Neutral Citation Number: [2019] EWHC 3488 (TCC)

Case No: HT-2018-000216

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

Royal Courts of Justice
7 Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 17th December 2019

Before:

HIS HONOUR JUDGE EYRE QC

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Between:

AMEY LG LIMITED	**Claimant**
- and -	
AGGREGATE INDUSTRIES UK LIMITED	**Defendant**

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- -

Alexander Hickey QC (instructed by **Pinsent Masons LLP**) for the **Claimant**
James Howells QC (instructed by **Macfarlanes LLP**) for the **Defendant**

Hearing dates: 7th – 9th October 2019.

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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.

HH Judge Eyre QC:

Introduction.

1. This dispute arises out of the parties' dealings in relation to works carried out in the refurbishment of the road network of Sheffield. The Claimant had been engaged as main contractor performing works as part of the Sheffield Streets Ahead PFI project. By a written agreement of 31st July 2012 ("the Subcontract") the Claimant engaged the Defendant as subcontractor and the latter undertook surfacing and planing works together with associated civil engineering works. The works have come to an end but the Defendant has not yet submitted a final statement. The Claimant says that having failed to submit such a statement the Defendant is in breach of the Subcontract and seeks a declaration to that effect together with a declaration setting out a time by when a statement should be provided and further declarations relating to the extent of the Defendant's right to apply for further payment and to seek adjudication in respect of payments already received pursuant to interim payment applications. The Defendant denies that it is in breach of its obligations and says that the declarations sought are inappropriate and should not be granted being either based on an incorrect analysis of the parties' dealings or otherwise inappropriate or unnecessary.

2. The hearing before me was the second substantive hearing in this matter. The Claimant had originally commenced proceedings by way of a Part 8 claim seeking four declarations. That claim came before Mr. Alexander Nissen QC sitting as a deputy judge. Mr. Nissen granted one of the declarations then sought and refused another. However, he concluded that the other two were not apt for determination in Part 8 proceedings and directed that in respect of them the claim should proceed as if commenced under Part 7. Mr. Nissen's order was conclusive as to the matters which he determined and flowed from the reasoning set out in a substantial judgment.

3. Following Mr. Nissen's order the Claimant served Particulars of Claim setting out the four declarations which it now seeks.

The Parties' Dealings.

4. Mr. Nissen's judgment set out a detailed analysis of the history and the parties' dealings. I am indebted to that and will draw on it for significant elements of this summary. I will not repeat here Mr. Nissen's detailed rehearsal of the terms of the Subcontract nor his analysis of how it was intended to operate. There was substantial agreement between the parties as to the history albeit there was considerable disagreement as to the interpretation of their dealings and the consequences to be drawn from them. In those circumstances I am able to set out the history in relatively short terms.

5. The Subcontract was a framework agreement with the Defendant agreeing to carry out at pre-determined rates and prices such of the services identified in the Subcontract as the Claimant should call for from time to time by way of Works Orders.

6. The Subcontract was to run for an initial term of 5 years continuing thereafter unless terminated with each party having power to terminate by the giving of 6 months' written notice.

7. Clause 17 of the Subcontract contained the payment terms and provided for interim payments being made by reference to the particular Works Orders. The parties did not, however, operate the contract on that basis. Instead single composite interim payment applications were made each month in relation to the totality of the sums due. The calculations were made not by reference to the Works Orders but by reference to the works which had been performed (pursuant to the Works Orders) in particular streets which were then grouped into geographical zones the total sums from those zones then being combined. Both parties proceeded on that footing with Payment Notices and Pay Less Notices being made with reference to the same approach.

8. Clause 17 (n) provided for the provision of a final statement in these terms:

> "The Subcontractor shall issue its final statement to the Contractor within one month following the completion of the Services".

9. Clause 8 of Schedule 1 dealt with "Final Accounts" and provided at (b) that:

> "Notwithstanding clause 17 (b) the Subcontractor shall submit his final statement for each Works Order together with full substantiation as required by the Contractor to the Contractor within one month of completion of the Works Order."

10. The resurfacing and planing works involved the removal of asphalt waste and planings. Such material can include material containing tar ("Tar Bound Materials"). Tar Bound Materials are hazardous waste and the management of such materials is more costly than that of other materials. There was a high incidence of Tar Bound Materials in the Sheffield road network and so in the materials with which the Defendant had to deal under the Subcontract.

11. The Defendant says that the high incidence of Tar Bound Materials only became apparent from March 2013. It is common ground that from late 2013 the parties were in negotiation with a view to varying the terms of the Subcontract to take account of the unusually high incidence of those materials. A deed of variation was prepared. Following the approach adopted by Mr. Nissen I will at times refer to this as the "Tar Agreement" without thereby prejudging the question of whether it was or was not effective as a contractual variation. In general terms the Tar Agreement provided for additional payments to be made to the Defendant. In summary three lump sum payments were to be made; in addition 48 monthly payments of £66,000 were to be made commencing in May 2014; and there was to be a Cost Share Calculation (helpfully described by all as a sharing of the pain or gain) whereby if the actual cost of dealing with Tar Bound Materials varied positively or negatively from the forecast total cost then the difference was to be shared equally between the parties.

12. It is to be noted that the deed of variation dealt with a number of proposed variations to the Subcontract in addition to those relating to the consequences of the presence of the Tar Bound Materials but those other matters do not appear to have been regarded as being controversial.

13. I need not recite all the terms of the Tar Agreement but the following are of particular relevance:

    i) "Actual Costs" were defined as being:

    > "Labour, plant, and material expense incurred in carrying out the works (excludes overheads and profit). Actual Costs will be established through transparent open book audit on an initial basis and thereafter on an annual basis".

    ii) The proposed clause 17.1.4 (e) provided that:

    > "If the actual cumulative cost of treatment and disposal of the above stated material varies positively or negatively from the forecast total … then a pain/gain share shall apply on a 50/50 basis between the parties subject to substantiation and agreement of quantities and Actual Costs."

    iii) The proposed clause 17.1.4 (g) provided that:

    > "Audits of Actual Cost will be on a sample basis. Such audits to be carried out at the Contractor's discretion without notice. If in the Contractor's opinion there is a significant variation in a sample audit a further detailed audit may be invoked. The findings of such audit may vary the allocation within the pain gain mechanism. …."

14. The Claimant had produced the draft Deed of Variation in September 2014 and a series of meetings and exchanges followed. The Defendant declined to sign the proposed deed. In its letter of 1st April 2015 and in its claim submission of 26th August 2016 the Defendant said that it was not prepared to sign the deed because it was not prepared to assume the risk of the tar content. It appears from the August 2016 claim submission that the Defendant did not take issue with the principle of a 50/50 split of the direct costs of dealing with the Tar Bound Materials but was concerned that the deed would cause it to bear the risk of the consequential costs of having to deal with them.

15. There was a meeting in August 2015. There is an immaterial dispute as to the precise date of the meeting. The minute of the meeting (erroneously on both accounts dated 12th May 2015) recorded "deed of variation not signed but both parties working to it". The Claimant says that this should be read as meaning that the parties were working towards the signing of the deed. The Defendant disputes that reading contending that the minute was a statement that although the deed had not been signed the parties were working in accordance with its terms. The debate about the interpretation of the minute did not really advance matters because both sides are agreed that the deed was never signed; that the refusal to sign came from the Defendant; and that notwithstanding the absence of a signed deed the parties implemented the provisions relating to payments for Tar Bound Materials with the Claimant making the lump sum payments and the monthly payments and with both parties engaging in the exercise of the cost share calculations.

16. The Claimant says that no agreed variation was concluded because there was no final agreement of the terms and so the Tar Agreement had no contractual effect.

It accepts that payments were made in accordance with the terms of the Tar Agreement but says that this gave rise to an estoppel by convention which has now come to an end. The Defendant accepts that there was no formal agreement of the proposed deed of variation but says that by their conduct the parties agreed those terms, at least as to payment, and that it took effect as a contract agreed by conduct. The differences as to the nature and effect of the Tar Agreement are at the centre of the dispute before me.

17. The Defendant served notice of termination on 31st January 2017 terminating the Subcontract on 31st July 2017. All the services to be performed under extant Works Orders had been completed by then although some remediation works were undertaken thereafter. Interim payment applications and payments also continued as did applications and payments in respect of the cost of dealing with material containing tar. The Defendant incurred some further costs in respect of the disposal of Tar Bound Materials after 31st July 2017 but that expenditure had ended by September or October 2017.

18. Payments in accordance with the Tar Agreement continued until April 2018 when the last of the 48 monthly payments was made.

19. Carl Flintham was the Defendant's commercial manager on this project. He said that in about April 2018 the Claimant indicated that it wanted to undertake an audit of the Defendant's actual costs for the period from 2017 onwards there previously having been an audit of the costs up to and including 2016. Mr. Flintham said that discussions and exchanges about audit had continued thereafter between himself and his counterparts at the Claimant with the last meeting at which the question of audit was discussed being in October 2018. On 18th January 2019 the Defendant's solicitors had written saying that the total amount due was £4,224,209.87 and that the Claimant had "already been afforded the opportunity to carry out an audit of [the Defendant]'s relevant costs". On 24th June 2019 they wrote saying that it was the Defendant's understanding that the Claimant considered that it had not yet completed the audit of the costs of dealing with Tar Bound Materials and asking for confirmation of this. The Claimant's solicitors replied on 27th June 2019 saying that they did not know the basis on which the Defendant had formed that understanding and that it was not the case. The letter went on to say that the question of audit had no effect on the Defendant's failure to provide a final statement making the point that the Defendant's solicitors had referred to a final amount in their letter of 18th January 2019 and had replicated there figures provided earlier. Mr. Flintham says that the Defendant regarded the letter of 27th June 2019 from the Claimant's solicitors as an indication that the Claimant had completed its audit and he says that this was the first time that the Defendant learnt that the Claimant had completed its audit.

20. However, in the meantime on 1st June 2018 the Claimant's solicitors had written to the Defendant's solicitors saying that the failure to provide a final statement within one month of the termination on 31st July 2017 was a breach and calling for the Defendant to provide its final statement "with full substantiation … without any further delay". The Claimant says that the letter brought an end to such estoppel as had arisen and that the Defendant became liable to provide a final statement within one month of that letter. A further letter of 6th July 2018

followed in which the Claimant's solicitors repeated the contention that the Defendant was in breach by failing to provide a final statement and called for provision of the statement by 13th July 2018. The Defendant has not yet provided a final statement and says that it is not yet obliged to do so because it was only obliged to do so within a reasonable time and that a reasonable time has not yet expired. The Defendant's case as to the date from when the reasonable period was to run was rather less clear.

21. The Claimant relied on the letter of 18th January 2019 from the Defendant's solicitors as demonstrating that by then the Defendant had all the calculations in place and was in a position to provide a final statement. Mr. Hickey QC pointed out that the figures put forward subsequently differed only marginally from the total of £4,224,209.87 appearing there. He invited me to find as a fact that the Defendant had been in a position to provide a final statement at that time. In the course of the evidence it transpired that there was no dispute about that. Mr. Flintham giving evidence for the Defendant accepted that a final statement could have been produced at a rather earlier date than that. The question was not whether the Defendant could have produced a statement by then but whether it was in breach by not having done so.

22. There have been seven adjudications in the period since July 2017. The most recent ("the Mosborough Adjudication") resulted in a decision issued on 30th September 2019. The continuation of the series of adjudications combined with the absence of a final statement caused the Claimant to start these proceedings. The Defendant saw things rather differently explaining through Mr. Flintham that the references to adjudication were necessary because without them the Claimant was declining to make payment.

The Earlier Judgments and their Effect.

23. The parties correctly accepted that to the extent any issue had been decided by Mr. Nissen they were both bound by such determination. By paragraph 1 of his order sealed on 15th April 2019 Mr. Nissen declared that the Subcontract terminated on 31st July 2017 under the terms of the Subcontract. He refused the Claimant's claim for a declaration that the Defendant was not entitled to claim further payment adjustments to previous payments by way of adjudication but would be able to adjudicate any dispute as to the final payment entitlement.

24. Mr. Nissen ordered that the Claimant's claims for declarations that:

    i) The final statement was then due to be submitted by the Defendant; and

    ii) The Defendant's entitlement to any further payment or any correction of any payment entitlement under the Subcontract post-termination would arise exclusively through the final statement mechanism of the Subcontract

    were to continue as if they had been begun under Part 7. As will be seen there has been some variation and expansion of the declarations being sought.

25. Having set out the terms of the Subcontract and explained the way in which the parties had operated the interim payment regime Mr. Nissen proceeded to

consider the effect of that on the requirement at clause 17(n) for a final statement to be provided. He concluded, at [31], that the position under the Subcontract was that:

> "… by varying the payment regime from the outset of the contract, the parties must have necessarily intended that the final payment regime would be varied in like manner. The consequence of this was that, instead of having individual final accounts for each Works Order, with a separate statement required within one month of completion of that Works Order, the parties must have intended to provide for a single final account process within one month of completion of all the Services ordered pursuant to the Subcontract."

26. However, Mr. Nissen made it clear that in saying that he was addressing solely the position under the Subcontract and was not making any determination as to the extent to which the Tar Agreement had altered the parties' rights and obligations in relation to the provision of a final statement.

27. Mr. Nissen rejected the Claimant's contention that the Tar Agreement was irrelevant to the issues about the operation of the Subcontract. At [37] he said

> "…Whatever legal or equitable consequences may flow from what the parties did and said, what seems plain to me is that they intended those arrangements to apply to and impact upon the Subcontract itself. The terms of the draft Tar Agreement and, indeed, the way the parties conducted themselves both involved the making of payments within and as an intrinsic part of the interim payment regime of the Subcontract…."

28. However, Mr. Nissen also made clear the limitations of the material before him in the Part 8 proceedings and the limitations on the determinations he was making. He was not able to determine the effect of the Tar Agreement on the obligation to provide a final statement nor was he determining the basis on which the interim payment applications were made and paid in the period from July 2017 to July 2018. Thus the Deputy Judge said, at [54], that he was not able to conclude that the correct explanation for the actions after July 2017 was an estoppel by convention which had come to an end. Similarly, at [58], he explained that the question of when a final statement was due depended on the effect of the Tar Agreement. Mr. Nissen was able nonetheless to state that whatever the effect of the Tar Agreement it could not totally remove the requirement on the Defendant to provide a final statement and that there would be a time by when it was possible to say the Defendant was to have provided that final statement. He explained that point in these words at [59]:

> "That having been said, if "now" means November 2018, the tar instalments (if due) have come to an end. It seems to me that, thereafter, a reasonable period should be allowed for any residual ascertainment of actual cost (with any audit in respect thereof) and implementation of the pain-gain provisions. In that context, I bear in mind that such costs will have been expended before July 2017 and should, by now, be capable of ascertainment. There was no argument about timescale but I can do no more than say that there must come a time (or have come a time) by

> which the implementation of those provisions must come to an end and be replaced with the requirement for [the Defendant] to provide the final statement."

29. The Defendant accepted that was a determinative rejection of its previous contention that it had an open-ended period within which to provide such a final statement. The Defendant accepts that it has an obligation to provide a final statement but says that the requirement is that it does so within a reasonable period.

30. The Deputy Judge's assessment in that passage of the time by when the costs should have been capable of ascertainment is also to be noted. Mr. Nissen was proceeding on the footing that the costs had all been incurred by July 2017. The evidence before me was that there were some remediation works carried out thereafter and that some of the costs of dealing with the Tar Bound Materials were also incurred after July 2017. However, the Defendant's evidence was that all of the costs had been incurred by September or October 2017. In my judgement nothing of significance turns on that further period of two or perhaps three months. The Defendant did not challenge Mr. Nissen's assessment that by the time of the hearing before him in the spring of this year the costs should have been capable of ascertainment.

31. The fourth declaration which the Claimant had sought had been one that

> "the Defendant is not entitled to claim further payment adjustments to previous interim payments by way of adjudication but will be able to adjudicate any dispute as to its final payment entitlement upon crystallisation of the dispute following the submittal of a final statement."

32. Mr. Nissen rejected that contention. As he pointed out, at [55] and [56], immediately before termination the Defendant had the right to have the Claimant's previous interim valuations opened up, reviewed, and revised in adjudication and that right was not lost by termination and was not dependent on the Defendant being entitled to make further applications for interim payment. The Defendant says that the fourth of the declarations which the Claimant seeks before me involves an attempt to go behind the rejection of that declaration at the earlier hearing and I will address that argument below.

33. It follows that conclusive though his judgment was on the issues he determined Mr. Nissen did not purport to determine the crucial issue before me which is the consequences of the Tar Agreement and the parties' other dealings for the question of when the Defendant should provide a final statement. Indeed Mr. Nissen made it clear that he was not able to determine that issue on the material before him and in the context of Part 8 proceedings.

34. In accordance with Mr. Nissen's order the Claimant filed and served Particulars of Claim seeking the declarations which I will consider below. A dispute then arose between the parties as to the method by which the final statement was to be calculated. The Claimant's position was that the final statement was to be calculated in all regards by reference to the rates in the Subcontract. The Defendant said that the statement was to be calculated in part on a cost reimbursable or reasonable sum basis. This gave rise to the question of whether

the determination of the declarations would involve the court in deciding the methodology of valuation to be used in calculating the true value of the final statement. On 16th September 2019 the matter came before Stuart-Smith J for pre-trial review and for the determination of disclosure and strike out applications. Stuart-Smith J directed that the trial would not determine that issue of methodology and it was common ground before me that to the extent that there remained dispute as to the appropriate way in which to calculate the final statement that would have to be determined on a separate occasion.

The Parties' Contentions in Outline.

35. The Claimant says that the Defendant was obliged to provide a final statement within one month of the termination of the Subcontract. The Tar Agreement did not, it says, effect a variation of the terms of the Subcontract. However, it accepts that as the parties continued after 31st July 2017 with the exercise of seeking and making interim payments and of making and receiving the payments in relation to the Tar Bound Materials an estoppel arose whereby the Claimant was not entitled to call for the final statement while those arrangements were still in hand. The Claimant says that it was entitled to and did bring that estoppel to an end by calling for the final statement as it did in June 2018. Accordingly, the final statement became due within one month of the letter of 1st June 2018. That was the Claimant's primary case. It also said that even if the Defendant was not obliged to provide the final statement within one month of that notice but was to do so within a reasonable period then such a period had long since expired (either by the time of the issue of the proceedings in April 2019 or certainly by the time of the hearing) such that the Defendant is now in breach of its obligation to provide such a statement. The Claimant also says that from the time that the final statement should have been provided the Defendant's right to payment is limited to the true value as submitted in the final statement and that although the Defendant is entitled to challenge the Claimant's position in respect of the earlier payment applications it may not do so repeatedly and is only entitled to do so by reference to the true value of the services as calculated in the Subcontract.

36. The Defendant accepts that the proposed deed of variation was not signed but says that the conduct of the parties amounted to an agreement by conduct to vary the Subcontract in respect of the arrangements for payment in respect of the Tar Bound Materials to incorporate the provisions of the draft deed of variation. It says that one effect of this was that the Defendant was no longer obliged to provide a final statement within 1 month of the end of the Subcontract or any other date. Instead it was obliged to provide such a statement within a reasonable time and that period has not yet expired. The Defendant said that the process of determining the amount of the final statement could not commence until the last of the agreed instalment payments had been made or at least had become due in April 2018 and the final pain/gain calculation had been made. So the starting point for the calculation of a reasonable period could not begin until at least then. The Defendant said that the provision for the Claimant to audit the Defendant's costs was also relevant. At points it was not entirely clear whether the Defendant was saying that the reasonable period for provision of the final statement could not begin until such audit had been performed or that the time taken by the Claimant to undertake the audit was relevant in deciding

whether a reasonable period had expired. Mr. Flintham's approach suggested the former was the case and this was the position adopted by Mr. Howells QC who argued that the start of the period for provision of the final statement was 27th June 2019 because it was only then that the Defendant knew that the Claimant had completed or did not wish to undertake an audit. The Defendant had not previously spelt out the date by when it said that the reasonable period for provision of the final statement would end and as recently as July 2019 it served a reply to a request for further information in which it declined to commit itself to name a date. However, the position before me was that the Defendant said that a reasonable period for provision of the final statement would expire at the end of April 2020.

37. In his skeleton submissions for the Defendant Mr. Howells contended that the effect of the pleadings was that the parties were agreed that the final statement had to be submitted within a reasonable time and that issue between them was only as to what a reasonable time was. That was a misreading of the Claimant's pleaded case. At [53] of Particulars of Claim the Claimant averred that the Defendant had to submit its final statement "either within 1 month of 1st June 2018 or within a reasonable time such reasonable time having expired by no later than the date that these proceedings were issued." The Claimant's primary case was put clearly there and is that the Defendant's obligation was to provide the final statement by 1st July 2018. The contention that it had to be provided within a reasonable time was an alternative case setting out a fallback position and contending that even if the requirement was to provide the statement within a reasonable period that period had expired. In maintaining before me that the final statement should have been provided by 1st July 2018 the Claimant was not seeking to move away from its pleaded case but was enunciating that case.

The Declarations Sought.

38. In his judgment, at [8], Mr. Nissen described the hearing before him in the following words which were equally apt as a description of the hearing before me:

> "Clarification of the issues underlying the declarations was by no means an easy undertaking. Both in his skeleton argument and orally at the hearing, Mr Hickey suggested that the Court should either give the declarations sought or "such declarations as it considered appropriate for the reasons set out in this Skeleton and as expounded at the oral hearing". During the hearing, as the argument ebbed and flowed, Mr Hickey suggested that the declarations that his client had sought could be modified as appropriate to address the real issues, as he saw them, between the parties…"

39. Before me the Claimant sought four declarations rather than just the two which Mr. Nissen had said could not be determined on the material before him.

40. The first declaration was that "the Defendant was obliged by clause 17 (n) to submit a composite final statement … for the Services which it provided under the Subcontract by 1st July 2018". The Claimant says the date of 1st July 2018 is the applicable date as being one month from the demand for a final statement which brought, it says, the estoppel to an end. The Defendant accepts that it is

obliged to submit a final statement but does not accept that it was obliged to do so by 1st July 2018 and says that the time for provision of the final statement has not yet passed.

41. Next the Claimant sought a declaration that "the Defendant is (as at the date of these Particulars of Claim [which was 4th April 2019] in breach of its obligation under clause 17 (n) to submit a composite final statement for the Services and that the Defendant remains under an obligation to provide to the Claimant a final statement within a reasonable time (to be determined by the Court)". That reasonable period is said to be a further 30 days from judgment. The Defendant accepts that it is obliged to produce a final statement in a reasonable time but denies that time has yet expired. The Defendant says that there is an inconsistency between the first declaration and this declaration which says that the Defendant is still in breach. In addition the Defendant says that what is being sought here amounts to specific performance in circumstances where a claim for such relief is not properly articulated. The Claimant says that it is appropriate for the Court to grant a declaration in these terms because the Subcontract contained no default mechanism such as would have entitled the Claimant to issue its own final statement.

42. The Third Declaration sought is that "from 1st July 2018, alternatively by no later than the date these proceedings were issued, the Defendant's only remaining right to apply for payment in respect of the Services … is for the true value of the Services calculated in accordance with the Subcontract as submitted in the final statement pursuant to clause 17 (n)….". The Defendant accepts that it cannot now submit further interim applications for payment but may only submit the final statement. It says that to that extent the proposed declaration is uncontroversial. It took issue with any suggestion based on the words "true value" that the final statement would be invalid if it failed correctly to identify the true value. The Defendant then proceeded to say that in the light of Stuart-Smith J's direction that the true value would not be determined at this stage the declaration should be regarded as confined to a declaration that the Defendant is no longer entitled to submit interim applications. It says that so confined the declaration is otiose because of its acceptance that it is not so entitled. The Claimant points out that the Defendant's concession in this regard is recent and so the declaration should not be regarded as otiose.

43. Finally the Claimant seeks a declaration that "the Defendant is entitled by way of dispute resolution process (ie adjudication and/or court) to seek to open up, review or revise any payment it received in respect of any interim payment application which it made (1) prior to termination of the Subcontract or (2) in the "convention" period from 31st July 2017 to 1st June 2018 provided that the Defendant is only entitled to seek to open up, review or revise the same application/payment once (not repeatedly) and can only do so on the basis that the review is to determine the true value of the Services calculated in accordance with the Subcontract." The Defendant takes no issue with the proposed declaration up to the proviso saying that to that stage it is simply a statement of the Defendant's entitlement. It does not accept the proviso and contends that there is no legal basis for restricting the scope of future adjudications in the manner proposed. Moreover, the Defendant says the proviso is an attempt to

reargue a point which was raised unsuccessfully before Mr. Nissen. At [64] Mr. Nissen noted that Mr. Hickey had invited him to hold that the seeking of adjustments to the interim payments could not be done "in a piecemeal fashion". In respect of that argument and a further argument that further sums had been sought on an incorrect basis Mr. Nissen said that the Part 8 hearing was not apt to decide the issues which were not reflected in the declarations sought before him. He said that instead it would be initially for an adjudicator to determine whether a piecemeal approach was permissible with the court becoming involved in the event of a dispute arising out of such a determination. The Claimant says that the limitations on further applications are inherent in the Subcontract and so it is appropriate for the court to grant the declaration sought and to do so at this stage.

44. In the course of his submissions to me Mr. Hickey proposed various alternative formulations of the declarations. Mr. Howells said that I should focus on the Claimant's pleaded case and that the question for me was whether the Claimant had or had not established an entitlement to declarations in the terms set out in the Particulars of Claim. He said that otherwise the Defendant would be required unfairly to address a different case from that which the Claimant had put forward in the pleadings. In my judgement this is a matter of degree. The Defendant's submission is essentially correct and I have to consider whether the Claimant has shown it is entitled to the declarations sought in the Particulars of Claim. However, I have to look to the substance and am not constrained by the precise wording of the declarations in the Particulars of Claim. Minor variations between the declarations sought in pleadings and the wording of the declarations which a court finally orders are commonplace. The question is whether the Claimant has shown an entitlement to declaratory relief substantially in the form of that sought in the Particulars of Claim. The Claimant cannot, without seeking to amend, obtain relief which is different in substance from that claimed in its pleading but it is not to be denied relief simply because the court is not persuaded to grant a declaration in the precise form of words of that claimed.

Did the Tar Agreement and the Parties' Actions give rise to an Estoppel or to a varied Contract?

45. The Claimant says that the dealings between the parties gave rise to an estoppel. It says that it was precluded from invoking the terms of the Subcontract while the tar arrangements were in place but that the estoppel no longer had that effect once the monthly tar payments had come to an end or at least when the Claimant gave notice that it was seeking to rely on the terms of the Subcontract. The Defendant says that the conduct of the parties gave rise to contractual obligations whereby they were bound to act in accordance with the payment arrangements of the Tar Agreement.

46. There are difficulties with the analysis of the dealings as giving rise to an estoppel. Thus both sides were subject to positive obligations. So the Claimant accepts that the Defendant was entitled to payment in respect of the Tar Bound Materials in accordance with the payment provisions in the draft deed of variation. It also accepts that the Defendant's rights in that regard persisted beyond the end of the period of the monthly tar payments and indeed beyond the ending of the estoppel. The latter acceptance derives from the Claimant's

acceptance that the final statement is to be calculated by reference to the provisions of the Tar Agreement rather than solely by reference to the Subcontract with the final statement including any outstanding sums due in respect of Tar Bound Materials.

47. However, there are also very considerable difficulties with the contention that the dealings gave rise to contractual obligations. It is very far from clear what the relevant conduct was and what contractual terms were being agreed by conduct. In my judgement it is of considerable significance that the draft deed of variation was never executed. Moreover, that was not through inadvertence or oversight. It was the consequence of a deliberate decision on the part of the Defendant. There was a sustained refusal by the Defendant to execute the deed and a repeated assertion that the Defendant was not bound by the terms of the deed. It is significant in that regard that the Defendant's refusal to sign the deed was not in relation to an aspect of it which was unrelated to the question of payment in respect of the Tar Bound Materials. The Defendant did not say that the sticking point was one of the variations which the draft deed proposed to other aspects of the Subcontract such as, for example, the provision in the deed for an escalation process to resolve disputes or the proposed new clause whereby the parties agreed to work together "in a spirit of partnership". Instead the Defendant repeatedly took issue with the proposed provisions in relation to the cost of dealing with the Tar Bound Materials. The parties' actions in respect of the payments in relation to those materials must be seen in the light of that stance on the part of the Defendant.

48. The Defendant's contention that the parties' dealings gave rise to a contract or to a contractual variation of the Subcontract is in reality a contention that by their conduct the parties effected a contract in the terms of some but not all of the provisions of the draft deed of variation. In setting out its objections to signing the proposed deed of variation the Defendant indicated that it was prepared to agree a 50:50 split of the direct costs of dealing with the Tar Bound Materials but was contending that the consequential costs or liabilities should not be dealt with in that way. The Defendant's expression of that stance would not necessarily preclude a conclusion that the payment provisions were agreed by conduct but it would not fit easily with such a conclusion. One route to acceptance of the argument put forward by Mr. Howells would be for the court to accept that the Defendant's conduct was to be seen as an agreement to be bound by some but not all of the provisions of the draft deed. There would also need to be an acceptance that the Claimant's conduct in turn amounted to an agreement that some elements of the draft deed were binding without others also being contractually effective. It is not explained how the Claimant's conduct is to be seen as indicating an abandonment of any provisions of the draft deed and if so which or how the Defendant's conduct is to be seen as an acceptance of all the terms when it was asserting that it was not bound by them. An alternative route to acceptance of the Defendant's case would be to find that the action of the parties on the ground amounted to an agreement of the totality of the terms of the deed of variation notwithstanding the assertions by the Defendant that it did not accept all the terms. This was the approach which appeared at points in Mr. Flintham's evidence. At times he said that he regarded the Defendant as bound by the variation because he and his colleagues worked to it although he

accepted that his superiors had said that they would not agree to the terms of the deed. However, at other times he suggested the partial approach. Thus in his answers to cross-examination he described the situation as being one of working to the agreement but that "if there were one or two onerous parts which my seniors did not like they were put aside and we worked within it". In his witness statement he said that there were a "small number of items" in the draft deed which the parties did not apply.

49. It is one of a number of unusual features of this case that the Defendant is now contending that there was contractually effective agreement of some of the terms of the deed of variation whereas in 2015 and 2016 it had been adamant in its assertion that it was not bound by the deed. The Defendant's stance in those years would not necessarily preclude it from now arguing that the parties' conduct had in fact effected a binding agreement of the terms of the deed of variation. However, that stance was an important aspect of the conduct of the parties at the time. The actions of Mr. Flintham and his colleagues on the ground must be seen in the context of the formal communications from the Defendant to the Claimant. The effect of the Defendant's actions is to be assessed in the light of its conduct as a whole including those assertions that it was not bound.

50. In my judgement the dispute as to the proper interpretation of the minute of the August 2015 meeting does not greatly advance matters. If it is to be read as saying that the parties were "working towards" the signing of the deed of variation then that is an indication that they had not at that stage agreed the deed. However, if it was intended as a statement that the parties were working in accord with the draft deed then it would still be necessary to consider what the parties were actually doing and in what context together with the effect of those actions. The Defendant's repeated and reasoned refusal to sign the deed is an important part of that context. That refusal and its repeated enunciation are a crucial difficulty with the Defendant's current argument that the parties' conduct constituted an agreement of all the terms of the draft deed relating to the tar payments. The Defendant's position is that the minute recorded agreement that the parties were working in accordance with the draft deed and this should be regarded as correct notwithstanding the Defendant's denial at the time that it was agreeing to the variation.

51. In my judgement when the entirety of the Defendant's actions is considered including the refusal to sign the draft deed and the assertions that its terms were not acceptable then it is not possible to see the conduct as an agreement of the totality of the terms of the draft deed. There is similarly a difficulty with the argument that the parties' conduct amounted to an agreement of some of those terms. This is that there is no basis for concluding that the Claimant's conduct amounted to an agreement to abandon some terms of the draft deed while accepting that the others had contractual effect. It may very well have been the case that not all of the terms were in fact implemented. Thus, by way of example, there was no challenge to Mr. Flintham's evidence that the escalation process was not used. However, the fact that particular provisions were not actually used is very far from demonstrating an abandonment of them let alone being conduct from which it could be said that the Claimant was bound by a partial variation as having contractual effect in circumstances where other parts

of the package which it put forward did not have that effect. In his closing submissions Mr. Howells said that it was not necessary for me to find which of the terms set out in the draft deed had been agreed by the parties' conduct and which had not but that it sufficed for me to be able to conclude that the terms on which the Defendant relied had been agreed. That is correct so far as it goes but the difficulty in identifying the extent of the agreement is a potent indication that the conduct of the parties did not constitute agreement of any terms.

52. It follows that although I have considerable reservations about the appropriateness of the estoppel analysis proposed by the Claimant I find that the obstacles to analysing the dealings as having given rise to a contract effected by conduct are greater and are, indeed, insuperable.

53. Accordingly, I find that the parties proceeded on the footing that payments in relation to dealing with the Tar Bound Materials were to be made by way of the lump sum payments; the further monthly payments; and the monthly pain/gain calculations. By participating in those arrangements the Claimant is estopped from denying that the Defendant is entitled to payment in accordance with those arrangements whether during the period when the payments were being made or in the final statement. The Claimant was also estopped from asserting that the Defendant should provide a final statement before the date had passed for the last of the payments to be made. However, it was not precluded from calling for a final statement once the time for payment in accordance with the arrangements had passed. In that regard I find it significant that the pain/gain calculations were being made on a monthly basis in circumstances where no further expenditure was incurred after September or October 2017 so that there would be no scope for further pain/gain calculations after the last of the monthly payments fell due in April 2018.

54. Even if, contrary to the foregoing assessment, the parties' dealings are properly to be seen as having effected a new contract or a variation to the terms of the Subcontract then any such contract or variation would be very limited in its scope. That is because the effect of those dealings would have to be assessed in the light of the Defendant's refusal to agree to the terms of the deed of variation. In my judgement any contractual variation would be to the same effect as the estoppel set out above. Thus it would extend to give the Defendant a right to the payments set out in the deed of variation and to defer submission of the final statement until after the last of those payments became due but there is no basis for a conclusion that any contractual variation had a wider effect. In particular there is no basis on which it could be found that the parties' dealings operated to effect any greater alteration in the provisions governing when the Defendant was to supply a final statement let alone to convert the requirement that the statement should be provided within one month of termination of the Subcontract into a requirement to provide one in a reasonable period.

When was the Defendant obliged provide a Final Statement?

55. The Claimant says that the estoppel came to an end with its letter of 1st June 2018 and that the provision in the Subcontract for a final statement to be supplied within one month of the termination of the Subcontract then came back into effect. In my judgement that is an over-simplification of the position. In

reality the Claimant accepts that the final statement is to take account of the sums which the deed of variation envisaged would be paid in respect of the Tar Bound Materials. It follows that the Claimant accepts that the estoppel had continuing effects after 1st June 2018.

56. What, if any, were those continuing effects in relation to the timing of the final statement? I have already explained that I can see no basis for a finding that the estoppel converted the obligation to provide a final statement within one month into one to provide such a statement within a reasonable period. Similarly, there is no basis for saying that the estoppel (or indeed any contractual variation if that were to be the correct analysis) converted the one month period expressly provided for in the Subcontract into a different finite period. It is noteworthy that the Defendant did not seek to contend for a different finite period. Its case was that obligation to provide the final statement within the one month period was converted into an obligation to provide it within a reasonable time. However, no persuasive basis was put forward to explain how either the estoppel or the asserted contract arising out of the parties' conduct could have that effect. The Subcontract made express provision for the period of one month. For there to be a contractual variation of that period there would need to be some conduct referable to the duration of the period. Here the parties' conduct could be said to have been referable to the start of the period but no conduct was identified which could be said to have been referable to a period of a different duration. Similarly, although there is scope for an estoppel operating to postpone the date when the one month period started and although that would accord with the requirement that the Claimant was precluded from asserting rights inconsistent with the estoppel there is nothing unconscionable in the Claimant asserting that the relevant period remained that of one month albeit with a postponed start date.

57. The estoppel operated to preclude the Claimant from requiring a final statement until the payments for the Tar Bound Materials had all become due and had been capable of being calculated. However, those preconditions had been met by the time of the Claimant's letter calling for a final statement. The last of the monthly payments had become due and the time by when the pain/gain and other calculations should have been done had also passed.

58. As I noted at [36] above the Defendant contended that account was also to be taken of the provision for the Claimant to audit the figures and argued the reasonable period for provision of the final statement did not begin until the Claimant had undertaken an audit. Relying on that argument it said that the relevant period did not start until it received the letter of 27th June 2019 which it took as an indication that the Claimant had completed its audit.

59. The references to audit in the draft deed of variation (which I have quoted at [13] above) have elements of inconsistency. Thus the definition of "Actual Costs" says that costs "will be established through a transparent open book audit" initially and thereafter annually while clause 17.1.4 (g) refers to audits of Actual Costs being made and so envisages audits after the Actual Costs figure is put forward rather than that figure being itself the result of audit. Similarly there is some infelicity in the provision in clause 17.1.4 (f) that an initial calculation of Actual Costs has been made. However, when seen as they must

be in context the effect of the provisions is clear. The figures were coming from the Defendant. The provision for an audit was a protection for the Claimant as is made clear by clause 17.1.4 (g) with its provision for sample audits at the Claimant's discretion without notice to be followed by a detailed audit if the Claimant formed the opinion that there was a significant variation. As the provision for an audit was protection for the Claimant it was not open to the Defendant to say that the Claimant had to carry out an audit before a final statement could be provided. A term whereby the party to whom payment is potentially due could require the potentially paying party to audit the former's figures before the former submitted its final statement would be theoretically possible but it would be unusual. For the court to find that there was such a provision there would need to be compelling evidence of the parties making agreement to that effect. There is no such evidence here. The Claimant had a right to audit the Defendant's figures but it was not obliged to do so and it could waive that right. Here the Claimant called for the final statement in its letter of 1st June 2018 and repeated the demand in the letter of 6th July 2018. To the extent that it had a right to audit the figures before a final statement was provided those letters waived that right. Those letters superseded the indication which had been given to Mr. Flintham in April 2018 that the Claimant wished to undertake an audit and it was not open to the Defendant to say that it was awaiting the Claimant's audit before producing the final statement.

60. Mr. Howells contended that paragraphs 50 and 51 of the Particulars of Claim were an acceptance by the Claimant that the audit of the costs in relation to the Tar Bound Materials was to precede the final statement. I do not accept that reading of the pleading. Those paragraphs must be seen in the context of those which immediately precede and follow them. Read in that context it is apparent that the Claimant was asserting that the Defendant had been obliged to provide a final statement within one month of 1st June 2018. The pleading could have been clearer but it asserted a case that the provision of a final statement was not to be delayed because of the costs relating to the Tar Bound Materials. At paragraph 50 and 51 there is reference to adjustment following audit in relation to those costs and to that adjustment being "part of the final statement process" but this was not a concession that audit by the Claimant was to precede the final statement let alone that the time for the Defendant to provide the statement did not begin to run until the Claimant had completed an audit.

61. It follows that by the time of the Claimant's solicitors' letter of 1st June 2018 the time for the last of the monthly payments had passed; the last of the expenditure in respect of the Tar Bound Materials had been incurred over seven months before; the material for making any further pain/gain calculation was available; and by that letter the Claimant was waiving its right to audit the Defendant's figures before the final statement and confirming that it no longer intended to pursue the audit intimated in April 2018. The start date of the one month period for provision of the final statement had been postponed but the letter of 1st June 2018 ended that postponement and the Defendant was, accordingly, obliged to provide the final statement within one month of the receipt of that letter (the letter was sent by post and email and there was no suggestion that there was any delay in its receipt).

62. The Claimant's solicitors sent a further letter on 6th July 2018 asking the Defendant to provide the final statement by 13th July 2018. If the Defendant had in fact provided the final statement by that date it would not have been open to the Claimant to say that the Defendant had failed to provide the statement in accord with the Subcontract but the obligation was to provide the statement one month from the 1st June 2018 letter.

63. Even if the parties' dealings had effected a contractual variation rather than given rise to an estoppel the date for provision of the final statement would nonetheless have been 1st July 2018. As explained above any contractual variation would need to be limited to the narrowest extent consistent with giving effect to those dealings. That would follow as a matter of general principle but more particularly in this case in light of the Defendant's reasoned and repeated refusal to sign the deed of variation. I have explained already that while a theoretical contractual variation could postpone the start date of the one month period there is no basis for saying that it altered that period and there would be no basis for the postponement of the start date being extended beyond 1st June 2018 given the circumstances I have set out at [54].

64. Mr. Howells put forward an alternative route which he contended led to the conclusion that the obligation had become one to provide the final statement within a reasonable time even if there had been a contractual obligation to do so within one month. He said that it would have been open to the Claimant itself to provide a final statement and that its failure to do so should be regarded as a breach with the consequence that both parties were to be seen as being in breach. It was, Mr. Howells said, as a consequence of both parties being in breach that the obligation to provide a statement within the fixed period of one month was to be seen as having been superseded by a requirement to provide one within a reasonable time. This argument is unsustainable. The Subcontract did not make any provision for the Claimant to provide a final statement let alone impose an obligation on it to do so. Mr. Howells accepted that but said that as a matter of practicality the Claimant could have provided such a statement. Even if that proposition were to be accepted it would not mean that a failure to do so could be a breach by the Claimant. However, even if some form of breach by the Claimant could be constructed leading to a conclusion that both parties were in breach of the terms of the Subcontract that would not have the effect that the requirement to provide a final statement within the one month period had been converted into one to provide the statement within a reasonable period. As already explained I have found that the parties' dealings postponed the date when the one month period began but they did not replace that fixed period with an indefinite one of a reasonable time.

Is the Defendant in breach of its Obligation?

65. Accordingly, the Defendant was required to have provided a final statement by 1st July 2018 although I have found that the Claimant would not have been entitled to contend that a final statement supplied on or before 13th July 2018 was supplied in breach of the terms of the Subcontract. The Defendant did not provide a final statement by either of those dates and so was in breach of its obligations.

66. Even if, contrary to the conclusions set out above, the Defendant's contention that its obligation had become one to provide a final statement within a reasonable period were to be accepted the Defendant would nonetheless be in breach of that obligation.

67. It was not possible from the pleadings to identify the Defendant's case as to precisely what it said was the start date from which the reasonable period was to be calculated. In the course of his opening Mr. Howells identified the receipt of the Claimant's solicitors' letter of 27th June 2019 as the start date because the letter, it is said, indicated that the Claimant had completed its audit. The start date must at the latest have been the time when the Defendant was in a position to calculate the figures and when the Claimant had either completed its audit or had waived its right to audit the Defendant's figures. As explained above the Claimant's solicitors' letters of 1st June 2018 and 6th July 2018 waived any requirement that a final statement could not be submitted until the audit of the figures for Tar Bound Materials had been carried out and by then all the expenditure had been incurred and calculation of the figures would have been possible. It follows that the date of the latter letter must be the latest date on which the asserted reasonable period could have started. I reject the contention that the period did not start until the Defendant's receipt of the letter of 27th June 2019. The letters of June and July 2018 had made it clear that provision of the final statement was not to await any audit by the Claimant.

68. Determining the duration of the reasonable period for provision of the final statement involves an assessment of the nature of the exercise involved in preparing the final statement here. However, that assessment must have regard to the fact that the Subcontract provided for a one month period. That is a potent indication that at the time of the Subcontract the parties regarded one month as a reasonable period for the purpose of preparing the final statement albeit it is to be remembered that they did so unaware of the extent of the Tar Bound Materials which would be encountered in these works.

69. The Defendant placed considerable weight on the evidence of Mr. Flintham. He set out a detailed analysis of the work which preparation of the final statement will involve and of the time which will be needed. In light of that the Defendant contended that the date by when a reasonable period would have expired was no earlier than the end of April 2020. Mr. Howells said that there was no evidence put forward by the Claimant to contradict Mr. Flintham's assessment of the work involved and the time required and that the court should, accordingly, accept it as establishing the duration of a reasonable period for providing the final statement. That argument is flawed because the time needed to prepare the final statement will depend not just on the tasks which have to be undertaken but also on the staff resources allocated to that exercise. Thus Mr. Flintham made an assessment of the number of full time equivalent employee days which would be needed for the preparation of the final statement but the timetable and identification of the date by when the Defendant said the statement could be produced were based on his view of the staff resources which it was appropriate for the Defendant to allocate to the exercise. That view could not be the sole determinant of what should reasonably have been done. Even if Mr. Flintham's assessment of the number of employee days which will

be required for the task is accepted the timeline will depend on how many employees the Defendant has available or is prepared to allocate to the exercise. Thus when work began on preparing the final statement the Defendant allocated the time of one and a half employees to the exercise but by the time of the hearing four employees had been allocated to the task.

70. However, there is a more significant difficulty confronting the Defendant's argument. Even if the obligation is to provide a final statement within a reasonable period the question of the date by when a final statement should be or should have been provided depends in very large part on when the period started and when the Defendant should have started the exercise of preparing the final statement. Here work did not start on preparing the final statement until April 2019 or thereabouts (Mr. Flintham explained that work began on preparation of the final statement six months before the giving of his evidence in October 2019). That delay was the result of a deliberate decision on the part of the Defendant not to commence work on the statement at an earlier time. The timetable Mr. Flintham produced ran from September 2019 but took account of the work already done.

71. The principal reason for the delay in starting work on the final statement was the belief on the part of the Defendant, and in particular Mr. Flintham, that a final statement would not be needed because the parties would reach a commercial compromise on the figures. In those circumstances the Defendant decided not to start work on the final statement because it did not believe that it would be needed and so the work and expenditure which would be involved would be wasted. Mr. Flintham acknowledged this frankly and repeatedly saying that a final statement could have been prepared earlier but that this was not done because he did not believe that the parties would get to the stage of there needing to be reference to such a statement but that they would instead reach a "negotiated outcome". Mr. Flintham's position was that he "never envisaged that we would end up in a final statement scenario". It was readily apparent from Mr. Flintham's evidence that this was the key reason why work on the final statement was not started earlier. When it was put to him directly Mr. Flintham did not accept that the reason why work was not started on the final statement was because it was not worth engaging in that exercise but in my judgement that explanation must follow from his acceptance that the exercise was not started because he thought a negotiated settlement would be achieved and a final statement would not be needed.

72. Mr. Flintham accepted that a final statement could have been prepared by the end of 2017 on the basis of that exercise being concluded within 6 months of the termination of the Subcontract on 31st July 2017. Again the reason this was not done was that Mr. Flintham "did not think we would be getting to this point".

73. The Defendant sought to argue that I should accept that it was reasonable for the Defendant to take account of the prospect of a commercial compromise as factor causing it to delay starting work on the preparation of the final statement. Reasonableness must, of course, be assessed on an objective basis. From the Defendant's viewpoint it clearly appeared sensible to delay starting work on the final statement because the Defendant believed that a deal would be done whereby the balance flowing between the parties was determined without

reference to a final statement. The Defendant took the commercial decision not to prepare a final statement because it believed that it was thereby avoiding expenditure which would turn out to have been unnecessary. In so doing the Defendant was running the risk that a deal would not be done and that it would have failed to provide a final statement at the due time. In my judgement it was deliberately choosing to take that risk. The Defendant's belief that a commercial compromise was likely was not relevant to the reasonableness of its decision to defer the preparation of the final statement. This is particularly so in the light of the fact that the Claimant had called for the final statement in June 2018 and had repeated the call in July 2018. It is significant that the Defendant chose not to act on those calls but instead continued to believe that a commercial deal would be achieved and that it could avoid unnecessary expenditure by postponing work on the statement. That was a calculated commercial gamble which might in many instances have paid off but it was not as between the parties a reasonable approach. Although I was rightly not told of their content the parties accepted that there had been negotiations here. It would have been highly surprising if there had not been. However, that does not add anything to this assessment because it is not suggested that the Claimant had agreed that the Defendant could defer preparation of a final statement pending the outcome of those negotiations.

74. A further factor was that Mr. Flintham said he was awaiting the outcome of the Mosborough Adjudication. The question of the proper approach to calculation of the sums due (namely the debate between a calculation based solely on Subcontract rates and one including figures based on a cost reimbursable or reasonable sum basis) was an issue in that adjudication. Mr. Flintham said that he regarded it as appropriate to await the outcome of the adjudication because the decision would indicate which methodology was correct. I find that this was not a reasonable approach to take. The Mossborough Adjudication was not commenced until 5th July 2019 with the decision being delivered on 30th September 2019. The former date was just a few days short of 2 years after the termination of the Subcontract; 14 months after the last of the monthly tar payments was due; and 13 months after the Claimant had called for the final statement. Such a delay was not reasonable. This is particularly so as although the adjudicator's decision would give a potent indication as to the correct approach to calculation of the final statement it would not be conclusive.

75. It was also suggested that it was reasonable for the Defendant to delay until it had been told that the Claimant had concluded its audit of the figures. This confirmation was said only to have come in the letter of 27th June 2019. Indeed, as articulated in the submissions of Mr. Howells, the Defendant's case was that this was the date from which the reasonable period should run. As I have explained at [59] above the Claimant had waived any requirement for an audit by the letters of June and July 2018. In those letters the Claimant had called for the provision of a final statement and the absence of an audit was not a reasonable ground for any delay in such provision by the Defendant. In any event Mr. Flintham's evidence was that work on preparing the final statement started in April 2019 and that he was not waiting specifically for the Claimant's audit and so the Defendant was not, in fact, awaiting confirmation that the Claimant had undertaken an audit.

76. Mr. Howells made reference to the Claimant's solicitors' letter of 11th September 2019. This was an open offer to discontinue the proceedings on various terms. Those terms included the provision of a final statement by 2nd March 2020. Mr. Howells argued that the letter amounted to a concession that 2nd March 2020 was a reasonable date for the final statement to be provided. He said that it was, therefore, a concession that a reasonable period for the provision of the final statement had not yet elapsed and also a demonstration that the difference between the parties as to the duration of that period was a matter of a few weeks (the period between 2nd March and 1st May 2020). That argument is untenable. The letter was not an admission as to the duration of a reasonable period but was an offer of compromise on particular terms. The fact that it was an open offer and that the parties have referred me to it and to the Defendant's preceding open offer does not alter its nature or effect. The attempts at reaching a compromise failed and the Claimant is not precluded by the letter or otherwise from contending that the final statement should have been provided at an earlier date than 2nd March 2020.

77. It follows that even if the Defendant's obligation was to provide a final statement within a reasonable period rather than the one month period which I have found was applicable any such reasonable period has elapsed. If it had not elapsed by the time of the commencement of the proceedings in July 2018 it had certainly elapsed by the time of the amendment of the Particulars of Claim in April 2019. Thus even on that basis the Defendant failed to provide the final statement when it should have done.

The Declarations to be granted.

78. The first declaration sought is that the Defendant was obliged to submit a composite final statement by 1st July 2018. It follows from the conclusions set out above that the Claimant is entitled to a declaration in those terms.

79. The second declaration which the Claimant sought was that "the Defendant is (as at the date of these Particulars of Claim [namely 4th April 2019] in breach of its obligation under clause 17 (n) to submit a composite final statement for the Services and that the Defendant remains under an obligation to provide to the Claimant a final statement within a reasonable time (to be determined by the Court)". The Claimant is entitled to a declaration that the Defendant's failure to provide a final statement by 1st July 2018 was a breach of its obligations. Such a declaration is appropriate though in circumstances where there is no dispute about the facts it adds little to the preceding declaration.

80. However, it is not appropriate to grant a declaration that the Defendant is still in breach. The Defendant's breach was committed when it failed to supply the final statement at the time when it should have been supplied. That failure would have constituted a breach even if the Defendant had supplied a final statement the day after (subject to the point made at [62] above about the effect of the letter of 6th July 2018). There is no suggestion that a final statement has been supplied and this is not a case where, for example, there is a dispute as to whether a particular document was or was not an effective or valid final statement. It follows that there is no need for a declaration that the Defendant

has still not provided a final statement and a declaration that the Defendant is still in breach would add nothing to the preceding declaration.

81. The proposed declaration that there is an obligation to provide a final statement within a reasonable time is not appropriate and still less should the court determine what that reasonable time period is. The Subcontract provided for the final statement to be provided within one month of completion. I have found that in the circumstances here the statement was to be provided within one month of the letter of 1st June 2018. The Subcontract did not provide for a further period after the expiry of one month within which a final statement could or should be served. Nor does it include any default provision setting out the consequences of a failure to supply the final statement within the one month period. Thus, as Mr. Hickey noted, the Subcontract does not contain a provision of the kind which can found enabling the Claimant to submit a final statement in the event of the Defendant failing to do so. The Defendant said that for the court to grant a declaration in the terms sought would amount to an award of specific performance in circumstances where such relief had not been sought in proper form. That is right though in an appropriate case such an order could be made if the court was to be satisfied that no injustice was caused by any deficiencies in the Claimant's pleadings. However, there is in my judgement a more compelling reason why the declaration sought cannot be granted. That is that to grant this declaration would be to go further than ordering specific performance of the Subcontract. It would amount to a rewriting of the contract made by the parties. The proposed declaration would give an entitlement and/or impose a sanction not provided for in the contract. Thus it would amount to giving a further identified period for service of the final statement and potentially to imposing or envisaging a sanction for a failure to serve a final statement in that period. Although expressed as a declaration in reality the Claimant was seeking an order that a final statement be provided by a particular date with the prospect of the Defendant being said to have been in breach of the order if that was not done. Indeed Mr. Hickey expressly said that the Claimant envisaged that the Defendant would be in contempt of court if it were to fail to supply a final statement within the period specified in such declaration. Even without having regard to potential sanctions for breach of a court order the Claimant was seeking redress not provided for in the Subcontract namely a direction that if the final statement was not be provided within the period of one month from termination it be provided in some subsequent fixed period. Although it did not express matters in these terms the position is that the Claimant regrets the absence from the Subcontract of express provision for the consequences of a failure by the Defendant to provide a final statement within the stated period and the absence of any mechanism for compelling the service of the final statement. It does not seek to say that it is not open to the Defendant to provide a final statement after the fixed date or that a final statement provided late will be of no effect. Indeed, it presses for provision of the final statement. That regret is understandable and the inconvenience to the Claimant caused by the delay in providing the final statement can also be understood although another of the unusual features of this case was that both sides accepted that further payment was likely to be due to the Defendant pursuant to a final statement (though there was a marked difference of view as to the likely amount) but that it was the Claimant who was pressing for provision of the final

statement. Nonetheless that does not entitle the court to rewrite the parties' bargain and granting a declaration in the terms of the latter parts of the proposed second declaration would have that effect. Mr. Hickey was in reality acknowledging this when he argued that a declaration in these terms should be made because damages were not an adequate or available remedy. However, that was a consequence of the fact that it could not be shown that the breach has caused loss. Indeed, both sides appeared to believe that it had not caused loss because as just noted both expected a further amount to be payable to the Defendant pursuant to the final statement. The absence of loss flowing from the breach does not mean that the court should rewrite the Subcontract to give the Claimant a different remedy.

82. There had been dispute in relation to the third proposed declaration providing that "the Defendant's only remaining right to apply for payment in respect of the Services … is for the true value of the Services calculated in accordance with the Subcontract as submitted in the final statement." The Claimant had sought the declaration because it wished to forestall any further interim payment applications. The Defendant had taken issue with the proposed declaration because it was concerned that the proposed wording could give scope for an argument that its final statement would be invalid if it did not identify the true value correctly (and as explained above the parties disagree as to the appropriate methodology for the calculation). The Defendant does, however, accept that it can no longer make interim payment applications and that its payment entitlement is now confined to payment pursuant to the final statement. The Claimant does not seek to say that a final statement which adopted an incorrect methodology and which thereby failed to set out the true value would be invalid. The purpose of the proposed declaration was to prevent further interim payment applications not to tee up a means of striking down a future final statement. It follows that there is no longer a dispute between the parties as to whether the Defendant can make further interim payment applications and the Claimant is not seeking a declaration which goes beyond that. At one point I was attracted by the Defendant's argument that it is unnecessary to grant this declaration because the parties are agreed on the question of whether there can be further interim payment applications. On that approach the Defendant's late acceptance of the position might be relevant to costs but would not affect the fact that there was no longer a dispute and so the grant of a declaration would no longer serve a useful purpose. However, on balance I am persuaded that in the light of the changing stance that the Defendant has adopted and given that there was a dispute at the outset of these proceedings it is appropriate to grant such a declaration. It will be appropriate for the declaration to be worded in such a way as to make clear that it is not to operate to invalidate a final statement calculated on what turns out to be an incorrect basis and I will hear submissions from counsel on the wording which is appropriate.

83. The initial part of the fourth proposed declaration records the Defendant's entitlement to seek by way of adjudication or court application to open up, review, or revise payments received in respect of interim payment applications made in the period to 1st June 2018. That is uncontroversial. The dispute relates to the limitation which would be imposed on that entitlement by the latter part of the declaration providing that the Defendant can only do so "once" and "on

the basis that that the review is to determine the true value of the services calculated in accordance with the Subcontract."

84. The foundation of Mr. Hickey's argument was clause 17 (h) of the Subcontract. This provided that if an item or statement rendered by the Defendant was disputed the Claimant was to pay any undisputed element but should not be liable to pay any disputed element "until satisfied or it is agreed or ascertained … that the same is lawfully due." Mr. Hickey says that once the time for a final statement has come a payment can only be "lawfully due" if it accords with the true value as set out in the final statement. So any review of payments made or due pursuant to the interim payment applications must be, Mr. Hickey says, by reference to that true value. He says that it is not possible to challenge the payments other than by reference to that and says that in turn means the exercise can only be undertaken once. As Mr. Hickey put it in his closing submissions "of course you can only open up and review on true value once". The argument was supported by reference to the decision of Ramsey J in *Eurocom Ltd v Siemens* [2014] EWHC 3710 (TCC) and of Coulson J and the Court of Appeal in *Grove Development Ltd v S & T (UK) Ltd* [2018] EWHC 123 (TCC), [2018] BLR 173 and [2018] EWCA Civ 2448, [2019] BLR 1 respectively. I will address those authorities in due course but the core of Mr. Hickey's argument was his contention as to the consequences which flowed as a matter of inevitability from the fact that the time had come for the provision of the final statement.

85. In the proceedings before Deputy Judge Nissen the Claimant had sought a declaration that

> "the Defendant is not entitled to claim further payment adjustments to previous interim payments by way of adjudication but will be able to adjudicate any dispute as to its final payment entitlement upon crystallisation of the dispute following the submittal of a final statement."

86. Mr. Nissen found that contention to be unfounded saying, [63], that:

> "…pending resolution of the final payment, [the Defendant] is entitled to bring a claim through adjudication in respect of adjustments to amounts notified in respect of previous interim payments. Once (and if) it is accepted that [the Defendant] had a right to apply for such interim payments, both before and even after termination (whether pursuant to an agreement or on a convention basis) it must follow that the amounts so notified could be challenged by way of review."

87. Mr. Nissen also addressed an "additional nuance" which Mr. Hickey had put forward during the hearing before him. That refined contention, as summarised by Mr. Nissen at [64], was that

> "Insofar as the Court might, contrary to [Mr. Hickey's] case, see it as permissible for [the Defendant] to seek certain adjustments to interim payments in adjudication, involving an opening up, review and revision of a given Payment Notice so as to assess the true value of the sum due, he invited the Court to say [the Defendant] could not do so in a piecemeal fashion. Complaint was made that [the Defendant]'s claims had sought

> further sums, not on the basis of true value, but on the (disputed) basis that [the Claimant]'s own valuation methodology was accepted."

88. The Deputy Judge declined to make a definitive ruling on that point explaining that a Part 8 hearing was not an appropriate occasion for detailed debate on that point particularly in respect of a proposition which went beyond the pleaded declarations and which did not arise out of the claim as then formulated. Although declining to make a decision Mr. Nissen did express his assessment that it was appropriate for the issue of the permissibility or impermissiblity of a particular reference to an adjudicator to be dealt with in the first instance by the adjudicator. The Deputy Judge expressed matters thus, at [64]:

> "If those sorts of granular or contingent claims are made to the adjudicator in respect of a given application, it will be for him or her to determine the permissibility of that approach in the first instance. If it becomes appropriate to revisit that question in Court, whether on enforcement or by way of a separate Part 8 claim, then the issues about that can be properly ventilated in those proceedings at that time."

89. The Defendant says that the Claimant is seeking to sidestep and to subvert the decision made by the Deputy Judge. It is true that the contention now being made is a variant (a refined and developed variant perhaps) of that which was put before Mr. Nissen by way of an "additional nuance". However, it was not a matter on which the Deputy Judge gave a definitive ruling. The effect of his decision was that it was not appropriate to grant the revised declaration in the proceedings before him because it was not a matter apt for determination in Part 8 proceedings and also because it differed from the relief sought in the claim. Accordingly the Claimant was not precluded by the earlier decision from seeking the fourth declaration in the current and reformulated proceedings. The provisional indication by Mr. Nissen of the appropriate course is not binding on me.

90. In any event, the Defendant contends, the Claimant's argument is incorrect. The Defendant says that the proposed declaration would cause the Subcontract to operate as a fetter on the right to adjudicate and as such is precluded by section 108 of the Housing Grants, Construction and Regeneration Act 1996. The authorities invoked by the Claimant were concerned, the Defendant says, with attempts at repeated adjudication of the same issue and do not prevent repeated adjudication references in relation to the same payment application provided that each is concerned with a different issue.

91. In my judgement it is not appropriate to make a declaration propounding the limitation which the Claimant seeks to place on potential adjudications. This is principally for the reasons expressed by the Deputy Judge so cogently and succinctly. Whether a particular adjudication reference is permissible and meritorious is a fact specific question depending on the circumstances of the payment being questioned and on the particular issues raised in the reference. The answer to whether a reference is permissible is best given in relation to the terms of the reference in question. The adjudicator dealing with the particular reference will be best placed to determine the issue of permissibility because he or she will be doing so in relation to that reference. It is of note that the proposed

declaration and limitation would extend not just to references to adjudication but seemingly to applications to the court and such a blanket limitation is even less appropriate in that regard.

92. The position might have been different if I had been persuaded that the Claimant's contention was uncontestably correct such that any reference to adjudication would undoubtedly be impermissible regardless of its precise formulation unless it was a single one in respect of each payment application and made with reference solely to the true value as determined by reference to the final statement. However, I am not persuaded that is necessarily the case and that an adjudicator would inevitably have to take that approach when dealing with a particular reference. The consequences which the Claimant was seeking to derive from the words "lawfully due" in clause 17 (h) do not necessarily follow.

93. In terms of the authorities relied on by Mr. Hickey I find that Mr. Howells was correct to say that in *Eurocom Ltd v Siemens* Ramsay J was dealing with the question of an adjudication reference which went back over the same issue as an earlier determined adjudication. Such repeated adjudication of the same issue is impermissible. A party who seeks to make repeated references to adjudication in respect of the same interim payment application runs the risk of a finding that a subsequent reference addresses issues which had been or which should have been addressed in an earlier adjudication but it is possible to have separate adjudications about different elements of an application. In *Grove Development Ltd v S & T (UK) Ltd* Coulson J and the Court of Appeal were addressing the converse of the point contended for by the Claimant. They were considering the entitlement to have an adjudication by reference to the true value but the decision there does not mean that an adjudication must be so limited.

94. A further adjudication in the circumstances of this case by reference to other than the true value may well be a futile exercise and I am not holding that any particular future reference to adjudication by the Defendant will be permissible. That will be a question for an adjudicator and thereafter potentially the court making a decision in respect of a particular reference. I do not exclude the possibility of an adjudicator being entitled to conclude that a reference is impermissible by reference to the arguments now advanced by the Claimant. However, that decision will need to be made in relation to the particular reference and it is not appropriate at this stage to grant a declaration imposing the limitation sought. The first part of the fourth declaration is an uncontentious statement of the Defendant's general rights and a declaration in those terms would have no utility and will not be made.

95. It follows that subject to submissions from counsel as to matters of particular wording declarations in the terms of the first and third declarations sought are to be made together with limited elements of the second declaration.