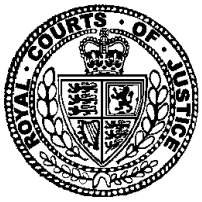

Neutral Citation Number: [2019] EWHC 3225 (TCC)

Case No: HT-2014-000016

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 02/12/2019

Before :

MR ADAM CONSTABLE QC

- -

Between :

MUNKENBECK AND MARSHALL AND ANOTHER	**Claimant**
- and -	
THE VINYL FACTORY LIMITED AND OTHERS	**Defendant**

- -
- -

David Sears QC (instructed by **DAC Beachcroft**) for the **Claimants**
Justin Higgo (instructed by **Asserson Law Offices**) for the **Defendants**

Hearing dates: 5, 6, 7, 11 November 2019

- -

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.

.....

MR ADAM CONSTABLE QC

MR ADAM CONSTABLE QC :

Introduction

1. The Claimants in this case are Munkenbeck & Marshall (In Dissolution) ('M&M') and Munkenbeck & Partners Urbanism Limited (In Liquidation) ('M&P'). The former is a partnership in which the principal witness for the Claimants, Alfred Munkenbeck was a partner with a Mr Stephen Marshall, which ceased to conduct business at around the beginning of June 2008. The latter is a separate company in which Mr Munkenbeck was originally a 90% shareholder, with Mr Neil Davies owning 10%, but now one which is owned wholly by Mr Munkenbeck.

2. The First Defendant ('Vinyl') is a property development company. The Second Defendant ('MSRL') is, or was, a subsidiary of Vinyl which also carried on business developing and selling real estate. Originally, the Claimants brought actions against ISG, a construction company to whom, as described further below, M&P's eventual Appointment was novated on 8 August 2008. The claims against ISG were settled.

3. The dispute arises out of a claim for unpaid fees which the Claimants allege are due in respect of design work carried out by the Claimants for the redevelopment of the Marshall Street Baths ('the Baths') and an adjacent car park ('the Car Park') in Poland Street, in Westminster, London (together 'the Project'). In broad terms there is:

    a. a claim for fees due in respect of M&M's work done in relation to the Baths, both for the original scheme design and also for work done in connection with the application for planning permission. It is said that this is broadly equating to Stages C and D of the standard RIBA appointment. This claim is brought in contract, pursuant to what has been called the 'Initial Agreement', and in the alternative as a claim for unjust enrichment;

    b. a claim made for unjust enrichment for additional work which the Claimants allege was instructed by the Defendants after the novation of its Appointment to ISG.

The Issues

4. The parties have agreed the following list of issues:

(1) What were the terms of the agreement or agreements that the parties reached as a consequence of the provision to Vinyl of the 8 March 2005 letter and the parties' subsequent conduct? In particular:

    (a) Did the parties enter into the Initial Agreement alleged in paragraph 13 of the APOC on around 8 March 2005 or some other agreement (and if so what agreement)?

    (b) Did the parties vary the agreement that they reached on or around 8 March 2005 in or around June 2005 when Vinyl agreed to pay M&M on the basis of time spent, and if so, on what terms?

(c) Did the parties vary the agreement that they reached on or around 8 March 2005 in November 2007 when M&M was appointed to prepare ERs for the Car Park (and if so, on what terms), or enter into a new agreement?

(2) To what extent was M&M responsible for the work required to complete stages C and D in respect of the Baths, and what impact does this have on a claim under the Initial Agreement?

(3) Was it agreed or clearly understood that Vinyl would remain liable to pay M&M for work in relation to the Baths, following the Appointment of M&P in relation to the Car Park, and if so, does that give rise to any basis for a claim?

(4) In the event that M&M has no contractual claim in relation to the Baths, is it entitled to claim in unjust enrichment for a reasonable fee? If so:

(a) upon what basis should a reasonable fee be assessed?

(b) what credit should be given for sums already paid?

(5) Are any claims that M&M may have in relation to the Baths time-barred:

(a) When did any cause of action accrue in contract under the Initial Agreement (if it was reached)?

(b) When did any cause of action accrue for a claim in unjust enrichment in relation to the Baths.

(6) Does M+P have a claim against MSRL in relation to Additional Work? If so, what is the quantum of that claim?

The Witnesses

5. I heard from the following 6 factual witnesses. For the Claimants, the principal witness was Mr Alfred Munkenbeck. He dealt with all key parts of the claim on behalf of the Claimants. I also heard from Ms Angela Marquito and Mr Thomas Kronig, who dealt with the nature of the work they were carrying out and, to some extent, why.

6. For the Defendants, I heard from Mr Timothy Robinson, a director of Vinyl, Mr Mark Wadhwa, the majority shareholder of Vinyl, and Mr Andrew Forman, an architect also involved, to an extent which is the subject of some dispute, in the Project.

7. This is a case where the salient facts occurred between around 9 to 14 years ago. It is inevitable, in these circumstances, that the memories of all concerned will not be fresh. As Mr Higgo, Counsel for the Defendants, contended, there is an inevitable difficulty for a Court when presented with oral testimony to determine contentious factual issues at such a distance in time. In Blue v Ashley [2017] EWHC 1928 (Comm) Leggatt J (as he then was) referred to his comments in Gestmin SGPS SA v Credit Suisse (UK)

Limited [2013] EWHC 3560 (Comm) at [16]-[20] on the subject of evidence based on memory and stated:

> *"I expressed the view in the Gestmin case...that the best approach for a judge to adopt in the trial of a commercial case is to place little if any reliance on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts."*

8. Whilst I have considered the oral testimony of those giving evidence with care, as further set out below, I have considered that evidence in the context of the documentary record. Where that oral testimony conflicts with the content of the documents, or inferences to be drawn from the content of those documents on a particular point, I have generally therefore approached the oral testimony with particular caution. I make no finding that any witness sought deliberately to mislead the Court. However, I do consider it likely that, as explained further below, in key respects the evidence of Mr Munkenbeck, in particular, was a product more of a conviction, perhaps developed over time, of what he thought should have happened than a recollection of what did in fact happen.

9. By way of architectural expert evidence, directed principally at the quantification of a reasonable fee, I heard from Mr Salisbury for the Claimants and Mr Greenhalgh for the Defendants. Both plainly sought to give such assistance as they could. Whilst their views differed, this was in large part due to the subjectivity that may be brought to the exercises they attempted to undertake.

Overview of the Evidence

10. In June 2004, Vinyl was, along with a number of developers, considering bidding for the opportunity to develop the Baths and the Car Park for Westminster City Council ('WCC'), the owner of the two sites. This would involve restoring the Baths into a leisure facility and replacing a council cleansing depot for the benefit of WCC, in exchange for the ability to develop commercially office and residential space in and around the Car Park.

11. In around May, Mr Munkenbeck and Mr Wadhwa, a director of Vinyl, met by chance in London and Mr Wadhwa mentioned the potential to work together on the Project. M&M and Mr Wadhwa had worked previously together on a project known as the Camden Carreras building. Following a visit to site by Mr Monkton-Mills of M&M, there was a meeting in June 2004 between Mr Munkenbeck and Mr Wadhwa, the outcome of which was that M&M carried out design work on a speculative basis. It is common ground that Mr Munkenbeck initially agreed that M&M would assist in the development competition on an entirely speculative basis, with the expectation that if and when Vinyl won the project M&M would get the appointment.

12. WCC had retained their own architects, Limbrick, who provided Initial Concept options which were provided to M&M. M&M produced drawings in December 2004 and

continued to develop the design into early January 2005. By reference to M&M's cost reporting, M&M's personnel had expended about 600 hours work on the Project, costed internally at just over £27,000 in this phase.

13. In March 2005, Mr Robinson asked Mr Munkenbeck how much it would cost to submit the concept design prepared by M&M to planning as a unilateral application, in order to increase their credibility and chances of being chosen by WCC as a development partner. It was envisaged that it would not take much more significant work to put the drawings already produced into planning. Mr Munkenbeck wrote to Mr Robinson on 8 March 2005. This letter forms the basis of what is alleged by the Claimants to be the Initial Agreement. The letter states:

> *"We are proceeding to submit a planning application for the Poland Street Parking Garage and Marshall Street Baths. If we obtain planning and you obtain the site we would expect to get appointed as architects for the project on the understanding that you might use another architect on a portion such as the renovation of the Marshall Street Building. We are now due £3,000 for our preliminary feasibility work producing drawings for brochures etc, as well as printing costs extra copies of brochures submitted to Westminster. For the planning submission we would get a fee of £30,000 with an interim halfway payment for the portion of work done on planning up to now.*
>
> *Our fee for the whole job, if you win, would normally be 8% of the construction cost less the planning fee paid on account for the portion of work we design and specify. Out of pocket expenses would be additionally re-imbursed at cost. Our scope of work would be Lead consultant for stages C through L set out in the Conditions of Engagement CE/99 published by the RIBA and all terms and conditions not otherwise covered in correspondence would be those standard terms.*
>
> *In addition to our own services you would need Consultants including Quantity Surveyor, Structural and Mechanical Engineers who you would appoint directly. If our appointment is discontinued before completing any stage we would be paid on a time basis for the time spent on that stage*."

14. Mr Munkenbeck accepted that the first part of the letter consisted of an offer, made for the first time, to accept £3,000 for the feasibility work and £30,000 for the planning application. It was understood by Mr Munkenbeck that these amounts would be paid irrespective of the outcome of the planning application. Mr Munkenbeck also accepted that that there had been no prior discussion between the parties in relation the payment of a percentage fee in respect of an appointment as architect in respect of the Project.

15. Mr Munkenbeck's evidence is that within a few days of this, and prior to sending out the bills referred to below, there was a conversation with Mr Robinson, either by phone or in person (Mr Munkenbeck could not recollect which), in which Mr Robinson said something like, '*We got the letter, that's fine*' or '*That's OK'*. Mr Robinson's evidence is that he has no recollection of any such conversation.

16. An application for payment of £3,000 for '*the preparation of feasibility concept design and drawings for [the Project]…Lump sum fee….as our letter of 8 March 2005*' was made, dated the same date as the letter, and paid. An application dated 9 March 2005 was made for '*preparation of planning application design and drawings for [the Project]…First Instalment of half total fee of £30,000 as our letter of 8th March 2005*'. This was also paid. Mr Robinson's evidence was that he considered that the offers in respect of payment for feasibility and planning were accepted when Vinyl paid the invoices. In around April 2005, Vinyl were appointed as WCC's preferred development partner for the Project. M&M also applied for payment of £7,500, half of the remaining fixed fee for planning on 31 May 2005; this was paid on 23 June 2005.

17. There was no written response to the 8 March 2005 letter. The letter, the conversation referred to above, and the fact that Vinyl paid the invoices, is the basis upon which the Claimants contend for the existence of the Initial Agreement.

18. Another firm of architects, Finch Forman, were approached on 26 May 2005 and asked to quote for a lump sum stage payment for designing and specifying the repair and redevelopment works to the Baths and for a percentage fee for appointment as the architect for the Baths as a whole on the basis of an estimated budget of £6 million. Mr Robinson's evidence was that this was because it became clear to Vinyl that M&M did not have the resources or expertise to deal with the Baths, although this is disputed. It is more likely, having heard the evidence, that the expertise Finch Forman brought specifically in relation to renovations, listed building and building regulation work was always anticipated for the Baths, as indeed is foreshadowed to some extent in the letter of 8 March 2005 itself. I do not regard their appointment as a reflection of a particular concern relating to M&M's quality of work, rather than a reflection that different firms may by their nature bring different skillsets to a particular project. The terms of the Finch Forman appointment state that, in respect of what was called Phase 1, Finch Forman was (amongst other things) to survey the Marshall Street building to ascertain the scope and specification for repairs, incorporate the drawn element for repair onto the M&M drawings, supplementing these with new drawings, and to incorporate new layout/fit out of the Leisure Centre '*which is likely to be largely based on the [M&M] proposals but which will be subject to detailed discussions/review*'. The package of information to be provided was to be sufficient to enable WCC to sign it off and so as to form the basis of the planning/listed building application. Finch Forman were sent M&M's drawings for that purpose in August 2005.

19. On 14 June 2005 Mr Robinson emailed a request to Ms Marquito of M&M to consider certain changes to the design, including a further residential floor at Marshall Street, adjustments to provide for affordable housing and to the commercial space. At around this time, Vinyl and M&M agreed to change from the flat fee method of charging (the agreed £30,000) to a time charge basis for further work in respect of the planning submission. As such, M&M was no longer effectively working at risk: it was billing and being paid for each hour worked.

20. On 2 September 2005 Vinyl sent M&M its standard form of appointment. There was no indication of what services were required, nor of the fees payable. Mr Munkenbeck responded on the same day indicating that this standard form was unacceptable, because it allowed the client to terminate but not the consultant, '*and forces us to be novated to some contractor we have never met*'. M&M did not provide any information as to what it considered to be the consultant's fee. There do not appear to be further discussions in relation to Appointment documentation until 2008.

21. In accordance with the changed approach to billing, from 30 July 2005 to 30 October 2005, M&M sent monthly applications for payment, with text identifying generally that the work was for '*Feasibility, alternatives and revisions for ongoing discussions with [WCC] for presentation to residents groups and development of brief and housing concept during…*' the relevant month. In November, the monthly invoice description of work was, '*Revisions as required and development of duct paths for discussion with [WCC], Limbrick and the Cleansing depot and development of brief and housing* concept'. December 2005 and January 2006 the monthly invoices related to '*Revisions to affordable housing and development of elevations. Redrawing of depot with revised survey information….';* and in February 2006 they related to '*Revisions to affordable housing and development of elevations. Redesign of apartments with revised flat sizes, structural grid. Meetings with client and planners….'.*

22. The amounts charged in these invoices were identified by hours worked as applied to a rate. Mr Munkenbeck suggested in his evidence that the bills he sent were on a 'reduced' time charge. Mr Munkenbeck appears to rely upon this to support the contention that, notwithstanding the move from a lump sum to a time charge basis, there nevertheless remained some aspect of speculation or risk on M&M's part as justification for an ongoing entitlement to future appointment. However, I do not accept that Mr Munkenbeck was in fact charging on a 'reduced' rate, or, importantly, that M&M let it be known at any time to Vinyl that is what it was doing. For example, the rate used in 2005-6 for Mr Munkenbeck was £120. This was 20% higher than the 'internal' rate used within the M&M system (and referred to in paragraph 12 above). There is no evidence from other projects at this time showing that this was lower than Mr Munkenbeck's external standard rate. The rate remained at this rate until 2007 when the rate appeared to be unilaterally increased to £150, which would seem consistent with an increase in rates after keeping them static for two years (or more). This rate was then proposed by Mr Munkenbeck in the 2008 negotiations, a year later. There is no contemporaneous documentary support, therefore, for the contention that the rate was, or was represented as being, 'reduced'. It is also to be noted that none of these hourly rate Applications identify that they were made by reference to the 8 March 2005 letter at all, or any agreement arising out of that letter (to be contrasted with the initial applications for the fixed fees which did make such a reference). Neither are they stated to be payments on account of a percentage fee entitlement. All of the applications for payment on an hourly rate were paid.

23. On 2 November 2005, Mr Robinson set out, in an email to WCC and Mr Munkenbeck, that he considered that '*present conduit for communication is the formal consultation and approval process between Andrew Forman/Richard Franklin and your recently appointed building surveyors, Stuart Roberts of Milbridge. Our team are coordinating any design suggestions from Alfred Munkenbeck whilst your team should be referring to Limbricks regarding any design finishes. However we must make clear that the*

principal architect on the project in terms of the restoration of the building and coordination of the new design is Andrew Forman. Mr Munkenbeck's own evidence was that in February 2006 M&M's work on the Baths went quiet for about a year.

24. The oral evidence of Mr Forman was that up to about October/November 2006 Finch Forman were involved in the preparation of drawings, schedules and specifications for the repair of defects and the conservation of the listed building. FF's invoices identify that FF worked on the preparation of Depot proposals and alteration to the internal layouts required by Westminster, on lease drawings for the Leisure Centre, Car Park and depot, on alterations to the Baths Car Park, and, from October 2006, on commencing planning application work.

25. In March 2007, Finch Forman provided numerous drawings and elevations, which they had been working on in the preceding months, to Vinyl in relation to the Baths for the purpose of the planning submission; these were sent to M&M for incorporation into the planning proposal for the whole Project. It is accepted by both parties that the drawings eventually submitted for planning on 2 April 2007 were an amalgam of work by both Finch Forman and M&M. The Defendants contend, further, that it would be right to consider Limbrick's initial designs as reflected in the eventual submission, as well. The extent of input by each entity into the drawings is dispute.

26. Following submission of planning, Finch Forman made further amendments to the design of the Leisure Centre in order to ensure that it complied with Sport England Guidelines. Planning permission was granted on 26 October 2007. Various invoices were rendered further to those referred to above for the period through to the granting of planning permission on a time charge basis. All these invoices were paid. All the work carried out for the Baths by M&M had therefore been invoiced and paid.

27. In or around November 2007, M&M were asked to undertake further work producing employers requirements ('ERs') for the Car Park; Finch Forman were asked to produce ERs for the Baths. There is no dispute that this work was agreed to be carried out on a lump sum basis of £200,000. This letter, from Mr Munkenbeck to Mr Wadhwa, stated:

> *"Thank you very much for asking us to get started on this tender phase of the Marshal Street/Poland Street housing project. I am writing to confirm our scope, fees and timing as we have discussed and you requested.*
>
> *Our role is to produce tender drawings for Employers Requirements for a JCT type Design and Build Contract for the Dufours Place affordable housing and the external shell of the market housing on top of the Poland Street parking garage developed from the recent planning permission design. The scope of work would be stages D and E as defined in the CE99 published by the RIBA which would define all terms and conditions not otherwise covered in correspondence….*

> *Fees from the ER's would be a £200,000 lump sum plus VAT and authorized expenses or disbursements at cost. This would be paid in equal monthly instalments over 5 months with the first £40,000 installment payable on 1st December 2007.*
>
> *…The architects for the Marshall Street Baths building will be Finch Forman who will also do the interior of the gym on the lower floors…*
>
> *…If at any point you wish to discontinue our appointment before we have completed, we would be paid on a time basis for any partially competed months. Our time charges would remain as in the past."*

28. This letter is not consistent with any understanding that there already existed a binding obligation to let the whole of the Project to M&M at an 8% percentage fee. The letter also connotes a clear understanding on the part of M&M that Finch Forman were to be architects relating to the Baths such that, to the extent any existing contract existed relating to M&M's work on the Baths, M&M knew that that contract had come to an end. M&M invoiced from November 2007 onwards in the stated lump sums of £40,000 'as *Progress payment as our letter of 30 November 2007*'. The agreement about sums payable for the ER was varied in that there was also a 6th monthly instalment invoiced for £40,000, paid on 1 July 2008.

29. In around February or March 2008, ISG became involved as the potential contractor. M&M were provided with a Procurement Strategy document which included ISG Requirements for Services of the Novated Consultant. By this stage, it was therefore clear that the intention was for any eventual appointment with M&M to be novated. The document also indicated (at Clause 2.1) the intention that the fee would be a fixed price lump sum, and (at clause 2.8) that no claims for additional fees due to uninstructed change to the contract design carried out by the architect would be entertained. Although Mr Munkenbeck's manuscript comments on the document illustrated his concern about Clause 2.7 (no changes in the novated fee would be considered without prior written instruction from ISG), no comment appears to be raised in relation to the suggestion that the fee would be fixed, rather than a percentage fee. Mr Munkenbeck did not, for example, suggest that this was contrary to the agreement already reached that he was entitled to 8%.

30. On 4 April 2008, as work on the Employer's Requirements was coming to an end, Mr Munkenbeck wrote to Mr Wadhwa (via Mr Robinson's email account):

> *"Now that the private shell phase is drawing to a close we are more and more concerned with what is going on below the 4th floor (for which we were trying to agree a fee) and who is going to revise and negotiate the many tender packages. I assume we are going to be working for the contractor from now on. Are we to propose and agree fees with them or what?*
>
> …

Let me know especially about how to proceed with ISG"

31. A few days later, on 7 April 2008, Mr Munkenbeck wrote to Mr Steele, a lawyer acting for Vinyl and/or MSRL in drafting the Appointment and Novation documents,

> "*We complete our work this week and have no agreement to continue so your enquiry is welcome subject to some indication as to fee…."*

32. A draft appointment had been provided to M&M on or around 23 April 2008, when M&M was asked for comments and to provide a fee proposal for the remainder of the project. Mr Franklin chased for comments and a fee proposal on 30 April 2008. On 2 May 2008, Mr Munkenbeck wrote to Mr Franklin, copying in Mr Robinson, stating:

> *"I wrote to Tim and Mark on 8 March 2005 proposing an overall fee of 8% of everything we would design and produce in view of doing that first years work speculatively. I asked a few weeks ago for the current QS estimate so I could work out converting into a lump sum."*
>
> *Normally we would receive around 4-6% for new build housing depending on size, 8% for commercial conversion and 10% for commercial luxury flat interiors. Obviously that gets a bit unwieldy without the cost breakdown or knowing how much 'luxury' interior work there will be. I would imagine putting specific figures to the estimate categories would bring that overall 8% down so please forward. What we have billed so far would be considered payments on account."*

33. The letter did not suggest that what had been 'proposed' in the letter of 8 March 2005 had been accepted and was binding, and the reference to bringing the overall 8% down is plainly a further negotiating position. Mr Munkenbeck had a number of detailed comments on the draft terms of appointment, including a problem with the proposed clause 2(a) relating to the requirement to obtain written confirmation of any instruction for additional work in advance.

34. Mr Munkenbeck's evidence in his witness statement, not specifically challenged, was that following this Mr Wadhwa responded by phone to say that '*the 5% fee was all that funders would wear*'.

35. On 15 May 2008, Mr Munkenbeck was asked to send a fee payment schedule. In the draft appointment Mr Munkenbeck sent to Mr Steele, he proposed:

> *"Lump sum of £1,080,000 to be paid in monthly instalments over the estimated contract period as follows:*
>
> | *Months* | *Instalment* | *Period total* |
> |---|---|---|

1-12	*50,000*	*600,000*
13-24	*40,000*	*480,000*
Totals		*1,080,000"*

The draft then included various rates for variation work. The draft did not suggest that payments already made would be deemed on account of this lump sum, and made no explicit reference to the 5% Mr Munkenbeck suggested had been referred to in the earlier telephone conversation. That said, it can be noted that the lump sum figure of £1,080,000 is very similar to the approximate £1.1m estimated out-turn fee which was, a few weeks later, explicitly calculated by reference to 5% of an out-turn construction cost (which must have been in the region, therefore, of £22m).

36. Mr Munkenbeck then chased for a reply, on 4 June 2008, stating: "*our current appointment officially ran out when we sent you the ER drawings for the existing parking garage*." This, again, is inconsistent with the suggestion of an ongoing contractual relationship arising out of the alleged Initial Agreement.

37. In or about June, there was clearly a further oral agreement to extend the agreement related to the provision of ERs, for payment of a further sum of £50,000 said to be for '*further design development and tender packages for Parking Garage area at scales of 1.200 and 1.50, wall sections at 1:20 with details at 1.*5'. This was paid. The parties were continuing to reach ad hoc agreements for further sums to be paid for further work undertaken. None of the applications expressed these as payments on account of the wider agreement said to exist.

38. On 9 June 2008, Mr Munkenbeck informed Vinyl that '*…the long awaited [M&P] is starting this week because I found Steve Marshall had been moonlighting. [M&M] is closed to new business and invoices will have different name soon…..Let me know if this makes any difference to you'.* There is no documented response to this that the Court was made aware of. Notwithstanding this, in his oral evidence, although absent from his witness statement, Mr Wadhwa appeared to be at pains to emphasise that this was a real concern given his view that Mr Marshall (Mr Munkenbeck's partner in M&M) was the 'real talent' in new build. I found this aspect of Mr Wadhwa's evidence rather more contrived than compelling.

39. On 12 June 2008, Mr Steele sent, on behalf of Vinyl, what was intended to be the final version of the Appointment to Mr Munkenbeck. It must have contained a different cashflow arrangement for the fee because Mr Munkenbeck reverted shortly after stating that he did not see the point in continuing the negotiation. On the same day Mr Munkenbeck wrote to Mr Robinson (copying in Mr Mason of ISG) stating:

> *"I sent a cash flow and fee proposal to Richard a month ago for £50,000 per month and have been working on that basis. You have sent me back one for half that.*

> *I suggest we bill you hourly for what we are doing now until you have the chance to shop around as to what fee levels should actually be in order to carry out a job of this complexity. We were already fully discounted and our proposal seems to have been completely ignored. We have been discussing fee arrangements now for 3 years and seem no further along….*
>
> *…I am also open to any reasonable suggestion about taking a flat."*

40. This email led to Mr Wadhwa responding on 13 June 2008:

> *"I have been trying to get hold of you since you sent this email yesterday but without success.*
>
> *At the meeting a month ago (and after the email you sent to Richard) we agreed 5% of the construction costs and this formed the basis of the total fee payable under the appointment. This was reconfirmed last week when I spoke to you but you said you would like to see the cost plan, which I agreed to. If the sums need to be amended on a month by month basis to meet your utilized staff levels then we can look at this although the fee % to cost plan remains agreed. I am happy to present the cost plan for the works that you are undertaking.*
>
> ..
>
> *I suggest we meet once again to finally resolve this although clearly the simplest option if you are not able to work within the agreed 5% fee structure is that you complete the work you are doing to the current stage. We will then appoint another architect for the D&B and fit out works if you now feel you are unable to work for the 5% fee that has already been agreed.*
>
> *In the meeting I would like to clearly understand why the costs are currently £38,000 per month and why you think you need £50,000 month for the duration of the job. Maybe we can work on streamlining your overhead in relation to the design work and the subsequent monitoring."*

41. Mr Munkenbeck responded to this on 16 June 2008, shortly before a meeting with Mr Wadhwa, and attached staff costs projections '*to discuss today*'. These showed a projection of necessary hours, calculated by reference to the proposed contract rates, totalling £933,000 (in other words, some £150,000 less than the previous lump sum suggestion of £1,080,000 from Mr Munkenbeck).

42. A meeting took place later that day. Originally, Mr Munkenbeck's contention was that at this meeting, there was a binding agreement between him and Mr Wadhwa that

M&M would be paid a lump sum of £100,000 for Baths planning works in addition to the sums due under the imminent Appointment. By amendment in December 2018 after the service of the defence, Mr Munkenbeck dropped this claim and, instead, suggests now that there was an offer to pay £100,000 rather than a binding agreement. Mr Munkenbeck says he relied on this offer when agreeing to commit to receive 5% of construction cost for the Car Parks pursuant to the terms of the Appointment, and this forms part of the unjust enrichment case. Mr Wadhwa's evidence was that no such offer was made, and that he would not have been in any position to make such an offer at the meeting without discussing it with other directors and his JV partners.

43. The day after the meeting, on 17 June 2008, Mr Munkenbeck wrote, in relation to the prospective Appointment, in the following terms:

> *"FEES SCHEDULE*
>
> *For a fee, why don't you put: 5% of the construction cost of everything the Architects design or specify including contractor or supplier's overheads and profit but excluding professional fees. The architect herewith acknowledges having received £373,000 on account" Then give us a cheque for the current outstanding Applications totally £90,000 plus VAT.*
>
> *Expected minimum total fee to be £1.1m. Fee payable in instalments of £50,000 per month for 10 months reducing to £25K per month for a further 9 months to be adjusted for actual site progress and cost."*

44. A Fee Schedule amended to reflect this proposal was provided by Vinyl a few days later, together with an amended Appointment at or around the same time. Mr Munkenbeck appears to have agreed this schedule the same day on behalf of M&P with a minor alteration to the wording.

45. M&P issued three applications for payments to MSRL on account of fees for the three months up to August 2008 that would be due on the Appointment. These sums were paid by MSRL.

46. On 6 August 2008 MSRL and M&P executed the Appointment and on the same date the deed of Novation by which the Appointment was immediately novated to ISG.

The Issues

(1) What were the terms of the agreement or agreements that the parties reached as a consequence of the provision to Vinyl of the 8 March 2005 letter and the parties' subsequent conduct? In particular:

Did the parties enter into the Initial Agreement alleged in paragraph 13 of the APOC on around 8 March 2005 or some other agreement (and if so what agreement)?

47. The Claimant's primary pleaded case is that the letter of 8 March 2005 set out the terms on which M&M had agreed to act for Vinyl. These terms are claimed to be (as pleaded at paragraph 13 of the Amended Particulars of Claim):

(1) Vinyl would pay M&M £3,000 for the preliminary work;

(2) M&M would submit a planning application for the Project, for which it would be paid £30,000;

(3) M&M would be paid no further sums for the work thus far undertaken by it unless Vinyl was appointed as Westminster City Council's development partner. In that event, it was agreed (amongst other things) that:

a. M&M would be appointed as the main architect for the Project (albeit that an additional architect might be instructed in respect of the Baths);

b. As to payment, if Vinyl subsequently won the competition, obtained funding and proceeded with the project, then:

i) M&M would be paid a fee of 8% of the construction costs for the work it designed; and

ii) in the event that M&M's appointment as architect was terminated M&M would receive both a percentage based fee for any completed stages and also a fee on a time spent basis for any work done on any uncompleted stage.

(4) Unless stated to the contrary, the Conditions of Engagement CE/99 published by the RIBA would apply.

48. It is common ground that, at most, the letter of 8 March 2005 constituted an offer of some sort. I must therefore determine whether the proposal contained in the March 2005 was an offer capable of being accepted, and if so, whether it was in fact accepted by Vinyl to create a binding contract in the terms alleged.

49. There is no dispute that the test which the Court is to apply is an objective one. In particular, I have regard to the statement of Lord Clarke in *RTS Flexible Systems Ltd v*

Molkerei Alois Muller GmbH and Co KG [2010] 1 WLR 753, upon which both parties rely:

> *"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends on what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations."*

50. I deal at the outset with the suggestion by Mr Sears QC that the offer should be read as a whole – either to be accepted or rejected as a whole. I do not agree. It would plainly have been open to Vinyl (by way of counter offer, if nothing else) to accept (say) the £3,000 for feasibility but refuse to pay or otherwise negotiate the £30,000 for planning submission fees. Similarly, as a matter of construction, it is possible that a letter may contain certain offers which are certain and capable of acceptance, and other offers which are not. One part might be an offer to create binding legal relations in relation to a certain aspect of the relationship, whilst another part may be no more than an offer to negotiate in the future in relation to a different part of the relationship.

51. Considered objectively, it is clear from its context and from its terms that the proposal was:

    (1) An offer to accept the fixed fees of £3,000 for preliminary feasibility work producing drawings for brochures etc as well as printing costs;

    (2) An offer to accept £30,000 for the planning submission with an interim halfway payment for the portion of the work done on planning up to that point;

    (3) that M&M wished to negotiate a percentage fee payable in due course by reference to the construction costs in the future, in the event that planning permission was obtained on the project and Vinyl was appointed as Westminster's development partner.

52. I therefore accept Mr Higgo's characterisation of this part of the letter as an invitation to negotiate a future fee which was incapable of being accepted so as to create an enforceable contract. I reach this conclusion, when simply looking at the language of the letter, on account of:

    (1) the language of expectation, rather than commitment in respect of the full appointment;

(2) the language of what, in respect of the future fee, '*would normally*' be the position. This is not the language of an unambiguous offer, capable of acceptance. It was an indication of the negotiating parameters which would in the future be advanced;

(3) on any view, the scope of the future appointment was, expressly, uncertain in light of the acknowledgement that it would be open to Vinyl to appoint other architects for some portion of the work. Mr Sears QC contends that uncertainty as to the scope of the future appointment does not affect a commitment to pay a percentage fee in relation to whatever that scope is intended to be. However, the lack of certainty on scope of future entitlement is important: for example, how large a portion of the future work could Vinyl award to others without being in breach? 50%? 99%?;

(4) the anticipation that the standard RIBA CE/99 terms would apply '*except as otherwise covered by correspondence*'. This language is consistent with the expectation of a future negotiation;

(5) the language can be clearly contrasted with M&M's letter of engagement dated 30 November 2007 relating to payment for the production of ER's.

53. Moreover, any other conclusion is wholly inconsistent with the way in which the parties in fact conducted themselves. Both Counsel accepted, rightly in my view, that where a Court is determining the extent to which an agreement was reached at all (as opposed to the construction of a contract agreed to exist) it was permissible to look at the conduct of the parties as a whole as part of the analysis. In my judgment, it is relevant that:

(1) not long after the March 2005 letter, the parties agreed that M&M should be paid on a time charge basis for all ongoing work, and in respect of which none of the monthly invoices made reference to the payments being on account of some defined future obligation. All such time charges were paid in full and no work was being undertaken 'speculatively'. As set out above, I do not accept that the rates being charged were in fact, or were represented to be, 'reduced';

(2) The time charge basis through to planning was then immediately followed by the lump sum agreement in November 2007 to produce the ER's. This is evidence that the parties were simply negotiating the appropriate fee for any particular stage as it arose, and certainly did not purport to do so by reference to an extant entitlement to a percentage fee. Mr Sears QC argued that the lump sum agreement just constituted some further payment on account of the existing future entitlement, but this is not supported by any contemporaneous documentation: neither the terms of the otherwise clear and legalistically drafted letter setting out the lump sum agreement makes any reference to the supposed existing arrangement, nor do any of the applications submitted pursuant to the November 2007 letter;

(3) Mr Munkenbeck's express references to the absence of any existing contractual relationship in April and May 2008 when the lump sum arrangement concluded.

This is wholly inconsistent with the case now advanced. In cross-examination, Mr Munkenbeck accepted the contradiction but said that he got that wrong at the time. In my view, this evidence was unconvincing. It is also inherently more likely that his own documented position at the time is more accurate than his recollection 11 years later;

(4) The negotiation for the Appointment itself. At no point in those negotiations did Mr Munkenbeck ever suggest that there was an existing obligation to pay 8%. Indeed, the very fact of the negotiations is consistent with the Defendants' case and inconsistent with the Claimants';

(5) The fact that at no point up to June 2009 (i.e. nearly a year after the Appointment) did Mr Munkenbeck suggest that he was owed further sums in relation to the Baths work, and even when he did so this was asserted by reference to the alleged agreement to pay by Mr Wadhwa to pay £100,000 in June 2008, which I consider further below. There was no suggestion even at that stage that the 8 March 2005 letter constituted some sort of binding entitlement which itself gave rise to any entitlement to fees. The claim as presently advanced was first articulated in May 2010 (which claim also included a now abandoned claim for lost profit as consequence of the fact that Finch Forman was appointed as architect for the Baths, a completely hopeless allegation even assuming the letter of 8 March 2005 was binding in relation to some sort of future engagement).

54. To the extent relevant to the objective exercise, I also note that – at times at least – Mr Munkenbeck accepted that the letter represented an invitation to negotiate.

> *"Q. There is a difference between an expectation and a commitment?"*
>
> *A. Yes.*
>
> *Q. And you understand that. So when someone reads this letter and it says "I would expect to be appointed" what they would understand from that is we will have a discussion about the terms of the future employment?*
>
> *A. Okay.*

(Day 1/87/14-21)

> *" You accept that my client didn't ask you for a quote on a percentage basis for any part of the project. That was your first shot.*

A. Yes, I think that's true.

Q. And you accept also that I understand from your answers before the short adjournment that your letter invited my clients to negotiate the terms of a proposal with you. You state your fee would normally be 8% and you said this morning that wasn't fixed. That is fair, is it not?

A. That's correct, yes."

(Day 1/89/11-21)

55. If, contrary to the foregoing, the letter of 8 March 2005 constituted an offer in respect of the future appointment which was capable of acceptance, I find as a fact that it was not accepted. Payment of the invoices relating to the £3,000 and £30,000 fees is no evidence of acceptance: it is wholly consistent with acceptance limited to those discrete parts of the offer. As I indicated above, it was open to Vinyl to accept parts of any offers contained in the letter of 8 March 2005 and not others. The only evidence, therefore, of 'acceptance' of the wider proposal is the suggestion by Mr Munkenbeck that at some point after the letter, Mr Robinson said something along the lines of '*That's fine*'. Mr Robinson has no recollection of the conversation.

56. I regarded Mr Robinson as an honest witness and accept he has no recollection of any such conversation. The inference to be drawn from this absence of recollection is, given the alleged conversation took place 15 years ago, limited. However, it is to some extent consistent with the conclusion that whatever conversation did take place, it was not one which Mr Robinson considered at the time to have been of particular import (as it would have been if he was accepting unambiguously to appoint M&M on certain terms). Taken together with the conduct of the parties in the months and years after the suggested conversation, which is wholly inconsistent with either party having a contemporaneous understanding that such an agreement in fact existed, I find that even if Mr Robinson did say something like '*That's fine*' upon receipt of the letter, those words could not reasonably have been understood as capable of constituting unambiguous acceptance of the purported offer relating to a future fee agreement, and, indeed, were not in fact so understood at the time by Mr Munkenbeck.

57. Finally, even if I am wrong about the nature of the offer and the issue of acceptance, there remains a further fundamental difficulty for the Claimants. The Claimants acknowledge that the offer left open the option *not* to appoint the Claimants in respect of some portion of the work. This is plain from the wording of the letter ('*you might*

use another architect on a portion such as the renovation of the Marshall Street Building').

58. The expectation of a fee of 8% (insofar as it was an offer capable of acceptance at all) related in terms to the anticipated appointment as '*Lead consultant for stages C through L set out in the Conditions of Engagement CE/99 published by the RIBA*'. Given the reference to stages C-L, this can only be a reference to the portion of the Project in respect of which M&M was in fact ultimately appointed post- planning. Other than the reference to the fixed fee to take the Project through to planning permission, the offer is entirely silent as to the basis of payment for any other work carried out in respect of any portion which the Claimants were *not* ultimately given. Indeed, the letter itself does not appear to contemplate there would be any other work: the letter considers the position pre-planning (fixed fees of £3,000 and £30,000) and post-planning if Vinyl was successful, and nothing in between. If the second part of the letter was sufficiently certain to be capable of acceptance at all, I find that it was an offer that, following the grant of planning permission, an 8% fee would only apply to work which M&M was given (and would apply to stages C-L) and that it would not apply to work M&M was not given. There is no suggestion at all in the offer that M&M would be entitled to be paid 8% of future construction costs for the portion of the work that M&M did not get appointed to carry out post-planning.

59. Therefore, even if accepted, the agreement reached would not give M&M any entitlement in respect of the claim advanced i.e. to be paid 8% of construction costs for pre-planning submission work (i.e. stages C & D) in relation to the Baths. This was work which was agreed expressly to be covered initially by the fixed fee of £30,000. When it became clear that the work required for planning became more significant, the fixed fee of £30,000 changed to a time charge basis. This did not change the fact that this would be, on a proper construction of the letter of 8 March 2005, M&M's sole entitlement in relation to the portion of the work which M&M were not then appointed as architect on (i.e. the Baths).

60. Therefore, I consider that:

(1) the parties did not enter into the Initial Agreement alleged in paragraph 13 of the APOC;

(2) If I am wrong about this, the agreement entered was on terms that M&M would be paid fixed fees for work through to planning submission (subsequently varied to a time charge basis); and thereafter M&M would be entitled to 8% fee of construction costs for Stages C-L only in respect of the portion of the Project it was given.

(3) Any such agreement did not entitle M&M to be paid 8% in respect of work carried out on stages through to planning for that portion of the Project in respect of which Vinyl chose, as it was entitled, to instruct a different architect.

61. The claim for fees relating to the Bath Works up to the end of planning by reference to the alleged Initial Agreement therefore fails.

Did the parties vary the agreement that they reached on or around 8 March 2005 in or around June 2005 when Vinyl agreed to pay M&M on the basis of time spent, and if so, on what terms?

62. As set out above, the answer to this issue is yes. The terms were simply that M&M would invoice for the additional work to take the project through to planning on a time-charge basis. There was no agreement that this was on the basis of 'reduced' rates.

Did the parties vary the agreement that they reached on or around 8 March 2005 in November 2007 when M&M was appointed to prepare ERs for the Car Park (and if so, on what terms), or enter into a new agreement?

63. I would characterise the agreement reached in November 2007 about the ERs for the Car Park as a further agreement rather than a variation of the agreement reach on or around 8 March 2005, although this difference in characterisation is immaterial.

To what extent was M&M responsible for the work required to complete stages C and D in respect of the Baths, and what impact does this have on a claim under the Initial Agreement?

64. As expressed, this issue relates to the claimed reduction in fee on a percentage basis which Vinyl claims should be made if M&M were otherwise entitled to further fees in respect of the Baths Work under the Initial Agreement. The issue therefore falls away given my findings above.

65. In deference to the evidence tendered and arguments advanced, however, I briefly state my findings of fact should I be wrong about the Initial Agreement.

66. Stage C in the RIBA Conditions is '*Outline proposals. Commencement of development of the Project Brief. Preparation of outline proposals. Review of procurement route*.'

67. Stage D is '*Detailed proposals. Completion of development of the Project Brief. Preparation of detailed proposals. Application for detailed planning approval*.'

68. It is also relevant, in considering the scope of Stage C, that Stage B is *'Preparation of Strategic Brief by or on behalf of the Client confirming key requirements and constraints. Identification of procedures, organisational structure and range of Consultants and others to be engaged for the Project.'*

69. The Claimants contend, and I accept, that M&M did everything they were required to do in respect of the work relating to Stages C & D in respect of the Baths. The question is not, therefore, related to some omission on the part of M&M, but an exercise in determining whether any fee for these Stages would fall to be reduced because (a) Limbrick (in respect of Stage C) and Finch Forman (in respect of Stage D) were also involved in the design of the Baths.

70. At the outset, I reject the contention by Mr Salisbury, the expert architect for M&M, that there would be no reduction because the involvement of other consultants (a) does not usually diminish an Architect's fee and, indeed, (b) usually leads to an increase in an architect's work. This is true insofar as it involves other specialist consultants over which the architect has co-ordination obligations. However, in this case the question relates to other architectural work carried out by others in place of work which M&M would be doing if responsible entirely for the whole architectural input to these stages.

71. In relation to Stage C, Mr Greenhalgh, the expert for Vinyl, contended that the fee for Stage C should be reduced by 50% on account of the provision by Limbrick of 'Development Guidelines'. Mr Sears QC points out that this claimed reduction was not foreshadowed in the pleadings or the joint expert report. As to the former point, the entitlement to the fee was in issue and it does not seem to me to be a good one: the reasonableness of the fees was explicitly agreed to be an issue the experts should opine on. As to the latter, the answer to question 2 in the experts' joint statement made clear that the experts had not reached agreement on whether or what adjustment should be made and that the issue would be dealt with in their separate reports. This is what Mr Greenhalgh did.

72. Mr Salisbury's evidence as to the work carried out by Limbrick was that the documents were similar to a written briefing document, except that they were graphically expressed rather than simply written, and that it was more of a feasibility exercise than a design exercise.

73. Having looked carefully at the Development Guidelines, I prefer the evidence of Mr Greenhalgh. It seems to me the document goes far beyond what would be anticipated in a Stage B brief, and provided a substantial step forward in the provision of a Project Brief, rather than simply a Strategic Brief. It goes well beyond identification of '*key requirements and constraints. Identification of procedures, organisational structure and range of Consultants and others to be engaged for the Project*' and is clearly a considered initial design concept which, in due course, resonates through the more detailed work M&M and Finch Forman carried out. I accept there was indeed further detailed work carried out by M&M, but accept Mr Greenhalgh's candid and straight forward evidence when asked that, as an architect, he would have – if presented with this work to take forward – have accepted a reduction in his fees for Stage C in the region of 50%.

74. In relation to Stage D, Mr Greenhalgh's evidence is that the work carried out by Finch Forman should result in a reduction of two-thirds from the Stage D fee. He accepted fairly the subjective nature of his assessment and both experts identified a difficulty in determining a percentage contribution from looking at the drawings. What looks like a small change might involve a great degree of work, and vice versa. Doing the best I

can, it seems to me from all the evidence that a fair proportion would be a 50/50 split. Whilst M&M clearly did a good deal of work taking the drawings to what was then considered to be Stage D by around the end of 2005/beginning of 2006, it is plain that Finch Forman were also heavily involved from then on designing parts of the Baths (i.e. the top floor flats) which M&M accept it had no involvement in at all, and in redesigning aspects which M&M had previously designed (such as the Group changing area).

Was it agreed or clearly understood that Vinyl would remain liable to pay M&M for work in relation to the Baths, following the Appointment of M+P in relation to the Car Park, and if so, does that give rise to any basis for a claim?

75. As I set out further below, it is said by M&M that, in the context of the claim for unjust enrichment, it is relevant that at a meeting on 16 June 2008 Mr Wadhwa made an offer to pay £100,000 for work in relation to the Baths. The alleged offer to pay £100,000 on 16 June 2008 is not said to give rise to any collateral agreement, or any actionable representation, and it is not said that, of itself, it gives rise to any basis of claim.

76. However, to the extent it may have any relevance to the issue of unjust enrichment, I have no hesitation in finding that the alleged offer was not made by Mr Wadhwa. I have formed the view that neither Mr Munkenbeck nor Mr Wadhwa's approach to giving evidence was entirely satisfactory, in that both tended to advocate what they thought improved their respective positions rather than answer questions in a straight forward manner. For example, I do not regard Mr Wadhwa's evidence that Mr Munkenbeck 'begged' to be given the job at the meeting of 16 March 2008 as likely, and I have already commented on the lack of contemporaneous documentation expressing any concern about the separation of Mr Munkenbeck from Mr Marshall when M&M dissolved and M&P took over. However, in relation to the alleged offer of £100,000, which was said to have been made in a conversation 11 years ago, I prefer the evidence of Mr Wadhwa for the following reasons:

(1) it seems entirely credible that Mr Wadhwa would not have made the offer at the meeting without first agreeing with his co-director and Joint Venture partners;

(2) It is said by Mr Munkenbeck that the reason for the offer was to drive Mr Munkenbeck to accept a 5% fee rather than an 8% fee. However, this is not credible in the context of the documented position at the time:

(a) Mr Wadhwa had recorded contemporaneously that 5% had already been agreed in his email of 13 June 2008;

(b) in his response to this email at the time, shortly before the meeting, Mr Munkenbeck did not contradict this statement but referred, instead, to his team cost projection. This showed a projection of £933,000 i.e. lower than the overall fees of 5% when calculated against a cost estimate of £22m, giving projected fees of £1.1m. I find, from the documents, that (even if Mr Munkenbeck had not seen it) this was the cost estimate figure likely to have been the context of discussions at

the time. (The parties agree that the relevant out-turn construction costs ended up at just over £22m, so this appears to be consistent);

(c) Mr Munkenbeck's earlier offer of a lump sum of £1,080,000 is strikingly similar to the £1.1m estimated fee calculated by reference to 5% of the then cost estimate;

(d) it therefore seems much more likely that Mr Wadhwa's contemporaneous e-mail recording earlier agreement on 5% was accurate at the time. It would follow that, on 16 June 2008, the conversation was no longer about 5%, but more likely to have been about the cashflow arrangements.

(3) no contemporaneous documentary evidence of the offer exists. The first time Mr Munkenbeck raised the point was nearly a year later, in different terms to the case now advanced. As stated above, it was initially alleged that at the meeting there had be an 'agreement', a position he rowed back from in his Amended Defence.

(4) it is most compelling that, as set out above, on the very day after the alleged offer, Mr Munkenbeck wrote either proposing, or at the very least commenting upon, the wording for the Consultant Fee Schedule. Mr Munkenbeck himself provided the precise number of the credit which should be set off against the 5% fees earned. No mention of the alleged offer was made. If such an offer had been made the previous day, it is implausible that Mr Munkenbeck would not have – at the very least – referred to the offer in this email. I reject the suggestion that Mr Munkenbeck did not refer to the offer because the offer related to the Baths but the proposal was concerned with the Car Park. This does not make sense: the proposal *did* directly concern the Baths because it was offering to credit all sums paid to M&M in respect of the Baths against the fee earned on the Car Park. If the offer had been made, I have no doubt that Mr Munkenbeck would have sought to give effect to the offer by reducing the relevant credit.

77. The answer to the Issue is therefore : No.

In the event that M&M has no contractual claim in relation to the Baths, is it entitled to claim in unjust enrichment for a reasonable fee? If so:

(a) upon what basis should a reasonable fee be assessed?
(b) what credit should be given for sums already paid?

78. The alternative claim advanced by the Claimants is one for a reasonable fee on the basis of unjust enrichment.

79. The way in which the claim appears to be put is that:

(1) the Claimants accept that its time charges for the Baths Work were paid as rendered during the course of 2005, 2006 and 2007;

(2) the 'effect', however, of setting off all sums already paid against the 5% fee on construction costs agreed as part of the Appointment in respect of the Car Park Works is that in fact the Claimants have been 'unpaid' for that work;

(3) on 16 June 2008, in negotiating the 5% figure, Mr Wadhwa offered to pay M&M £100,000 in respect of the Bath Works fees, thereby representing that M&M were entitled to remuneration for the Bath Works fees in addition to sums under the Appointment;

(4) in reliance on the assurance, Mr Munkenbeck agreed 5%.

(5) The fact of (1) and (2) above in their own right, but particularly when supplemented by (3), gives rise to a restitutionary entitlement to payment of a reasonable sum. It is said simply that the Claimants have received nothing in respect of the work done in relation to the Baths. The Defendants have received all the benefit of the work carried out by the Claimants but have, in effect, paid nothing for it, notwithstanding Mr Wadhwa's offer to make some form of payment in relation to the Baths.

80. The starting point is that the M&M billed all hours worked on the Baths and all those invoices were paid. The real mischief of which complaint is made, therefore, is the credit, agreed by M&P, of all sums paid to M&M which had previously been paid against the sums due under the Appointment (calculated as 5% of the construction costs of work designed by M&M/M&P in relation to the Car Park). However, that credit was simply part of the commercial bargain struck between M&P and MSRL, and indeed ISG by Novation.

81. Indeed, as the chronology above makes clear, following the meeting at which it is alleged an offer in respect of the Baths was made, it was Mr Munkenbeck himself who appeared to propose the precise value of the credit and the associated wording which became in effect the Schedule setting out the Consultant's fees. It was open to him to agree whatever sum, if any, he considered appropriate. Although in evidence, Mr Munkenbeck stated that did not know how he had calculated the £373,000 credit stated, it is plain that there was nothing stopping Mr Munkenbeck from proposing, if he thought fit, a lower credit. He did not do so.

82. In cross-examination, it was suggested to Mr Munkenbeck that he either entered the agreement aware of, and content with, with the fact that the credit included all sums for the Baths, or that he did so mistakenly. Mr Munkenbeck said it was more likely to have been a mistake:

> *Q. Isn't the truth, Mr Munkenbeck, that contrary to your current evidence you didn't think about the Baths claim when you agreed a fee for the appointment and that can only have been for two reasons. Either you were willing to agree to deduct what M&M had been paid because you*

> *were getting enough money, as you said in the witness box, or you made a mistake? It is one of the two reasons, Mr Munkenbeck; isn't that right?*
>
> *A. I think it's more likely that I was making a mistake, I wasn't thinking about it.*
>
> *Q. So you accept that you made a mistake?*
>
> *A. I wasn't thinking about that but I don't accept that 373 was everything that had been paid up to date.*

(Day 1/179/10-22)

83. Whether he did so willingly, or by mistake, there is no claim in restitution against the Defendants. It is no part of the law of restitution to correct mistakes made by parties in entering a Contract. It may be that, in certain circumstances, a unilateral or mutual mistake may be relied upon to vitiate a contract. However, unless a claimant can bring itself within such a contractual analysis (and thereafter potentially rely upon restitution to fill the hole left by the vitiated contract), they must bear the consequences of their error. It is, plainly, not unjust for a party to be held to their legally binding contract. I accept, therefore, the contention of Mr Higgo that in circumstances where M&P does not seek to set the Appointment aside, it has no claim in unjust enrichment in relation to the credit that it gave against its fee. As per Millet LJ in Portman Building Society v Hamlyn Taylor Neck [1998] PNLR:

> *'The obligation to make restitution must flow from the ineffectiveness of the transaction under which the money was paid and not from a mistake or misrepresentation which induced it. It is fundamental that, where money is paid under a legally effective transaction, neither misrepresentation no mistake vitiates consent or gives rise by itself to an obligation to make restitution'.*

84. Furthermore, as argued by Mr Higgo, in this case the Appointment was immediately novated on signature to ISG, who thereby became the contractual counterparty of M&P. M&M, who carried out the work, were paid in full. M&P, who gave the credit, had carried out no work. Moreover, the beneficiary of the 'credit' was not the Defendants, but ISG whose obligation to pay a fee to M&P under the novated Appointment was reduced. No claim in unjust enrichment could lie against ISG, but even if it did, the Claimants have settled all their claims against ISG.

85. The answer to the issue is therefore: No.

86. In the circumstances, it is not necessary to answer the second part of the Issue. If I were to be wrong about the claim in restitution, I will for completeness briefly set out my conclusions on what a 'reasonable fee' would have been for the purposes of a claim in unjust enrichment. It is my view that:

(a) whilst both experts have agreed that approaching the question of a reasonable fee *at the outset* of the project is a percentage fee, I do not accept that it follows from this expert evidence that this is the appropriate basis for a restitutionary claim, particularly one put in the terms advanced by the Claimants;

(b) If anything, it seems to me that such '*enrichment*' as has been conferred on the Defendants (according to the Claimants) is the amount of discount or credit which M&M said it gave. This is the fees which it had, to that point, been paid for the Bath works;

(c) It is not possible to determine precisely from the documents what part of the £373,000 credit provided related to time charges for the Baths work:

(i) Mr Salisbury's approach was to apply a split derived from the ratio between Bath and Car Park works from the construction costs of 35.5% to the overall time charge hours incurred up to planning. By reference to the corrected spreadsheet he provided in evidence, this amounted to, using his 'less approximate' basis of calculation from the spreadsheet presented during oral evidence, of £88,187;

(ii) Mr Greenhalgh did not provide an equivalent calculation;

(iii) On the basis of the factual evidence from Ms Marquito that she personally did most of the drawings that enabled the Baths design to evolve from November 2004 to April 2007 when the planning was submitted, it is possible to determine from her time records that she spent around 1900 hours. Her rate was either £40 per hour or, as sought in the Appointment negotiations, £55 per hour. This gives a total of between around £76,000 and £104,000. It is likely that not all her time was Baths related; similarly it is likely that some others will have contributed. But, in the round, it provides some comfort that the application of 35.5% to the overall time charges is reasonable.

(d) In the circumstances, had the restitutionary claim succeeded, I would have allowed the sum calculated by Mr Salisbury of £88,187.

Are any claims that M&M may have in relation to the Baths time-barred:

(a) When did any cause of action accrue in contract under the Initial Agreement (if it was reached)?
(b) When did any cause of action accrue for a claim in unjust enrichment in relation to the Baths.

87. This does not arise, given my findings above. It is nevertheless my view that:

(a) in relation to the contract claim, the cause of action would have arisen when it was made clear to M&M that it would not be the architect in respect of the Baths. On the facts, this became clear by November 2007, when Mr Munkenbeck's letter in relation to the lump sum agreement for ER's acknowledged that '*…The architects for the Marshall Street Baths building will be Finch Forman who will also do the interior of the gym on the lower floors…*'. I do not accept the suggestion, given the broader factual context set out above, that there was by this stage any prospect that M&M would be appointed for any part of the Baths work in the future. If, therefore, by this time M&M had any contractual right to have been paid for that work already undertaken on the basis of a fee percentage instead of or in addition to the amounts already paid, such a claim would have accrued around this time. The contract claim brought by Claim Form dated 3 June 2014 is therefore statute-barred;

(b) in relation to the restitution claim, I accept the submission of Mr Sears QC that the claim would have accrued at the point at which the credit/discount was made i.e. August 2008. This claim would not, therefore, have been statute-barred.

Does M+P have a claim against MSRL in relation to Additional Work? If so, what is the quantum of that claim?

88. M&M claim £61,932, or such other reasonable fee, in respect of work done in respect of 'Instruction 2: Options 1 to 9'. The claim relates to work that was carried out by M+P after the Novation and which the Claimants allege was carried out on MSRL's instruction. Originally, its claim for these sums, with others, was advanced against ISG in an adjudication in 2009. As against ISG, the claim in adjudication for these particular sums did not succeed. The claim for these sums was then included in its claim against ISG within this litigation. It also claimed the sums, in the alternative, from the Defendants. ISG's claim has been settled. M&P received £285,000 plus VAT and a contribution towards legal fees. The settlement agreement did not seek to apportion the sum of £285,000 against any particular parts of the various claims brought against ISG. I note at this juncture that Mr Higgo provided to the Court a spreadsheet which sought to identify what sums overall had been paid to M&M/M&P and the effect of the ISG Settlement. The contents of the spreadsheet were not explored with any witness, but in light of the fact that some weight appeared to be placed on it in closing by Mr Higgo, Mr Sears QC was permitted to submit a spreadsheet, following the conclusion of the trial, setting out an alternative approach. There was thereafter an exchange of further short submissions on the spreadsheet. For the reasons set out below, it is not necessary for me to decide the issue raised by Mr Higgo, but I observe that in light of the fact that the content was not explored with Mr Munkenbeck, I would have been reluctant to accept the inference that Mr Munkenbeck has not suffered a loss. I make clear that I draw no conclusions adverse to the Claimant's claims from the spreadsheet submitted by Mr Higgo.

89. The Claimant brings its claim not pursuant to any contractual obligation, but again on the basis of restitution. It cannot bring its claim in contract against the Defendants because it accepts it had no contract with them after the novation of the Appointment to ISG. Instead, it is simply said that as MSRL instructed the additional work, and ISG had no liability to pay for the work under the Appointment, MSRL have been unjustly enriched by reference to the benefit they received for no payment.

90. The Defendants dispute any liability for the Additional Works. The Defendants contend:

(1) As a consequence of the terms of the Novation and the timing of the instructed work (all after the date of the Novation), MSRL can have no liability for the work;

(2) The parties had agreed a contractual regime with clear demarcation of responsibility post Novation. Clauses 3 and 4 of the Novation provide:

> "*3* ***Release by [M+PU]***
>
> *[M+PU] releases and discharges [MSRL] from further compliance and performance by [MSRL] of [MSRL]'s obligations under the Appointment and from all claims demands liabilities and duties whatsoever arising out of or in respect of the Appointment whether arising prior to, or subsequent to the date of the Agreement.*
>
> *4.* ***Acceptance of Liability by [ISG]***
>
> *[ISG] accepts the liabilities of [MSRL] under the Appointment and agrees to perform all the duties and to discharge all the obligations of [MSRL] under it and to be bound by all its terms and conditions in every way whether arising before, on or after the date of this Agreement as if [ISG] were named in the Appointment as a party ab initio in place of [MSRL]. Without limiting the generality of the foregoing [ISG] acknowledges and agrees that he will receive and accept responsibility for negotiating and settling all claims and demands whatsoever against [MSRL] arising out of in in respect of the Appointment whether arising prior to, on or subsequent to the date of this Agreement."*

(3) The claim for additional work (on whatever basis it is put) falls within the definition of released claims in clause 3 of the Novation and within the acceptance of liability of ISG;

91. The Defendants rely not just on the terms of the Novation itself, but – to the extent necessary – the understanding of Mr Munkenbeck and M&P. In the Adjudication, Mr Munkenbeck stated in evidence:

> "*M+P have interpreted [clause 4 of the Novation] to mean that any design work on this project after novation is carried out under the employment of [ISG] and no further fees can be collected from the original employer [MSRL]. [M&P] would not refuse an offer of payment from [MSRL] but we do not feel we have any contractual basis for claiming from [MSRL] directly. We feel that the Appointment clarifies that it is up to ISG to negotiate fair payment from [MSRL] for any bona fide additional services they may have instructed on the project*."

92. The position advanced by the Defendants is undoubtedly correct. At the date of the Novation, and by its terms, the parties agreed a clear contractual regime in which M&P's counterparty was ISG. The Appointment, as novated, also had clear terms as to the requirements upon M&P should it advance any claim for additional payment. Clause 2(a) of the Appointment stated:

> "*If [M&P] considers that it has been instructed to provide services additional to those set out in Schedule [4] it shall not commence carrying out such additional services unless it has obtained written approval from [ISG] of the additional fee payable in respect of such additional services or has written to [ISG] (before commencement of such additional services) notifying [ISG] of the need for such additional services*."

93. It is said by Mr Sears QC that this clause is irrelevant in circumstances where the instruction comes not from ISG but from MSRL. However, this puts the cart before the horse. The point is that outside of the Appointment, as novated, M&P had no obligations whatsoever to follow any instruction provided by MSRL. When faced with any such instruction it could either (a) ignore the instruction; (b) seek to come to a specific agreement for payment from MSRL for the work or (c) seek to treat the instruction as one which it would undertake having first complied with clause 2(a) so as to make ISG liable for the costs of carrying out the work.

94. I do not accept, either, the characterisation of the work instructed as 'outside' the Appointment. By definition, any potential variation work is 'outside' the scope of services within the Appointment, or else it would not be a potential variation. I can see circumstances in which completely unrelated requests (e.g. in relation to a different construction project altogether) might be regarded as 'instructions' which could never fall to be dealt with under option (c) in the list of choices above. But what were effectively requests to carry out a type of value engineering, undoubtedly for the benefit of MSRL, are the type of requests employers make in construction projects all the time. They are the type of instruction which is sufficiently related to the scope of services under the novated Appointment for them to be paid, if at all, through the contractual mechanisms between ISG and M&P.

95. The purpose of the contractual regime and of clauses like 2(a) is to provide certainty and clarity to the relationship between the parties. I accept therefore, as contended for by Mr Higgo, that in light of the clear contractual regime, there is (absent some special

feature) no room for any restitutionary claim. Where A performs work pursuant to a contract with a third party (B) which confers a factual benefit on C, A has no claim in unjust enrichment against C if, for whatever reason, A fails to recover from B. In *Macdonald Dickens v Macklin (a firm) v Costello & Ors* [2012] QB 244, relied upon by Mr Higgo, builders performed construction work on land owned by the defendants. Rather than contracting personally with the builders, the Costellos had used a company (Oakwood) of which they were the sole shareholders and directors, to engage and pay the builders. The builders presented invoices to Oakwood which went unpaid and then brought a claim against both Oakwood and the Costellos. At first instance, the Judge held that Oakwood was liable (in contract) and that the Costellos were jointly liable (on the basis that they had been unjustly enriched at the expense of the builders). On appeal, Etherton LJ held that the Costellos had not been unjustly enriched, because to permit such a claim would impermissibly undermine the contractual arrangements between the parties, stating (at [23] that):

> *"I am clear, on the other hand, that the unjust enrichment claim against Mr and Mrs Costello must fail because it would undermine the contractual arrangements between the parties, that is to say the contract between the respondents and Oakwood and the absence of any contract between the respondents and Mr and Mrs Costello. The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy, which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation".*

96. It is of course conceivable that some specific representation or agreement as to payment outside the contractual regime upon which a party then relies might give rise to an entitlement to payment, whether in contract or restitution. However, this is no such case. Mr Munkenbeck confirmed in evidence that MSRL did not suggest that they would be responsible for payment.

> *Q. And I started by saying to you that you knew at the time that you didn't have a contractual claim against my clients in relation to this work. You are not suggesting that they agreed outside the framework that everyone was operating under separately to pay you for this work?*
>
> *A. They didn't specifically agree to pay us. They merely instructed it.*

(Day 2/34/15-22)

97. It is unquestionably clear both from the documentary and witness evidence that there was a clear contractual regime in place in which M&P, should it wish to be paid for any broadly related work it regarded as additional – whomsoever it was instructed by – would need to look to ISG for payment and, to the extent it was a condition precedent to payment (which I do not need to decide), comply with Clause 2(a) of the Appointment.

98. The answer to the issue is : No. To the extent necessary, I would have determined that the quantum of the sum was as claimed, namely £61,932.

Conclusion

99. For the reasons set out above, the claim brought by the Claimants fails.