided that the ceiling lighting was to be of "equivalent number to existing but in locations to be advised by the Bombay Palace Restaurant". Photographs show that the existing lighting was recessed halogen lighting. DSD's design for the restaurant included different types of light fittings involving what have been referred to as "the feature coffers".

211. Liberty's pleaded case in the Scott Schedule set out a relatively complex narrative involving changes to the ceiling, the coffer design and locations. By trial, Liberty said that the bulk of the claim (£2,875) related to the construction of the coffers in the first place. That led BP in its closing submissions to put as its primary case that the works were part of the final ceiling design and within the original scope of works for the replacement of the ceilings.

212. I do not accept that. Whilst, as in other instances, the specification did not prescribe that the new suspended ceiling or the light fittings would be like for like, the coffers represented a significant design change from the type of ceiling and light fitting. It must be a matter of fact and degree in each case but I cannot see how BP could have considered this change to fall within the specification and, in providing DSD's designs, BP was clearly requesting that Liberty should carry out this work. I therefore find for Liberty on this issue and in the sum claimed of £2,875.

213. The balance of the sum claimed (which now appears to be around £400) relates to relocation of the coffers. The evidence on this issue is far from satisfactory. There was no evidence of fact on this issue from Liberty. In its submissions, Liberty relied on an apparent admission by Mr Brown in cross-examination that it became apparent in January 2011 that DSD's ceiling design would not work. BP relied upon internal e-mails (which, in the interests of proportionality, I do not set out) between Liberty's professional team and Pochin which appear to show that Pochin had carried out works either before DSD's drawings had been issued or not in accordance with DSD's drawings or that Hawkins Brown had decided to lower the coffer in the lobby. All of this paints a completely obscure image of what further work was done and why and on this issue I find that Liberty has failed to prove its case.

Item 22

214. Although listed in the Scott Schedule, item 22 was "not used". I refer to it solely so that it is clear that it has not been overlooked.

Item 23: Entrance Doors

215. Clause 3.43 of the Specification provided for the "removal of existing and installation of new entrance doors to the restaurant ….". Drawing VP_000_241 Rev A (which shows and external elevation) shows "Powder coated metal framed, clear glazed doors" as the entrance doors. Drawing 200 shows a further set of internal lobby doors.

216. Liberty's case is twofold: (i) the specification required only one set of entrance doors; (ii) the doors were to be metal (aluminium) but DSD's design required hardwood doors. BP's case is that two sets of entrance doors were included in the Specification and that the type of door was a matter for design development.

217. The first issue is one purely of construction and common sense. Absent any definition, in my view the "entrance doors" are both the external entrance doors and the internal lobby doors. Such a configuration is commonplace and regarding only the doors immediately giving on to the street as the entrance doors is too narrow a construction. Having said that, the external entrance doors are clearly shown as being metal and there is, in this instance, no wording in the specification that suggests that there was any further agreement to be reached or requirements to be provided by BP. The position is less clear in relation to the internal lobby doors. Mr Brown's recollection was that the existing lobby doors were wood and he infers should have been replaced on a like for like basis.

218. This is an item which BP says that Ms Allen has not valued – she has merely advanced the sum claimed by Liberty. Nonetheless, the schedule to the joint statement of the experts records an agreement in the sum of £9,578.28 for the additional works which the comments record to be the cost to install the two sets of "external doors". The credit of £3,767.03 was stated to be not agreed but Mr Champion appeared to accept in cross-examination that the figure was agreed at £3667 or £3687, that is less than the figure in the schedule. In closing submissions, Liberty reverted to the sum of £3,767.03 as the credit and accepted that the sum due to it, if it was required to install two sets of doors, would have to take account of this additional credit.

219. If Liberty was entitled to the extra over cost for both sets of wooden doors, I would find for Liberty on this issue in the sum of 9,576.28 less (£3,767.03 x2), that is £2042.02. I

am not satisfied that the internal wooden doors were a variation and, doing the best I can, I therefore find for Liberty in half that amount, namely £1,021.01.

Item 24: Wall finishes

220. Put simply, Liberty's claim relates to varied wall finishes arising from DSD's design. Some elements were admitted by BP and the only item that remained in issue was the alteration to the curved wall radius. In its closing submissions, Liberty accepted that that was not a matter for which BP should be liable. The claim is, therefore, in effect, agreed in the sum of £1,796.46.

Item 25: Windows

221. This claim was largely admitted by BP with a remaining issue as to liability for an additional window. Since BP's opening submissions, the claim has been admitted in full and Liberty is entitled to the sum of £24,400.35.

Item 26: Terrace tiling and drainage

222. The Specification at cl. 3.48 provided for the laying of stone paving to external areas "as required …. drawing 00200". Drawing 00200 provided that the restaurant terrace area floor finish was to be resin bonded aggregate. On this item, Liberty's case, in part, is that its obligations were, therefore, limited to the provision of resin bonded aggregate on the terrace but that BP (by DSD's drawing 14E issued on 28 November 2011) required a change to "Gascogne" beige stone tiles.

223. BP's response is that there was a conflict between the Specification (referring to stone paving) and the drawing which was to be resolved by agreement. BP contends further that the matter was resolved by agreement at a meeting between Mr Brown and Mr Gatehouse (of Liberty) recorded in Mr Brown's e-mail dated 25 July 2011 which of course, precedes the DSD drawing. The e-mail says simply this:

> *"Further to our recent meeting we confirm the issues discussed*
>
> …
>
> *8 The terrace floor is stone not resin bonded aggregate*
>
> …"

224. Liberty says (rightly) that Mr Brown, although he addresses this item in his witness statement, gives no evidence about this issue or this meeting and that an e-mail recording what issues were discussed does not undermine Liberty's contractual obligation. Liberty further contends that the Gascogne tiles would have been in any event an upgrade on the existing basic stone tiling – a case which BP says is not pleaded.

225. Liberty's case involves the assumption that its obligations were defined by the drawing. That in itself involves the proposition not that the drawing elucidates what is within the specification, as is the case in relation to other items, but rather that it overrides it. There is, to my mind, no basis for that assertion or construction and BP is right to say that there is an apparent conflict. In the absence of any provisions for the resolution of conflicts, that could only be the product of agreement. The evidence that there was an agreement to provide Gascogne tiles (not resin bonded aggregate) is, to say the least limited, but there is a complete absence of any evidence that what was agreed was the provision of resin bonded aggregate, followed by a change to tiles. On the balance of probabilities, it seems to me far more likely that there was an agreement to provide the Gascogne tiles and that there was no variation and I so find. There is no pleaded case that these tiles

were themselves an upgrade on the specification and no evidence to support that proposition.

226. I, therefore, reject Liberty's claim in respect of the Gascogne tiles and it follows that I also reject the element of this claim which relates to waterproofing works which are said by Liberty to have arisen from the change to tiles.

227. The further element of Liberty's claim under this item, as set out in the Scott Schedule, relates to a request by BP to level the terrace area with the bar. It is said that that necessitated the replacement of floor gullies and that Mr Brown on 30 May 2012 then requested a change to the location of the gullies which were replaced with a drainage channel at the inner face of the planter walls. In the Scott Schedule, Liberty identifies its claim as being for "the costs associated with making up the terrace area to a consistent level with the bar and the abortive costs of implementing the late instruction of Mr Brown to change the method of drainage in that area." I quote from the Scott Schedule because it appears that, in fact, the claim is wholly or mainly for the cost of the aborted concrete pour.

228. In this respect, BP relies on a chain of emails on 29 May 2012 and 30 May 2012 which indicates that BP had earlier required the paving to be constructed with a fall away from the restaurant to the planter wall but that that had not been taken into account.

    (i) Mr D'Silva's email to Mr Brown and others on 29 May 2012 noted that water would flow back to a drainage point from the flowerbed line and continued: *"It is my understanding and it was agreed that the water is to flow away from the restaurant to the flowerbed line where the gullys would be located. This is not what was agreed, pls ensure correction."*
    (ii) Mr Brown forwarded that email the following day to Mr Harris and others, including Mr Guest. He said *"We are totally at a loss as to why this has happened. We sat in a meeting and discussed this and there was enough fall to get it to the outside pavement planter wall (Tony you may not have been present). We now find gulley in the middle of the terrace. The canopy takes water to the edge and now it will flow back in. This is totally unacceptable to the Bombay Palace …"*
    (iii) Mr Guest responded that HPF's drawings detailed the outlets to be replaced in the existing location and that he did not recall any request to move them.

229. Albeit the evidence is less than satisfactory, it does seem to me that in a terrace area, to have the water drain away to the edge would have been an understandable request from BP, and that both Mr D'Silva's e-mail and Mr Brown's reaction is consistent with this. I am not satisfied that Liberty has established that the cost of the abortive pour arose from this change.

230. On this item as a whole I therefore find in BP's favour.

Item 27: Additional Front Entrance Features

231. This claim relates to enhancements to the entrance structure. BP makes some admissions but 3 items remained in issue.

232. The Specification item 3.53 provided for the installation of a new entrance structure. In its Scott Schedule, BP says that the existing entrance had the restaurant's name etched in the stonework. That could not be done on the proposed pre-cast concrete structure so BP requested a black granite panel be provided. BP admits liability for the provision of the black granite but not for the engraving of its name on the entrance which, it says was to replace the existing. It is not in dispute that the black granite was a variation or addition to what was provided in the Specification and I find that all the costs of the same, including the signage, should be paid by BP.

233. BP has agreed to pay for 50% of the cost of stone engraving to the head of the entrance. Liberty argues that BP should pay the full amount.

234. Mr Brown's evidence in his witness statement was simply that his recollection was that sign writing on the parapet was a Liberty idea. In cross-examination it was put to him that there was previously no stone and only a fabric awning. His answer was:

"No. The writing on the inner face of the lobby had a black – not that it was granite, but it had a black stone panel on it. We are talking about the original ….."

It seems to me wholly unclear what Mr Brown was referring to and whether this evidence advanced either BP or Liberty's case. Without any greater clarity, I find that Liberty has failed to provide its case.

235. Liberty made a further claim in respect of external signage which was withdrawn in closing submissions.

236. I therefore find that BP is liable to Liberty for the admitted sum of £7,495 together with the cost of engraving of the black granite (£2,495) giving a total of £9,996.00.

Item 28: Copings

237. This claim is for the cost of replacing copings other than on a dwarf wall to which a balustrade was fixed.

238. As set out above, item 3.47 of the Specification provided for the demolition of metal balustrades and installation of a new balustrade. The item referred to drawing 00200 which showed the location of the balustrade. Item 3.55 was "allow for necessary repairs to existing perimeter dwarf boundary wall including replacement of copings with like for like". Drawing 00200 was not expressly referred to in this item but, on the drawing, there was an arrow pointing to "Existing Masonry Low Level Wall to be repaired and repointed" and BP submits that that must be what the Specification is referring to.

239. Liberty's case is that reading the documents together, they limit Liberty's obligations to the replacement of the copings on what Liberty describes as the dwarf boundary wall (to which the balustrade was fixed). BP's case is that that is a wrong and far too limited reading of the drawing and specification. I agree. There is no obvious connection between items 3.47 and 3.55. The "dwarf perimeter boundary wall" is not defined but fits easily with the description of a low level masonry wall on the drawing. The drawing

makes no meaningful distinction between different sections of wall and there is no reason why it should have done so.

240. On this item, I find in favour of BP.

Item 29: Terrace Canopy

241. The Specification at clause 3.56 provided for the replacement of the terrace canopy "with new". In the absence of any further evidence, I would readily have concluded that that although the parties could agree what was new they would anticipate a similar type of canopy. The existing canopy was a fixed fabric canopy. In fact, what was provided was a completely different type of canopy, extended and electronically operated.

242. BP's defence is based on Mr Morris letter to Mr Woodcock dated 12 February 2007 (which was marked subject to contract). In that letter, Mr Morris said:

"To re-cap in general terms, we would, inter alia, propose to undertake at our expense the following works to your property.
…..
8) Provide a new electronically retractable canopy to the entire external elevation of the restaurant …."

243. In an e-mail dated 22 November 2011 to Mr Harris, Mr Brown said that, although they had been requested and discussed at meetings, BP still did not have proposals for the awnings both fixed and retractable. That e-mail was forwarded to others by Mr Harris with the comment "*The canopy quote appears very expensive but before going back we need to obtain our own prices for whatever we think we're to provide*." There then appears to have been a meeting which Mr Harris attended. On 3 December 2011, following that meeting, Mr D'Silva sent an e-mail in which he said that: *"…. my understanding at the meeting was that we would be provided a design for the restaurant awning as understood by Liberty, with retractable facility in the patio. Liberty to instruct accordingly and the variances to be left to QS."*

244. BP relies on Mr Morris' letter as defining what was meant or intended by "new". Liberty argues that BP simply cannot rely on that apparent agreement because that would be contrary to clause 20 of the Agreement. However, this is an instance where what was to be provided was loosely defined as "new" and the issue is not, whether a prior agreement is relied upon, but what fell within that meaning. On the evidence, such as it is, it does seem to me that the parties expected the "new" canopy to be retractable and proceeded on that basis at least to the point where that was subsequently agreed in respect of the terrace.

245. I recognise that Mr D'Silva's email indicated that there would be something, which can be inferred to be an extra cost, to be discussed by the Quantity Surveyors and Mr Brown accepted that in cross-examination. But that does not amount to an agreement that "new" meant like for like or that the retractable canopy was not within the Specification and the Court is not in a position to either identify or value the variances that Mr D'Silva referred to. On this item, I find in favour of BP.

Item 30: Cloakroom

246. This item in admitted in the sum of £6,073.73. The parties have subsequently agreed that the correct figure should be £6,038.73.

Item 31: Relocation of the bar

247. There is no issue between the parties that the intention was that the bar would remain in its previous location but that it was, in fact, relocated. BP accepts that that was additional work for which it is liable. BP, however, disputes Liberty's claim for the costs involved in providing flooring, new feature lighting in the bar area, and for the electrical works in involved in the relocation
    (i) In respect of the flooring, BP contends that the cost is covered by Specification item 3.37;
    (ii) in respect of the electrical work, BP puts in issue whether the cost claimed is for the whole bar area or just the bar;
    (iii) in respect of the lighting, BP relies on item 3.35 of the Specification. BP says that it would accept liability for the specialist additional lighting but that that is covered in Ms Allen's assessment of the lighting claim.

248. So far as the flooring is concerned, Liberty identifies a credit for the flooring it would have had to provide. So far as the lighting is concerned, for the same reasons as I have given in respect of the feature lighting, I do not consider this to have been included in the Specification and BP's position is consistent with that.

249. All the elements of the claim are then the subject of an agreed figure in the schedule to the joint statement of the experts and that is sufficient evidence for me to value what is largely accepted to be additional work. I find in Liberty's favour on this item in that amount, namely £8,057.53.

Item 32: Sliding partitions

250. It is common ground that the Specification did not require Liberty to replace the existing folding wall system which appears to have allowed the creation of a private dining area. Liberty, in fact, installed two new sliding partition walls. It is accepted by BP that one of these amounts to additional work for which BP is liable.

251. The second partition wall was replaced because the removal of cast iron pipes (serving the storeys above) created "an opportunity" for higher ceilings. The position is set out in the e-mail of Mr Goyal sent on 11 December 2011 which says this:

    "In the meeting Tony Guest had indicated that the cast iron pipes will be removed and the fore (sic) the bulkhead can be higher, giving us the advantage of the higher ceiling. Therefore we would be going for new partitions as the existing ones will be shorter than the required height."

252. Whilst Mr Harris characterised that as "an opportunity" that BP took (with which Mr Brown agreed in cross-examination), it was not an opportunity which BP requested and, as BP submits, once the pipework was removed, a new sliding partition was required for the increased ceiling height. I reject Liberty's claim on this item and find for Liberty in the sum of £8,104.76 only which is admitted by BP.

Item 33: Doors

253. The Specification contained no requirement to replace doors. DSD, however, specified new doors throughout, as Mr Brown accepted. One might have expected, therefore, that this item would be uncontroversial. It is not: BP's defence essentially is that the doors had to be replaced to comply with the Building Regulations and, therefore, fell within clause 2.11 of the Specification. There is no particularisation of that case.

254. The evidence in support of that contention is vague to non-existent. Mr Brown's evidence in his witness statement was that there were a number of reasons for new doors, including upgrading for fire rating and altered layouts and that neither he nor BP had requested any new doors. In cross-examination, his evidence was significantly different and was to the effect that that DSD specified the doors that they wanted but that issues, for example, as to adequate fire rating were then left to Hawkins Brown. To my mind that falls far short of evidence that the doors had to be replaced to comply with the Building Regulations. Rather it appears that BP (through DSD) wanted and requested new doors and it would have followed that they should be appropriately fire rated or otherwise comply with any relevant Building Regulations. I find for Liberty on this item in the agreed amount of £3,400.05.

Item 34: Terrace Services

255. Liberty's case is that it provided, in accordance with BP's requirements, and as set out on HPF's drawings, new water supplies, lighting and small power to the terrace. BP admits only that the number of lights and power outlets increased. The total claim as agreed in the schedule to the joint statement is for £28,719.81.

256. In respect of the lighting, BP relies on item 3.39 of the Specification which provides for "new light fittings". Liberty argues that this does not include the terrace. I agree. This item appears in the section headed "front of house" and it is right that some of the front of house items relate to the terrace. But the provision of new light fittings is clearly under this item in the context of the replacement of the internal suspended ceilings.

257. The majority of the costs, however, relate to the installation of an external bib cock and what are said to be consequential works.

258. Mr Brown accepted that the bib cock was instructed by BP. On Liberty's case, that appears to have led to the requirement for a booster tank and pumps as shown on drawing HPF 6458/1101 rev C8.

259. BP says that this drawing is not pleaded. In the Scott Schedule the claim was first put as follows:

> *"Liberty was required to provide water, lighting and small power to the bar terrace area… As shown on DSD away 15 E, issued on 28.11.11, and HPF drawings 6458/1102 Rev C, PUR 3402/5010 rev C3 at 5020 Rev C3"*

None of these drawings appears to be relevant to the claim in respect of the booster tank or to be relied upon. However, in its Reply, Liberty said that the works "extend far beyond the provision of 6m of pipework, a tap and trace heating" and that the additional booster tank was shown on drawing 1101.

260. Although the booster tank is shown on that drawing, there seems to me to be a complete lack of evidence as to how the addition of a bib cock necessitated such substantial additional equipment and work. In cross-examination, it was put to Mr Brown that the items shown on the drawing were necessary because of the external bibcock which BP wanted on the terrace. His response was "*That appears to be the case from this drawing. That does seem rather excessive in terms of a requirement for one bib tap, but that is*

what is shows on the drawing." That goes no further than to agree what is shown on a drawing but it does not help to explain Liberty's case.

261. In all the circumstances, I am not satisfied that BP can be said to have requested this work or that the reasonable sum for the installation of the bib cock includes the cost of the booster tank.

262. Although I find that Liberty is entitled to be paid for some work, the claim is not broken down in a way that allows me to assess the appropriate amount and, doing the best that I can, I find in Liberty's favour in the sum admitted by BP, namely £1,800, plus the claimed amount for electrics/lighting of £4,000 giving a total of £5,800. There is a further claim for around £15,000 for irrigation. I can see nothing to support this claim.

Item 35: Kitchen extract works

263. Liberty's claim on this item is put on the basis of that it was additional work arising from the late issue by Lockhart of its kitchen canopy requirements, which were not provided until 9 January 2012. Liberty relies on Thermatic's drawing issued on 19 January 2012 which added the kitchen canopy detail and associated ductwork and HPF's comments in response on 31 January 2012 that: "*changes to the supply duct sizes required due to the increased airflow through these ducts following confirmation of the Lockhart design."*

264. In its response to the Scott Schedule, BP pleaded that the ductwork had to be adjusted partly because Liberty had introduced acoustic insulation to part of the kitchen ceiling. By the time, at least, of closing submissions, this case did not seem to be pursued. Rather, BP said that Liberty's case was demonstrably wrong by reference to the documents within the chronological bundle. BP contended that those documents showed that Liberty had encountered difficulties following the discovery of a beam in the kitchen. This conflicted with HPF's design for the kitchen ductwork and necessitated changes to the ductwork.

265. This case is, as Liberty submits, not pleaded and I bear that in mind when considering the argument that BP now advances:

(i) By email dated 27 January 2011 to Mr Harris, Mr Page (Hawkins Brown) noted the discovery of the beam ("that we previously did not know existed") and the problems it presented. Two ducts needed to be moved across as shown in the marked up drawing attached and he said that Hawkins Brown were waiting for a proposal from Thermatic. Mr Page marked the beam in blue on Thermatic's drawing showing that it conflicted with Thermatic's ductwork design.

(ii) On 30 January 2012 Mr Jones of Thermatic provided a proposal in line with discussions that had been held on 27 January 2012. The sound attenuator had been changed to provides space to bring both canopy supply ducts to the left side of the down stand concrete beam. He said that his proposals required approval from the canopy designer because one connection had been "radically repositioned". This was forwarded by Pochin to HPF.

(iii) Mr Tudor (HPF) responded on 31 January 2012:

> "*Lockhart have provided a canopy design which is incompatible with the special constraints. The canopy determines the ductwork sizes and the ceiling height. When we discussed this on site on Friday I thought it was clear that Thermatic and Lockhart need to get together to allow Lockhart understand the constraints and provide connections that Thermatic can work with. As for the drop beam it was the Lockhart design that planted the hood with a column through the middle of it. Were the column and drop beam not picked up in the measured survey as we were not made aware of it as design stage. Again this needs to be accounted for by Lockhart in their design as their hood determines the ceiling height surely they can agree to drop a section of ceiling locally to allow the ductwork to fit? The canopy drawing was not issued to me until 20th Jan 2012 our design was completed on 12th December 2011. I have been requesting this drawing since Sept 2011 so the fact that Lockhart were appointed too late to incorporate the canopy design into the ductwork is not an HPF issue. I will comment on Thermatic's proposals but I will not be attending Thursday's meeting"*.

(iv) BP submits that that can only be seen as an effort to pass blame from HPF to Lockhart.

(v) Mr Tudor followed that with another e-mail (which is relied on by Liberty) appending the markup of Thermatic's proposed redesign.

(vi) BP's argument is, therefore, that the redesign of the ductwork was obviously driven by the location of the beam which had not been provided for and not by Lockhart's requirements for the kitchen canopy.

(vii) On the face of it that is entirely right. Had Lockhart's canopy designs been provided earlier, the change might have been made earlier but there is no reason Lockhart ought to have taken account of a beam that even HPF did not know was present.

266. When Mr Brown was cross-examined on this issue he referred to a column "which everybody knew about". That knowledge on the part of BP is material only to any complaint that BP's case is unpleaded. Any other reliance on BP's knowledge of the presence of the column is misplaced. If it was present and not allowed for in HPF's design, then such changes as were necessitated by its presence were matters for Liberty. It is not suggested that they arose from any other identifiable request for additional work by BP.

267. Whilst I hesitate to find in BP's favour on a matter that is unpleaded, it would, in my judgement, be wholly artificial to find that Lockhart's design was the cause of these changes when that was patently not the case and on this item I find in favour of BP.

Item 36: Kitchen flooring substrate

268. This item relates to the substrate for the "Altro" kitchen flooring. BP accepts that the Altro flooring was additional work for which Liberty is entitled to be paid but disputes that the underlying screed was additional work. Liberty relies on item 3.26 of the

Specification which, on its face, that provided for Liberty to carry out only minor demolition and reconstruction works and Liberty says did not include any flooring works.

269. BP submits, however, that the works of minor demolition and reconstruction were to be "in accordance with agreed requirements". On 2 September 2011, Mr D'Silva e-mailed Mr Morris: he referred to a meeting with Mr Harris at which Mr Harris appeared to be unaware of certain matters agreed with Mr Morris including that Liberty w*ould "demolish or alteration of walls and elevated area of floor as required. Reinstate ceiling, walls, floor (we had discussed tiles, but we are now using a different floor)"* . Further, in his e-mail on 26 September 2011, again following a meeting, Mr Morris said that he was happy that Liberty would reinstate the shell kitchen post our work *"with all appropriate floor, wall and ceiling surfaces bearing in mind the use of the area"*. Thus BP argues there was express agreement that Liberty would provide an appropriate flooring surface. That is what the e-mail says but it expressly refers only to the flooring surface and the earlier e-mail implies that only a particular section of the floor was to be "demolished".

270. As BP puts it in its submissions, the issue is whether Liberty's obligations extended to cover the preparation of the floor to the standard required for the floor finish BP wanted. I do not see that that follows from the e-mail exchanges relied upon by BP. On the basis that the substrate was a necessary part of the work to provide the admittedly additional Altro flooring, on this item, I find in favour of Liberty in the total sum of £12,923.26 agreed without qualification in the schedule to the Joint Statement.

Item 37: Kitchen wall cladding

271. This is a claim for the costs of preparing the walls within the kitchen for BP's required "Altro Whitelock" and stainless steel cladding. Liberty's case is that this relates to admitted Scott Schedule item 18(j) (install "Altro Whitelock and stainless steel cladding").

272. For reasons that are not apparent to me, BP does not advance any argument similar to that under item 36. What BP says is simply that Liberty has adduced no evidence to support this claim and has not challenged the evidence of Mr Brown which was as follows:

"Much of the issues relating to the condition of the walls was due to alterations and filling undertaken by Pochin in carrying out libertine works and the general condition was more than what one would have expected following works that had been undertaken and was a risk that was the liability of Liberty."

273. Given BP's admission of liability for the wall cladding and the nature of Liberty's case, I can see no reason why it was necessary to cross-examine Mr Brown on this evidence which was both vague and involved opinion as to contractual risk. For the like reasons I have given in relation to item 36, I find in Liberty's favour on this item in the sum of £2,543.40 agreed in the schedule to the experts' joint statement.

Item 38: Further Fan Coil units (FCUs) in the reception/bar area

274. This is a small claim for £855.82 for the modification of ductwork and plenum boxes in the bar area. Liberty's case is that DSD assumed a 300mm service zone and 2840mm ceiling height which was in error. In essence, Liberty says that an issue arose (and led to

the modifications claimed for) because DSD's designs did not adhere to the dimensions of the service zone and made an error in the ceiling height.

275. Liberty adduced no factual evidence to support that case or to establish the request for additional work relied upon. Instead Liberty relies heavily on Mr Brown's evidence in cross-examination. In my assessment of that evidence, it went some way to establishing some of those facts but it fell short of evidence that DSD's design led to the modification of the ductwork or a request from BP. As BP put it in its submissions, the evidence was confusing but it did not establish any liability. I agree and on this item I find in BP's favour.

Item 39: Extension of ductwork in the private dining area/Adjustment of services bulkhead in the dining area

276. This is another small claim for £393.75. Liberty's pleaded case is that this work was done in order to satisfy BP's request to retain a constant bulkhead feature. No particulars of that request were pleaded and Liberty adduced no evidence on this item. Mr Brown's evidence was that this was a co-ordination issue between FCUs and soil pipes and nothing to do with BP. There is no evidence to support Liberty's position and nothing to contradict Mr Brown and Liberty has failed to prove its case.

Item 40: Feathering out the floor

277. Liberty's claim is for "feathering out" the disparity in floor levels across the restaurant area which, it says, was not within the scope of the Specification. Liberty relies on two e-mails:
    (i) Mr Harris' e-mail to Mr Brown on 24 February 2012:
    "We've discussed in the past the disparity in floor levels across the restaurant area, and identified that the bar area is generally overall 30/40mm lower than the rest of the ground floor space. It simply isn't a matter of a gradual fall across this area, but an almost pronounced step down from around the reception area. [Pochin and Hawkins Brown] are so conscious of the sensitivity and importance being played to floor to ceiling heights, that they are looking for guidance and instruction on how we should deal with this abnormality. To do the "proper job" we really should level the floor over the whole bar area, but this would impact upon the ceiling heights. Alternatively, we could "feather out" in the preparation for the floor tiling to make the situation less pronounced. The last alternative would be to simply relay the tiles as before, but this is not doing the job justice. Any guidance on how we should proceed would be greatly appreciated."
    (ii) Mr Brown responded on 28 February 2012 as follows:
    "We have spoken to the Bombay Palace and are of the opinion reducing the floor to ceiling heights would be detrimental and would suggest feathering the floor to take out the step would be the most appropriate…"

278. On this basis, Liberty submits that it is clear that BP requested Liberty to carry out works to feather out the floor. I do not accept that argument. This seems to me to be an instance in which Liberty identified an issue and sought, as Liberty put it, "guidance" on what BP wanted. BP characterises this as BP being given three options and choosing one and that, to my mind, reflects the documents I have seen and Liberty cannot spell out of that a request for additional work for which BP was liable to pay. On this item I find in favour of BP.

Item 41: Gas manifold/ Further drainage works

279. This claim is admitted in the sum of £1,687.79

Item 42: Low level wall supporting dispense bar

280. This claim is admitted in the sum of £791.64

Item 43: Changes in Bottle Store Ductwork

281. Liberty's case, in summary, is that ductwork was to be run, to BP's knowledge through the bottle store. However on 22 March 2012, Mr Woodcock e-mailed Mr Harris (copied to Mr Morris) stating that the bottle store was virtually unusable; asking for suggestions as to how and where to "install" deliveries and supplies; and stating that the layout was unacceptable. Liberty asserts that, as a result, HPF produced sketches identifying changes to the ductwork and moving the low level ductwork to a plenum above the bottle store. Liberty thus treats Mr Woodcock's e-mail as a request or instruction to revise the ductwork.

282. The fuller text of the e-mail is as follows:

> *"I spoke to the guy installing the electricals to the (I assume boilers) and asked why such large "boxes" were required and placed in the middle of the bottle store. Even he could not understand the reasoning behind the specification.*
> *The bottle store is now virtually unusable.*
> *Any suggestions as to how and where we can install the deliveries and existing supplies?"*

283. Mr Morris replied the following day:
> *"I understand the point you make in the email entirely.*
> *We are however all faced with having to put the controls etc. for plant and machinery somewhere. The volume of this equipment is a function of the totally comprehensive refit restaurant has had. This is a fact that we must not overlook.*
> *That being said however, David is on site on Wednesday and with the help of this team will look to see where we can possibly help gain further storage for you, as we, as ever, want to try and help if we possibly can."*

284. Mr Brown's evidence was that Liberty's decision to put boilers in the bottle store space made it totally unusable but that they provided a bottle store area elsewhere. He was not cross-examined on his evidence as to how this issue is dealt with. Instead, he was cross examined about the impact of Mr Woodcock's e-mail of 22 March 2012. He did not accept that it had led to changes to the ductwork.

285. I accept BP's submission that Mr Woodcock's e-mail simply did not complain about the ductwork or request its reconfiguration and any decision to re-route the ductwork appears to have been taken by Liberty. BP's issue about storage was met by finding storage space elsewhere. I find in BP's favour on this item.

Item 44: Additional wall to restaurant/ bar area.

286. This item is admitted in the sum of £923.58

Item 45: Minor works

287. This item is described in the Scott Schedule as "other, minor, requests from Bombay Palace for further varied and/or additional works." Liberty then sets out eight such minor

items in each case relying on minutes of a meeting as recording BP's request. In its response to the Scott Schedule BP admitted all of these items except item (d), the supply and installation of additional light fitting in the main entrance to illuminate signage. BP then identified 18 items of cost which were included in the claim but which did not relate to the items referred to in item 45.

288. The experts have agreed the value of these additional works at £6957.11. Although BP argues that it is not possible to identify an amount for the admitted items, there is no reservation in this agreement for further account to be taken of BP's pleaded case on quantum and I take it that the reasonable sum for the admitted minor works has been agreed. I therefore find in Liberty's favour in the sum of £6,957.11.

Item 46: Architect's Fees

289. This is the first of a number of Scott Schedule items which are, in effect, consequential on the other items, in this case a claim for architect's fees which must necessarily be those incurred in connection with the additional work claims on which Liberty has succeeded.

290. The claim was based on two invoices dated 2 September 2011 and 31 January 2012. However, Liberty now accepts that the 2 September 2011 invoice does not relate to the additional or varied work claimed against BP and reduces its claim accordingly.

291. There is a fundamental problem with Liberty's claim. The invoices were accompanied by a schedule of work done in relation to BP's additional works mostly identified by reference to drawings. It is simply not possible to relate these invoices to the additional works claimed in the Scott Schedule. Liberty, in effect, accepts this and invites the court to "assess a reasonable amount in respect of such services mindful of the 7% construction value fee to which Mr Harris referred". That is a reference to Mr Harris' evidence that Hawkins Brown was engaged on the basis that it would be paid 7% of the construction value.

292. This is quite hopeless. There is no pleaded claim for a percentage addition; that is not the basis on which Hawkins Brown has invoiced for additional work; and there is no evidence as to the additional work that they may have carried out in respect of the additional works. In my judgment, this claim fails for lack of evidence.

Item 47: M+E Design Fees

293. I can readily accept that fees of HPF were incurred in respect of mechanical and electrical design work and it is evident that a number of the Scott Schedule items required M+E design to be carried out. The difficulty for Liberty's claim that arises here is, however, the same as in relation to the Architect's fees. The total sum claimed is derived from a series of invoices and there is no evidential link between the amounts claimed in these invoices and the Scott Schedule items.

294. As a result, Ms Allen had sought to advance a percentage addition claim. She reached her percentage by calculating the lump sums fees payable as a percentage of construction cost. That has some attraction as a method for assessing a reasonable amount to be paid but it fails to recognise that only some additional works would involve M+E work and,

more obviously, that that was not the basis on which HPF was to be paid. I find again that this claim fails for lack of evidence.

Item 48: Quantity Surveyors' Fees

295. In relation to the previous two items, the experts agreed only that "the amount claimed was incurred". In relation to Quantity Surveyors' fees, however, the experts have agreed a percentage for such fees at 1.83% of construction costs.

296. I take a different view of this claim for two reasons. Firstly, on the balance of probabilities, quantity surveying fees were incurred in respect of all items. Not only was work done for which quotations needed to be obtained or valuations needed to be carried out under the building contract but there were substantial exchanges between Mr Gatehouse and Mr Brown. Secondly, although MDA was not paid on a percentage basis, where the experts have agreed a reasonable percentage addition, in my view, that is an appropriate way to assess a reasonable sum. That percentage should, therefore, be added to the sums which I have found to be due to Liberty.

Item 49: Bond extension

297. Under clause 14 of the Agreement, Liberty was obliged to maintain a bond for a period until the issue of a Sectional Completion certificate in respect of the Restaurant Works under the building contract and, bond in a lesser amount until practical completion of the development as a whole. A weekly cost for the bond was agreed between the quantum experts, subject to responsibility for delay.

298. In my view, this claim is confused and unsustainable. I assume first that the Building Period was a period during which Liberty had the right to carry out and complete the Restaurant Works. If the additional works took longer to carry out, the corresponding extended cost of the bond might, in principle, form part of the reasonable sum for those works. But, in this case, save in respect of one or two items where it has been pleaded that the additional works caused delay, there has been no item by item identification of the additional time taken to carry out the additional works. Rather, and as I consider below in relation to closure compensation, the underlying assumption in Liberty's case seems to be that the items relied on in the context of its case on closure compensation prolonged the carrying out of the Restaurant Works and that that carries with it an entitlement to be paid additional monies for that period of prolongation as part of the assessment of a reasonable sum. For the reasons I explain below that case on delay is simply not made out and this claim must fail.

Item 50: Bank Fees

299. Although a percentage has been agreed by the quantum experts as part of the reasonable cost of additional works, this claim is disputed in principle by BP.

300. It is not disputed that Liberty had a bank facility in respect of the project as a whole but it seems to me that there is no evidence at all of the impact on that facility of the additional works and what fees, if any, might have been incurred as a result. Liberty puts its case on the basis that a reasonable sum would include an appropriate percentage of the bank fees necessary to fund the works in question. But there is no evidence as to what those fees were and that they were indeed necessary and incurred to fund the additional works. This claims fails for lack of evidence.

Item 51: Overheads and profit

301. In the context of a contractual or quasi-contractual relationship between, say, employer and contractor, where the contractor is entitled to be paid a reasonable sum, that sum might well include an amount for both overheads and profit. Liberty claims such overheads and profit in this case as 10% of the sums otherwise found due for additional works.

302. As I consider further below, the relationship here between Liberty and BP is significantly different. The Agreement was a commercial deal under which BP vacated their premises to enable Liberty to carry out Liberty's works. Part of that deal involved Liberty's carrying out the Restaurant Works at its own cost. Liberty was not a contractor and was itself engaging Pochin to carry out those works. In those circumstances, I can see no reason why a reasonable sum payable to Liberty for additional works should include a profit element.

303. The position may be different in relation to overheads in the sense that clearly staff time was devoted to the Restaurant Works and the additional works. But all of those costs would have been incurred anyway in administering the overall project and there are no identifiable additional overheads costs that have been incurred in respect of the additional works. Indeed, Mr Harris' evidence was that his company was engaged by the Fourth Claimant to manage the project for payment but he could give no evidence about those charges.

304. In the context of the employer/ contractor relationship, a contribution to overheads might nonetheless form part of a reasonable sum to be paid but that is not the position here. This claim fails in principle.

Item 52: Pochin's preliminaries

305. Liberty claims a sum for Pochin's preliminaries which is said to be part of the reasonable cost of the additional works. That is not, however, what this claim in truth is. There is no evidence at all of the preliminaries costs associated with the additional works. This is, in fact, a time related claim of the same nature as the bond extension claim and it fails for the same reasons.

Closure compensation

306. In respect of this claim, the first issue that arises is one of construction.

307. The Agreement provides, as set out above, for the payment of compensation for the period that the restaurant is closed <u>as a direct result of the carrying out of the Restaurant Works</u> (as defined). In what I might call a "standard" building contract, the Works would be defined in such a way that the scope of the Works might be varied or, put another way, the Works would include variations instructed under the contract. There would then commonly be provision for the contractor to be granted an extension of time for completion if the carrying out and completion of the works was to be prolonged by the carrying out of the variation. The benefit of that extension of time to the employer would usually be that it would preserve its entitlement to liquidated damages which would not then fall foul of the so-called prevention principle.

308. As BP submitted, the Agreement in this case was both commercially and in its terms significantly different from that standard type of building contract. Although it provided for the carrying out of construction works, it was not a building contract in any classic

sense at all. What it was was a commercial arrangement under which BP vacated its business premises for the benefit of Liberty – so that Liberty could carry out the redevelopment of the building as a whole.

309. As part of the deal, Liberty undertook to carry out the Restaurant Works. These were obviously a benefit to BP but it was also the quid pro quo for the restaurant being closed so that Liberty could carry out its own redevelopment. As part of the deal, Liberty also agreed to pay closure compensation during the period when the restaurant was closed as a direct result of the carrying out of the Restaurant Works. This was, in my view, quite different in nature from liquidated damages (which is how, it seems to me, Liberty have sought to treat it in this action) for failure to complete the Restaurant Works by a fixed completion date.

310. There was, in the first place, no fixed completion date in the normal sense. Clause 7.7.2 provided that the Building Programme anticipated that closure would be for a period of four weeks. Under the Agreement, the Building Programme would not, in fact, be identified until the Commencement Notice was issued with the Building Programme annexed. What that programme was to be was, therefore, entirely in the hands of Liberty. This was not, therefore, an agreement under which an employer fixed a period for the carrying out and completion of the works, carrying with it both the obligation and the right of the contractor to carry out the works in that period. Consistently, whilst the Agreement imposed an express obligation to commence the Restaurant Works (clause 7.1.1) in January there was no express obligation to complete within a period thereafter. The Building Programme was simply to be provided with the Commencement Notice.

311. In its nature the closure compensation was not payable as damages for breach of an obligation to complete: rather it was payable to compensate BP for the closure of the restaurant. That was, of course, whilst works were being carried out for BP's benefit but the reason those works were being carried out in the first place was the deal under which BP vacated the premises.

312. Other than under clause 5, there was no provision for variations. If BP requested additional works to be carried out, as in some instances I have found that they did, there were no express contractual provisions that dealt with that situation either in terms of the variation (thus making any varied works part of "the Restaurant Works") or an extension of time.

313. The absence of an extension of time provision seems to me to be explicable by the following three matters:

    (i) there was no obligation on Liberty to complete by a fixed date or within a fixed period;
    (ii) there was no provision for the payment of liquidated damages for delay to completion;
    (iii) there was no provision for the instruction of variations to the Restaurant Works by BP such that those works would then become part of the Restaurant Works as defined.

    It follows, in my judgment, that any reliance that Liberty sought to place on the prevention principle was misconceived. It simply did not come into play. That view is

unaffected by the observations of Coulson J. at an interlocutory stage. It is right that the Agreement did include a form of extension of time provision under clause 7.1.4. The clause, in itself is unusual in a number of respects. Firstly, in the standard building contract scenario, an extension of time provision extends the date for completion of the works with the result that an obligation on the part of the contractor to pay nor allow liquidated damages for failure to complete on time does not come into play unless and until the extended completion date is not met. In this Agreement, as I have already described, closure compensation was payable during the period the restaurant was closed as a direct result of the carrying out of the Restaurant Works. Any extension of the period for carrying out the Restaurant Works would, therefore, on its face do exactly what it said and no more. It would neither end or suspend the liability of Liberty to pay closure compensation during the period of closure. The second respect in which the clause is unusual is the matters for which an extension of time may be certified by the Architect. In the common extension of time clause, the relevant matters are those which are the responsibility of the employer, such as the instruction of variations, which would otherwise be characterised as acts of prevention and, to a lesser extent, matters that are beyond the control of the contractor, such as exceptionally adverse weather conditions. Under this clause, the extension of time may be certified not only for delays that are BP's responsibility but for any matters that are beyond the control of Liberty and for any events that would entitle the contractor under the specified type of JCT contract to an extension of time. It is wholly unclear what that was intended to mean in this Agreement. It is capable of meaning that, for these purposes, BP is to be treated as if it were the employer and Liberty as if it were the contractor under such a contract even where there is no such contract, between BP and Liberty. If it is construed as meaning that Liberty is entitled to an extension of time in any circumstances where Pochin would be entitled to an extension of time, it has the even more peculiar meaning that Liberty might be entitled to an extension of time for matters for which it was responsible. It is not necessary for me to decide the meaning of this clause but the difficulties with it support my view that this is not an extension of time provision that could be construed, without express words, as affecting the right to closure compensation.

314. I take the view that the way that clause 7 works is far simpler. The only works that can be relevant for the purposes of considering whether the restaurant is closed as a direct result of the carrying out of the Restaurant Works are the works as defined in the Agreement. Any additional or varied works requested by BP would not fall within the meaning of the Restaurant Works because closure caused by such works would not fall within clause 7.4.2 and entitle BP to be paid closure compensation. I have accepted above that there would be an implied term that Liberty would be entitled to be paid a reasonable amount for additional work instructed or requested by BP. It does not seem to me to follow that that entitlement to payment necessarily carries with it the concept that the "varied" works fall within the definition of the Restaurant Works. That will commonly be the case because of the operation of the express terms of the contract but that would be inconsistent with the express terms in this Agreement.

315. The issue here is simply one of causation. What caused the restaurant to be closed? Was the closure directly caused by the Restaurant Works? The burden of proof is on the claiming party to establish that the closure was directly caused by the Restaurant Works. If the closure is, in fact, caused by the carrying out of additional works, then the closure compensation is not payable. That opens the possibility that the compensation might be payable for different and non-contiguous periods although neither party put its case on

that basis. But what I emphasise is that in my view this is a question of causation and not analogous to an extension of time claim.

The evidence

316. The way Liberty put its case on closure compensation was, however, in effect as an extension of time claim. Liberty adduced no factual witness evidence about delay at all and the extent of its evidence was Mr Bordoli's report. I have already set out why I place no reliance on that report but for completeness, I summarise the nature of Liberty's case.

317. In the report, Mr Bordoli divided the works or the delays into six periods.

318. The first period was described as "pre-closure delays". The nature of this case was that the variations affecting the kitchen area and the restaurant area resulted in an extension of the planned duration for the restaurant works from four weeks (in the building programme issued with the commencement notice) to a period of nine weeks in Pochin's December 2011 programme. The Scott Schedule items relied upon were items 2, 3, 4, 6, part of 7, 10, 11/12, 13, 14, 15, 16, part of 17, part of 18, 21, 23, 24, 25, 30, 31, 32.

319. There was, as I have said above, no programming or planning expertise involved in this evidence at all. These items were simply taken as a whole to explain the revised programme.

320. The second period of delay was described as "Increased Demolition Scope". The thrust of this case was that both the original building programme and the revised building programme showed the Restaurant Works commencing on 9 January 2012. Both programmes also allowed a one-week period from 2 January 2012 for demolition works to be carried out by others. In fact, as Mr Bordoli accepted in cross examination there was provision for BP to vacate the premises and for site setup including scaffolding in the same period.

321. The third period relied upon by Mr Bordoli reflects an extension of time under the building contract setting a revised sectional completion date to 13 April 2012. The critical delaying events are said to be (i) the revised ductwork design for the kitchen area and (ii) the revised ceiling feature details.

322. In respect of the kitchen, the report does not identify the Scott Schedule items relied upon. The only matter relied upon expressly is Lockhart's delay in issuing its canopy design. In respect of the Restaurant, the report identifies generally changes in ceiling design. Mr Bordoli accepted in cross-examination that he had given no consideration to why these two items caused critical delay.

323. The next period of delay considered reflects a further extension of time for sectional completion to 27 April 2012, the matters relied upon being items 41, 42, 43 and 44 of the Scott Schedule. One of these, the redesign of the bottle store ductwork is said to have extended the sectional completion date to 27 April 2012 and I have found in BP's favour on this item.

324. The Architect awarded Pochin a further four day extension of time to 1 May 2012 for delay in the submission of BP's kitchen equipment subcontractors operation and maintenance manuals. There is absolutely no evidence about this at all.

325. There is then a further period considered to 19 May 2012 when BP was carrying out its own fit out works.

326. I have found above that some (but not all) of the items referred to in this report were additional works requested or instructed by BP. Even as an extension of time claim, Liberty's evidence would not allow me to make any informed assessment of the extension of time due. As I have said above, Mr Bordoli proceeded on the basis of a planned period for the Restaurant Works without any consideration of its adequacy. He did not present anything that might be described as an expert analysis of the effect of the carrying out of additional works and there was no factual evidence. Even if that were not the case, the causes of delay relied upon were not all BP additional works and there is no evidence or analysis which would allow me to disentangle the alleged effects of those items that I have found to be additional works and those that I have not.

327. If I then consider the evidence in the context of the question of what caused the restaurant to be closed, it is equally, if not more, unhelpful. At a very high level, it might well be open to me to conclude that the carrying out of additional works must have caused the restaurant to be closed for longer than was originally anticipated but the evidence offers me no assistance in identifying when and for what period.

328. Faced with these difficulties, Liberty sought to piece together a factual case as to the causes of delay in its closing submissions. This amounted in my view to a new case and one that was very much a matter of impression. It provided no sensible basis on which I could determine what might have caused delay in the completion of the Restaurant Works, still less what had caused the restaurant to be closed.

329. BP's case is, however, shortly stated. The Restaurant Works included the works to the entrance of the restaurant – that is not in dispute and indeed those works themselves are the subject of items in the Scott Schedule. Until the entrance was completed, the restaurant had to be closed. The entrance was not completed until 19 May 2012. It follows, on BP's case, that Liberty was liable to pay closure compensation for the entirety of the period for which the restaurant was closed (up to 19 May 2012).

330. On the facts, and forming a view as to what was the direct cause of the restaurant's closure, I accept BP's case that the direct cause of the restaurant's closure was the fact that the entrance was unusable. There was clear photographic evidence to support that case and no real answer to it from Liberty. Some of the background is also helpful:

    (i) Scaffolding remained in place until 17 April.

    (ii) After this was removed, Hawkins Brown issued a Sectional Completion Certificate dated 1 May 2012 but the certificate attached a drawing which excluded from handover all external areas, showed a temporary entrance and listed 15 'snagging items' which included installation of the restaurants toilets, decoration of the restaurant and flooring.

    (iii) On 8 May 2012, Mr Brown also e-mailed Hawkins Brown as follows:

> *"In our opinion having visited the site today Tuesday 8 May 2012 that the works in the restaurant area which you have marked green on your section completion plan BP_00 252 are not complete*
> *You cannot have a completed restaurant if you have no heating. A restaurant cannot be operational without working guest toilets. This is not a snagging item as you suggested in your list*
> *Decoration is on-going, light fittings remain unfixed, socket face plates remain unfixed*
> *Access is required to the terrace by Pochin through the area you state is completed*
> *Ceiling grille not fitted*
> *Comms room air conditioning unit not working/connected*
> *Data points not completed in the restaurant so orders cannot be taken*
> *Washbasin in kitchen restaurant lobby not plumbed in*
> *No CCTV in operation*

Mr Brown's e-mail demonstrates that there were further works outstanding that plainly needed to be completed for the restaurant to trade as such.

331. If this were an extension of time claim, my view on the impact of the entrance being unusable might be met with objection that it is similar to the position where there is delay for which the contractor is responsible; the employer then instructs a late variation; and the contractor argues that he is then entitled to an extension of time for the entirety of the period or delay for which he was, in fact, responsible because he cannot complete until he has carried out the late variation. It is well established that that approach is wrong in principle. But, as I have said, this is not an extension of time claim and it is fallacious to approach it as if it were.

332. I recognise that that gives BP the benefit of the closure compensation during what, in the event, was the period when it carried out its own fit out works but it seems to me that that was a risk that Liberty took. Had the entrance been completed earlier, Liberty would have been fully entitled to say that the closure of the restaurant during the period when, say, BP was carrying out its own fit out works, was not directly caused by the Restaurant Works. Liberty did not do so and that is not what happened.

333. The position might also have been different, at least to some extent, if it were the case that the completion of the entrance was delayed by additional works requested by BP. There is no evidence to that effect.

The takeaway service

334. There is one last issue which arises in relation to the period of closure compensation which I can deal with shortly.

335. Although the restaurant remained closed to diners, BP started providing a takeaway service from 1 May 2012. Liberty argues that the restaurant should not be regarded as closed after the takeaway service started. I regard this argument as hopeless. A restaurant is a place where customers go to eat and remain at the restaurant while they eat, most commonly sitting on some form of seating at something that resembles a table. BP may well have sought to limit the impact on its business, or re-establish a clientele, by starting a takeaway business but that does not amount to opening a restaurant.

336. The test under clause 7.7 was whether the whole of the First Property cannot "by an objective and reasonable opinion trade as a restaurant". By any objective and reasonable opinion offering a takeaway service is not trading as a restaurant.

Conclusion on closure compensation

337. I, therefore, find that BP is entitled to closure compensation from 2 January 2012 to 19 May 2012. The sum calculated by BP is £784,571.43.

Counterclaim

338. On the pleadings, BP advances a counterclaim for fees payable to Mr Woodcock under the Agreement.

339. There has been no evidence about this counterclaim at all and it is, accordingly, dismissed.

Finally

340. The effect of this judgment is set out in the table below. I will invite the parties to agree the total sums due from BP to Liberty and vice versa so that, taking into account the sums already paid as a result of the adjudicator's decision, a final balance can be calculated.

TABLE OF THE TOTALS

Item No.	Description	Judgment
1	Kitchen Extract - externally	£28,029.66
2	Kitchen Extract - internal	£1,500.00
3	Replace internal restaurant extract	£24,863.21
4	Kitchen fresh air supply	£0.00
5	Cold Water Storage Cistern	£4,100.99
6	New Boiler	£44,596.61
7	VRF units	£28,213.86
8	Three phase power supply	£6,642.39
9	Incoming building gas supply	£25,738.92
10	Fire alarm	£15,069.24
11	New Lighting	£21,561.71
		£6,516.70
		£18,087.93
12	Power	£7,670.00
13	Voice, Data and AV services	£2,045.70
14	Grease traps and dosing units	£0.00
15	Services: Pipework and drainage	£8,916.85
16	Rooflights/Glass block wall	£0.00
17	Public toilet facilities	£923.58
18	Works within the kitchen	£59,790.09
19	Remove redundant services above ceiling	£500.00
20	Remove floor finishes: remove screed also	£0.00
21	Suspended ceiling - coffers	£2,875.00
22	Not used	£0.00
23	Entrance doors	£1,021.01
24	Wall finishes	£1,796.46
25	Windows	£24,400.35
26	Terrace pavings: additional costs	£0.00
27	Front Entrance: additional features	£9,996.00
28	Repairs to perimeter dwarf walls	£0.00
29	Terrace canopy: steel support and electric operation	£0.00
30	Cloakroom	£6,038.73
31	Relocation of the bar: new services	£8,057.53
32	Sliding wall/partition	£8,104.76
33	Replace doors	£3,400.05
34	Terrace works: water, lighting and power	£5,800.00
35	Kitchen extracts - further works	£0.00
36	Flooring works - Screed required	£12,923.26
37	Wall cladding - further works: Dot and Dabbing	£2,543.40
38	Item 7 further works	£0.00
39	Item 3 - further works	£0.00
40	Floor finishes - levelling	£0.00
41	Item 15 - further works	£1,687.79
42	Item 18 - further works	£791.64
43	Bottle Store Ductwork	£0.00
44	Item 32 - late or additional requirements	£923.58

45	Other minor requests	£6,957.11
46	Architect's fees	£0.00
47	M&E design fees	£0.00
48	QS fees	£7,358.14
49	Bond extension	£0.00
50	Bank fees	£0.00
51	Overheads and profit	£0.00
52	Pochin Preliminaries costs	£0.00
		£409,442.25