Neutral Citation Number: [2018] EWHC 368 (TCC)

Case No: HT-2017-000182

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS**
**TECHNOLOGY AND CONSTRUCTION COURT (QBD)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/02/2018

**Before**:

**MRS JUSTICE O'FARRELL DBE**

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**Between:**

| | |
|---|---|
| **BHC LIMITED** | **Claimant** |
| **- and -** | |
| **GALLIFORD TRY INFRASTRUCTURE LIMITED (trading as MORRISON CONSTRUCTION)** | **Defendant** |

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**Stephanie Barwise QC** (instructed by **Shulmans LLP**) for the **Claimant**
**Piers Stansfield QC** (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing dates: 12th October 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.

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MRS JUSTICE O'FARRELL

**Mrs Justice O'Farrell:**

1. In about 2010 Total E&P Limited engaged Petrofac Facilities Management Limited ("Petrofac") to carry out the construction of a gas processing plant in Shetland, for the processing of hydrocarbon from the Laggan and Tormore gas condensate fields off the coast of the Shetland Isles.

2. In June 2011 Petrofac engaged the defendant ("Morrison") as a sub-contractor to carry out civil engineering and building works as part of the construction of the gas processing plant.

3. On 30 November 2011 Morrison engaged the claimant ("BHC") to carry out structural steelwork (including associated design works), roof and wall cladding, and precast concrete flooring works for buildings to be constructed in respect of the gas processing plant project ("the Contract").

4. The Contract provided for three buildings to be constructed, namely, the administrative building, the gatehouse and a workshop, but it was anticipated by the parties that additional buildings would be required to provide shelter for items of plant. During the project, 33 additional buildings were instructed by change order instructions ("COIs") issued under the Contract.

5. A dispute has arisen between the parties as to the basis on which the works carried out pursuant to the COIs should be valued or measured.

6. On 10 July 2017, BHC commenced these Part 8 proceedings, seeking declaratory relief as to the proper construction of certain change order instructions issued under the Contract, including:

> "That the Sub-subcontract works carried out pursuant to COI 2, COI 3, COI 4, COI 5 and COI 7 shall be valued in accordance with the agreement made by the parties as evidenced by such COIs, namely that the price quoted in each of those COIs should be subject to final re-measurement [in accordance with the rates and prices in the quotation] on issue of finalised construction drawings."

7. Initially, a further declaration was sought as to whether the COI works were construction operations for the purpose of the Housing Grants Construction and Regeneration Act 1996 (as amended) but the parties have reached agreement on that issue and the court is not required to grant any relief.

8. The parties have agreed also that COI 4 and COI 7 are subject to re-measurement based on the rates and prices set out in the relevant quotations by BHC. Therefore, there is no dispute in respect of those change orders.

9. The issue for determination by this court is whether, on a proper construction of COI 2, COI 3, COI 5 and the Contract, the whole of the work covered by each identified change order should be re-measured, or whether the parties are bound by the lump sum prices in the COIs, subject to measurement on an add/omit basis in respect of any variations to the works as compared with the original scope of the COI.

*The material terms of the Contract*

10. Article 2 and Exhibit B provide that the Contract Price is £897,199.13 less 2.5% discount, £874,769.16.

11. Article 30.3 states:

> "Fixed SUB-SUBCONTRACT PRICE
>
> Unless expressly provided otherwise in EXHIBIT B or in any CHANGE ORDER, all rates sums and prices stated in the SUB-SUBCONTRACT shall be fixed and firm and not subject to any revision, nor escalation, nor any adjustment due to currency fluctuations."

12. Article 30.4 states:

> "All rates, sums and prices set out in EXHIBIT B or specified in CHANGE ORDERS shall be deemed to be all-inclusive for the WORK relative thereto carried out and/or completed in accordance with all subcontract requirements …"

13. Article 1 of EXHIBIT B states:

> "For the purpose of the SUB-SUBCONTRACT and as described in more detail in this EXHIBIT B and in accordance with the requirements of the WORK Breakdown Structure (WBS) as defined in EXHIBIT A, SUB-SUBCONTRACTOR's prices shall be presented in the following categorisation:
>
> - Lump Sums based on agreed BHC rates and prices (see later breakdown).
>
> SUB-SUBCONTRACTOR shall be reimbursed firstly in accordance with the Lump Sums. Re-measurable Elements shall be in accordance with the build up to the Re-measurable Elements as submitted by SUB-SUBCONTRACTOR and as included in this EXHIBIT B and as further defined at Article 5.2."

14. Article 5.2 of Exhibit B and the Re-measurable Elements were not used.

15. Article 6 of Exhibit B states:

> "Any change to the WORK shall be authorised by issue of a CHANGE ORDER in accordance with Article 22 of the AGREEMENT.
>
> CHANGE ORDERS shall be evaluated and processed in accordance with Article 22 of the AGREEMENT, EXHIBIT B and its Schedules and EXHIBIT G.

The method used to price change orders shall reflect the pricing structure of the Work Breakdown Structure, i.e. a Work Package / Unit in a COR will follow the same pricing structure as the same Work Package / Unit of the main scope of work …"

16. Article 22.1 states:

"At any time, SUBCONTRACTOR shall have the right to modify (by additions, deletions, substitutions or any other alterations) the Scope of Work … Upon receipt of SUBCONTRACTOR's request, SUB-SUBCONTRACTOR shall promptly prepare at its own cost and expense an evaluation and estimate of any and all consequences such modification would have on the personnel, equipment and materials requirements, SUB-SUBCONTRACT PRICE, WORK TIME SCHEDULE and/or COMPLETION DATE, as a direct net consequence, if any, on the critical path of the WORK TIME SCHEDULE, and/or any other changes to SUB-SUBCONTRACT, and shall attach to each modification evaluation a detailed backup dossier.

If SUBCONTRACTOR decides to proceed with such modifications and accept such estimate of consequences, it shall issue to SUB-SUBCONTRACTOR a written CHANGE ORDER with a full description of the modifications and any mutually agreed adjustments to SUB-SUBCONTRACT PRICE, WORKTIME SCHEDULE and/or COMPLETION DATE. SUB-SUBCONTRACTOR shall sign and return such CHANGE ORDER to SUBCONTRACTOR as its acceptance to comply with the requested variation to Scope of WORK, the WORKTIME SCHEDULE and/or the COMPLETION DATE, at the specified price, and/or schedule adjustments …"

17. Article 22.3.1 states:

"<u>Price Adjustment</u>

Effects of CHANGE ORDERS on the SUB-SUBCONTRACT PRICE shall be evaluated by SUB-SUBCONTRACTOR who shall give preference in priority to a lump sum price adjustment based on the SUB-SUBCONTRACT PRICE lump sum breakdowns set out in EXHIBIT B and deduced by analogy or interpolation.

When the above procedure is not applicable, unit rates, attached to separate items of the WORK as set out in EXHIBIT B, or mutually agreed detailed unit prices [deduced] there from by analogy or interpretation shall be used. In such a case, the variations of quantities involved shall be determined by difference between the new quantities and the previous

> corresponding quantities, evidenced by supporting documents agreed by both PARTIES …"

18. Article 22.3.3 states:

> "No claims for CHANGE ORDERS
>
> Adjustments as indicated in CHANGE ORDERS shall be deemed to take into account the full and final effects of the considered modifications upon any and all aspects of the SUB-SUBCONTRACT. SUB-SUBCONTRACTOR hereby agrees to make no further claim for any other consequences of CHANGE ORDERS whether directly or indirectly resulting therefrom at the time of the CHANGE ORDER or thereafter."

19. Article 22.7 states:

> "CHANGE ORDERS as part of SUB-SUBCONTRACT
>
> CHANGE ORDERS shall in no way vitiate or invalidate the SUB-SUBCONTRACT, and, unless otherwise specified in CHANGE ORDERS, all provisions of the SUB-SUBCONTRACT shall apply to CHANGE ORDERS."

*The Change Order Instructions*

20. COI 2 instructed the fabrication, supply, delivery and installation of structural steel for shelter buildings.

21. On 11 June 2012 BHC provided a quotation for the works in the lump sum of £3,229,322.07, with a breakdown of rates for each shelter, compressor and labour, identifying specific inclusions and exclusions. The quotation also stated:

> "Our quotation is based on the section sizes designed by Messrs Petrofac and indicated on tender drawings …
>
> **For clarification please note**
>
> The rates identified in the Schedule will be utilised in the evaluation of variations on an add/omit basis only providing the mix of sections and quantities remain as the tender drawings, however where the mix amends we require to revalue the schedule rates analogous to the tender rates."

22. COI 2 is dated 27 July 2012 and states:

> "The terms used in this CHANGE ORDER that are defined in the CONTRACT shall have the meaning given to them in the CONTRACT and all provisions of the CONTRACT not expressly modified by this CHANGE ORDER shall remain in full force and effect.

> PRICE: as per BHC Quotation dated 11th June 2012 subject to final re-measurement on issue of finalised construction drawings…"

23. COI 3 instructed the fabrication, supply, delivery and installation of the cladding for the compressor shelter buildings.

24. On 21 August 2012 BHC submitted its quotation for those works. Separate prices were included for the following elements of the works:

    i) Roof and wall cladding: "2,453 $m^2$ @ £53.91/$m^2$ = £132,241.23."

    ii) Louvres: "Total 212 no. modules in mix of length to achieve arrangement – Max module length 3000 mm… For the total sum of £203,900.00."

    iii) Galvanised sheeting angles: "Total 2,475 metres @ £9.78/metre = £24,205.50."

    Inclusions and exclusions were identified.

25. COI 3 is dated 31 August 2012 and states:

> "The terms used in this CHANGE ORDER that are defined in the CONTRACT shall have the meaning given to them in the CONTRACT and all provisions of the CONTRACT not expressly modified by this CHANGE ORDER shall remain in full force and effect.
>
> PRICE: As per BHC quotation dated 21st August 2012 subject to final re-measurement on issue of finalised construction drawings."

26. COI 4 instructed the fabrication, supply and delivery and installation of pipe support steelwork for three compressor buildings, as detailed in BHC's quotation dated 22 November 2012.

27. On 22 November 2012 BHC provided the rates per tonne for the painted steel and for the fire protected steel, and provided the total tonnage for each type of steel system.

28. COI 4 provided as follows:

> "ATTACHMENTS: Priced Schedule of Clarifications, BHC email dated 22 November 2012 confirming rates.
>
> The terms used in this CHANGE ORDER that are defined in the CONTRACT shall have the meaning given to them in the CONTRACT and all provisions of the CONTRACT not expressly modified by this CHANGE ORDER shall remain in full force and effect.
>
> PRICE: £2,096,478.08 subject to final measurement on issue of final construction drawings…

> Total Re-measurable Price = £2,096,478.08 as per the attached Bill of Quantities.
>
> Work to be re-measurable on completion."

29. On 30 November 2012 Alan Hawkins of BHC sent an email to John Dorward of Morrison, asking for confirmation whether the instruction was based on a lump sum or re-measure basis for the steelwork. The response from Keith Glazier of Morrison was: "Re-measurable."

30. COI 5 instructed the fabrication, supply, delivery and installation of the cladding for the GTG shelter buildings as set out in BHC's quotation dated 16 November 2012.

31. On 16 November 2012 BHC provided the quotation for the cladding works. A description of the works was set out together with the schedule of rates for the same in the total sum of £246,698.46.

32. COI 5 was dated 6 December 2012 and stated:

> "The terms used in this CHANGE ORDER that are defined in the CONTRACT shall have the meaning given to them in the CONTRACT and all provisions of the CONTRACT not expressly modified by this CHANGE ORDER shall remain in full force and effect.
>
> PRICE: As per BHC quotation dated 16th November 2012 subject to final re-measurement on issue of finalised construction drawings"

33. COI 7 instructed the fabrication, supply, delivery and installation of metalwork/tertiary steelwork for the shelter buildings as per BHC's quotation dated 7 February 2013.

34. On 7 February 2013 BHC provided the quotation for the steelwork in the sum of £278,250.00 "subject to re-measurement in accordance with the attached schedule of rates…"

35. COI 7 stated:

> "The terms used in this CHANGE ORDER that are defined in the CONTRACT shall have the meaning given to them in the CONTRACT and all provisions of the CONTRACT not expressly modified by this CHANGE ORDER shall remain in full force and effect.
>
> PRICE: As per BHC quotation dated 7th February 2013 subject to final re-measurement on issue of finalised construction drawings"

36. The parties now agree that COI 4 and COI 7 are re-measurable and therefore the dispute is limited to COI 2, COI 3 and COI 5.

*The dispute*

37. The works carried out by BHC were completed in August 2016.

38. Under cover of a letter dated 15 September 2016, BHC submitted its final assessment claim for the works in the sum of £27,637,523.34 (less 2.5% discount).

39. By letters dated 11 October 2016 and 14 December 2016, Morrison responded to the claim, disputing various elements of the claim. Included in the disputed items was the claim for steelwork, cladding and louvres:

> "SUB-SUBCONTRACTOR values all WORK associated with Steelwork, Cladding and Louvres as "re-measurable" and has submitted re-measures from its "As Built" "Erection Drawings" on this basis…
>
> Of 24 No COIs issued by SUBCONTRACTOR, only 6 (002, 003, 004, 005, 006 & 007) refer to "re-measurement". For the avoidance of doubt, whilst certain COIs refer to "re-measure", it is expected that quantified "re-measurable" change would be done on an add/omit basis, against construction drawings (AFC) and in line with the requirement of the SUB-SUBCONTRACT."

40. Morrison's valuation of the final assessment was £14,082,191 (less 2.5% discount).

41. The parties were unable to resolve the disputed assessment through correspondence and discussions.

42. In August 2017, BHC commenced these Part 8 proceedings, seeking declaratory relief in respect of the identified change orders.

*Objection to Part 8 claim*

43. Morrison objects to BHC's claim for declaratory relief using the Part 8 procedure on the ground that it would serve no useful purpose. Mr Stansfield QC, for Morrison, submits that the declaration simply repeats the words used in the change orders and adds nothing to the parties' understanding of the change orders or the consequences of the declaration. The amount in dispute between the parties on the final account is in excess of £10 million but the total difference in respect of COIs 2, 3, 4, 5 and 7 is assessed by Mr Heap, a commercial manager engaged by Morrison, as £1,227,528.72. Mr Cathcart, general manager of BHC, has assessed the amount in dispute as £5,302,065.94 but that includes COI 4 (difference of £2,143,532.26), where the dispute concerns alleged incomplete and defective work, and COI 2 (difference of £2,594,528.72), where BHC has failed to explain the revised figure claimed. In any event, Mr Stansfield submits that, based on Mr Heap's evidence, an ad-measurement valuation should produce the same result as a re-measurement valuation. Therefore, the substantive valuation dispute does not turn on the interpretation of the COIs and the declaration sought will not assist in its resolution.

44. Ms Barwise QC, for BHC, submits that the question whether the COIs properly construed require re-measurement or ad-measurement is a question of contractual interpretation and is suitable for determination under Part 8. Mr Heap's assumption that an ad-measurement valuation should produce the same result as a re-measurement valuation is flawed. The reason for providing for re-measurement was to ensure that BHC would be compensated for known design and quantity changes which would occur between tender and issue of the construction drawings. The court is not required to determine which drawings should be used for the re-measurement exercise and there are no factual disputes to be determined. The court is not required to determine the quantum of the dispute and, on both parties' evidence, a substantial amount of the dispute turns on the issue of construction identified in the Part 8 claim.

45. The court's jurisdiction to grant declaratory relief is derived from section 19 of the Senior Courts Act 1981. CPR 40.20 provides that the court may make binding declarations whether or not any other remedy is claimed. The power to make declarations is a discretionary power.

46. The factors relevant to the exercise of such power were considered by Neuberger J in *Financial Services Authority v Rourke* [2002] CP Rep 14:

> "… so far as the CPR are concerned, the power to make declarations appears to be unfettered. As between the parties in the section, it seems to me that the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts, or principles have been established to the court's satisfaction. The court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The court has to consider whether, in all the circumstances, it is appropriate to make such an order…
>
> It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration."

47. The court will not grant declaratory relief where it would be unlikely to serve any useful purpose or do justice as between the parties: *Forest Heath District Council v ISG Jackson Limited* [2010] EWHC 322 per Ramsey J at paragraph [43]. Each case necessitates a fact-sensitive assessment of the benefits and disadvantages of the relief claimed. Consideration of the approach of the court in ordering preliminary issues may help in that assessment but the test is a different one. It is not necessary for a party seeking declaratory relief to establish that the issue is capable of resolving the whole or a substantial part of the proceedings, reducing the scope of the dispute, or significantly improving the possibility of a settlement. The principal distinction, between a claim for declaratory relief in Part 8 proceedings and Part 7 claims where preliminary issues are considered, is that in Part 8 proceedings there are no other outstanding issues for the court to resolve; the declaratory relief is the only relief

sought. Therefore, usually, the court does not have to weigh up the time, cost and utility of resolving some issues before others.

48. In my judgment, this is a case in which it would be appropriate for the court to grant declaratory relief. The dispute between the parties is reasonably clear by reference to the correspondence between the parties. BHC's case is that the whole work instructed by each of COI 2, COI 3 and COI 5 should be re-measured against final drawings, using the rates and prices in the quotations for the respective change orders. Morrison's case is that the lump sums in the quotations for each of COI 2, COI 3 and COI 5 are fixed, subject to revision in respect of variations based on changes between the drawings identified in the quotations and final drawings, on an add/omit basis. The court is in a position to resolve that dispute without determining any other disputes that might require significant factual or expert evidence.

49. It is not possible for the court to determine, as part of these proceedings, how much of the disputed final assessment turns on the question of interpretation. However, even on Morrison's evidence, the difference in value (which may not relate only to the question of interpretation) is more than £1 million. Although that would be a relatively small part of the overall account, it would justify the costs and court resources required for a one day hearing to resolve the issue.

50. It is not possible for the court to determine, as part of these proceedings, whether the alternative constructions adopted by each party produce the same or different valuations of the change orders. Much depends on the detail and information available in the tender drawings on which the quotations were based, the nature of the variations, and the extent to which changes should be categorised as variations or design development. However, it will be of benefit to the parties to know the basis on which the works should be valued, so that the parties can focus on the same valuation exercise and so that the scope of the dispute is reduced.

51. For those reasons, I am satisfied that the declaration sought by BHC will serve a useful purpose and the Part 8 proceedings are appropriate.

*Legal principles of construction*

52. In construing a contract, the court should seek to ascertain the parties' objective intentions, having regard to both text and context of the contract words, by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract. It does so by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of:

    (i) the natural and ordinary meaning of the clause;

    (ii) any other relevant provisions of the contract;

    (iii) the overall purpose of the clause and the contract;

    (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed; and

    (v) commercial common sense; but

    (vi) disregarding subjective evidence of any party's intentions.

    *Arnold v Britton* [2015] UKSC 36 per Lord Neuberger at paras. [15] to [23]; *Wood v Capita Insurance Services Ltd* [2017] UKSC 24 per Lord Hodge at paras. [8] to [15].

*BHC's submissions*

53. BHC's case is that each of COI 2, COI 3 and COI 5 expressly state that they are subject to final re-measurement on issue of finalised construction drawings.

54. The quotation for COI 2 was a lump sum but broken down by a detailed schedule of rates.

55. Although the quotation for the COI 2 work referred to the valuation of variations on an add/omit basis, that was a mistake made by BHC. Alan Hawkins, the senior estimating manager of BHC, explains in paragraph 6 of his witness statement dated 21 September 2017 that:

    > "the reason the phrase *"adds/omits"* was used in some of our tender letters was due to the erroneous use, by me of existing template letters; I confirm that I carried over by mistake the wording form a previous letter that I was using as a template."

56. The quotation for COI 3 comprised three lump sums, two of which were based on rates. Although the price for louvres was a lump sum, the quotation identified the quantities and specification for the units, and could be used to adjust the price by reference to the final drawings for the works.

57. The quotation for COI 5 was a lump sum based on a schedule of rates. The schedule included lump sums for the louvres, specialist sub-contractor items and louvre supports. However, the details provided in the quotation could be used to adjust the

price as for COI 3. The only item that was a stand-alone lump sum was £10,000 for design development but that was based on the understanding that the design development process was substantially completed, as set out in the quotation. Therefore, it is unlikely that it would be necessary to re-measure that element of the works.

58. Reliance is placed on the acknowledgement by Morrison that COI 4 and COI 7 are full re-measurement change orders. BHC's case is that there is no material difference between those COIs and the disputed COIs.

59. Reliance is also placed on the evidence of Mr Dorward, the commercial manager engaged by Morrison, who accepts that the reason for the use of COIs in these terms was to avoid the need for numerous, formal change orders under the Contract. Mr Dorward explains the basis on which the additional works were dealt with by way of change orders at paragraphs 18 and 19 of his witness statement dated 6 September 2017:

> "It was foreseeable at the time of the COIs that changes might be made to the design of the Shelters by Petrofac, which would be shown on revised construction drawings, and which would have an effect on BHC's works. Morrison has always accepted that if such revised drawings were issued, then the effect of any change to BHC's works should be taken into account.
>
> However, under the terms of the contract, if the COI had simply referred to a lump sum price, then BHC would not be entitled to payment for any such change to the works referred to in the COI unless the Change Order procedure was operated again. The reference in the COIs to re-measurement by reference to finalised construction drawings provided a pragmatic solution to this difficulty. The parties' intentions regarding the basis of payment for the works is clear from the terms of the quotations, which were accepted by the COIs …"

*Morrison's submissions*

60. Morrison's case is that each of COI 2, COI 3 and COI 5 refer to the price: *"as per BHC quotation"* and these words must be given effect on a proper construction of the change orders.

61. The quotation for COI 2 expressly states that it: *"is based on the section sizes designed by Messrs Petrofac and indicated on tender drawings"* and that variations will be valued: *"on an add/omit basis…"* The reference to re-measurement in COI 2 must be a reference to measurement on an add/omit basis.

62. It is submitted by Mr Stansfield that the evidence of Mr Hawkins is not admissible evidence on the question of interpretation because it is evidence of subjective intention. There is no claim for rectification or estoppel that might permit the use of such evidence.

63. Morrison submits that the quotation for COI 3 contains lump sums, for the instructed scope of work based on identified specifications. It does not use rates that could be used for re-measurement.

64. Morrison's analysis of BHC's final assessment suggests that the differences in figures between the parties are not the result of a re-measurement exercise, based on the final drawings using the rates and prices in the quotations, but the result of new rates and additional claims by BHC that have no contractual basis or justification.

65. The quotation for the COI 5 work contains lump sums in addition to rates. However, there is no real dispute on the valuation of COI 5. The difference between the parties is approximately £2,724.

*Discussion*

66. Each of COI 2, COI 3 and COI 5 expressly state that the relevant price in the quotation is subject to final re-measurement on issue of finalised construction drawings. The words mean what they say. The natural and obvious meaning of these words is that the price is not a fixed, lump sum price but subject to full re-measurement.

67. There is no material difference between the wording of COI 2, COI 3 and COI 5 on the one hand, and COI 4 and COI 7 on the other hand. They form part of the same series of change orders, instructing the steel and cladding works for the additional shelter buildings forming part of the project. Although the precise form of words differs on each COI, they all have in common the reference to "re-measurement" to determine the price.

68. There is no dispute as to the factual and commercial background to the issue of the change orders. The substantial variations to the project works were instructed at a time when it was anticipated that there would be further revisions to BHC's works by Petrofac. In those circumstances, it made commercial sense that the parties would not be able to establish the price for the works until the final design was complete.

69. The quotations for each of COI 2, COI 3 and COI 5 contain schedules of rates and/or prices that can be used for the re-measurement exercise. Where necessary, rates can be extrapolated from the lump sum prices in the quotations for items such as louvres and design.

70. I accept Mr Stansfield's submission that Mr Hawkins' evidence of subjective intention is not relevant to the proper interpretation of the change orders. If the reference to an add/omit basis of valuation for variations were in the change order instruction, BHC could not rely upon a unilateral mistake to avoid its application. However, the reference to an add/omit basis of valuation for variations in the quotation is incompatible with, and overridden by, the express reference to re-measurement in the change order instruction.

71. In any event, it appears only in the quotation for COI 2 and would not assist in the construction of COI 3 or COI 5.

72. There appears to be a dispute as to the meaning of final construction drawings. However, it is not necessary for this court to identify the drawings that should be used for the re-measurement exercise as that does not form part of the relief claimed.

*Conclusion*

73. For the reasons set out above, the court grants the declaration as sought by BHC, namely that the works carried out pursuant to COI 2, COI 3, COI 4, COI 5 and COI 7 shall be valued in accordance with the agreement made by the parties as evidenced by such COIs, namely that the price quoted in each of those COIs should be subject to final re-measurement, in accordance with the rates and prices in the quotation, on issue of finalised construction drawings.