Claim No A50MA088

Neutral Citation Number: [2015] EWHC 2923 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MANCHESTER DISTRICT REGISTRY
TECHONOLOGY AND CONSTRUCTION COURT

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ

Date handed down: 16 October 2015

Before:
HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

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Between :

	WILLIAM CLARK PARTNERSHIP LIMITED	**Claimant**
	- and -	
	DOCK ST PCT LIMITED	**Defendant**

- -
- -

Lucy Colter (instructed by **Kennedys Law LLP, Manchester**) for the **Claimant**

Justin Mort, QC (instructed by **Harrison Drury Solicitors, Preston**) for the **Defendant**

Hearing dates: 8, 9, 10, 11, 16, 23, 24 June 2015
Draft judgment circulated: 31 July 2015
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JUDGMENT **His Honour Judge Stephen Davies.**

1. INTRODUCTION

1.1 The claimant company [**Clark**] is a professional services practice which provided quantity surveying and project management services for the defendant company [**Dock Street**] for a development project at a site at Dock Street, Fleetwood, Lancashire, involving the construction of a new build primary healthcare centre for the North Lancashire Teaching Primary Care Trust [**the PCT**].

1.2 Clark claims that it is entitled to £174,500 as the balance of its professional fees account falling due under the deed of appointment by which it was retained.

1.3 Dock Street is dissatisfied with the services provided by Clark, contending that it failed to provide the specified services in certain key respects with the result that there was a considerable overspend on the project, amounting to £733,394.96 over the original contract sum as agreed with the appointed building contractor, F Parkinson Limited [**Parkinson**].

1.4 In such circumstances Dock Street contends that nothing more is due to Clark, and also seeks:

(1) Repayment of the amount of £195,000 already paid to Clark, further or alternatively that there should be a deduction, by application of the principle of abatement or otherwise, from any sum payable to Clark under the deed of appointment to reflect the services not provided.

(2) Damages for breach of contract and/or professional negligence in the amount of the overspend, plus reimbursement of certain liabilities incurred in relation to an adjudication brought against it by Parkinson in the course of which it reached the settlement which crystallised the overspend. As a separate allegation Dock Street seeks to recover as damages one part of the overspend in the sum of £214,557, which it contends represents the value of unnecessary variations to the project works for which Clark is responsible [**the unnecessary variations claim**].

1.5 Clark: (a) contends that it provided the services required of it and, accordingly, is entitled to payment of the balance as claimed; (b) denies that there is any right to repayment of amounts already paid; (c) denies that the right of abatement is available to Dock Street; (d) denies breach (although accepts that certain findings of breach are likely to be made following agreement reached between the experts); (e) contends that Dock Street is unable to show any causative link between any proven breach and the overspend, the adjudication liabilities and/or the value of the allegedly unnecessary variations.

1.6 At trial I heard evidence over 5 ½ days from:

(1) The two directors of Clark involved in this project, Edward Crewdson and Fred Brindle.

(2) The sole director and shareholder of Dock Street, Mark Abbott.

(3) The surveying manager at Parkinson responsible for this project, Adrian Whittle.

(4) The project manager at the PCT responsible for this project, Philip Hargreaves.

(5) The expert quantity surveying and project management witness for Clark, David Martin, and the expert quantity surveying and project management witness for Dock Street, David Baldwin.

1.7 As to those witnesses, in summary:

(1) My impression of all three principal witnesses, Mr Crewdson, Mr Brindle or Mr Abbott, was broadly similar. They are all, I am satisfied, basically honest men, but their reliability as witnesses was compromised by the strength of their conviction that they were in the right and the other party was in the wrong. There were numerous instances where it was clear to me that each was very considerably overstating the position in their favour, both in their witness statements and in their oral evidence, and where elements of their evidence were inconsistent in important respects with the contemporaneous documents and/or the inherent probabilities. In short, this is not a case where I can start from the position that I should prefer the oral evidence of one over the other in every case where there is a dispute. Fortunately, this is not a case which turns to any significant extent on hotly contested factual issues. Insofar as I need to make findings on factual matters in dispute, I

must consider the contemporaneous documents and the other evidence which I accept as reliable, have regard to the inherent probabilities, and assess the rival accounts by reference to those considerations.

(2) Mr Whittle was, I am satisfied, honest and broadly reliable in his evidence, which I broadly accept. However it does not follow that I can safely accept at face value everything that he asserted in contemporaneous correspondence, because in writing that correspondence his principal motive was undoubtedly – and perfectly properly - to advance the financial interests of his employer, Parkinson.

(3) Mr Hargreaves was manifestly honest and reliable in his evidence. Although he was also interested in protecting the position of the PCT as his then employer, it seemed to me that there was no obvious reason to doubt the reliability of his contemporaneous correspondence.

(4) Mr Martin and Mr Baldwin were both broadly speaking reliable and knowledgeable expert witnesses, who demonstrated their ability to reach and maintain independent opinions in their reports, joint discussions and statements, and in their oral evidence, even where those opinions were adverse to their respective client's interests. There were some respects in which their opinions differed, although mostly on issues which are not fundamental to the questions which I have to decide. I do not think that one was obviously more convincing than the other in every material respect. Where necessary I resolve any disagreements between them on an issue by issue basis. I did however consider that on balance Mr Baldwin's report was a little more tightly focussed and convincing than was Mr Martin's, and also that Mr Baldwin was a little more convincing witness in terms of "pure" quantity surveying matters, thus I tend to prefer Mr Baldwin's opinion on issues where there is any real doubt in my mind.

1.8 I have also received detailed and extremely impressive written openings and written and oral closing submissions from both counsel, for which I am very grateful. They also greatly assisted the court in reaching, and adhering to, sensible agreements to divide the time for cross-examination of the other's witnesses equally, so as to enable the evidence in what was a factually complex case to be concluded with the time allocated at the start of the trial with only limited overrun. There has been a considerable delay in handing down this judgment in final form, after it had been circulated in draft on 31 July 2015, due to Dock Street's wish to address me on one substantive matter, the time for which had to be extended, due to holidays and availability for a further hearing for judgment to be handed down and all consequential matters addressed.

1.9 The issues which arise for determination may be summarised as follows:

(1) Breach, causation and loss in relation to pre-construction phase services.

(2) Was the contractual trigger point for payment of Clark under the deed of appointment satisfied?

(3) Is Dock Street entitled to a deduction (by abatement or otherwise) in relation to any non-performed or defectively performed pre-construction phase services?

(4) Breach, causation and loss in relation to construction phase services: the "global loss" claim.

(5) Breach, causation and loss in relation to construction phase services: the "unnecessary variations"

claim.

(6) Is Dock Street entitled to a deduction (by abatement or otherwise) in relation to any non-performed or defectively performed construction phase services?

(7) Breach, causation and loss in relation to post-construction phase services.

(8) Is Dock Street entitled to a deduction (by abatement or otherwise) in relation to any non-performed or defectively performed post-construction phase services?

1.11 My conclusion in relation to each of those issues is as follows:

(1) Dock Street has failed to make good its claim for damages in relation to the pre-construction phase.

(2) Clark is entitled to payment of the balance of £162,500 (inclusive of VAT) under the deed of appointment, subject to one deduction under (6) below.

(3) Dock Street is not entitled to make any deduction in relation to pre-construction phase services.

(4) Dock Street has failed to make good its claim for damages in relation to the construction phase.

(5) Dock Street has made out its claim to damages in relation to unnecessary variations, but only in the sum of £52,023.46.

(6) Dock Street is entitled to make a deduction of £25,000 plus VAT in relation to construction phase services.

(7) Dock Street has made out its claim for damages in relation to the post-construction phase, but only in the sum of £37,500.

(8) Dock Street is not entitled to make any deduction in relation to post-construction phase services.

1.12 The end result therefore is that subject to any issues as to precise quantification and VAT, and before any questions of interest fall to be determined, Clark is entitled to recover the principal sum of £132,500, and Dock Street is entitled to recover damages of £89,523.46, with a set-off producing a net amount payable to Clark of £42,976.54.

1.13 In the remainder of this judgment I will begin with the history, and then proceed to give my reasons in relation to each of the above issues. The relevant sections can be found as follows:

5	Is Dock Street entitled to a deduction (by abatement or otherwise) in relation to any non-performed or defectively performed pre-construction phase services?	pp31-34
6	Breach, causation and loss in relation to construction phase services: the global loss claim.	pp34-42
7	Breach, causation and loss in relation to construction phase services: The unnecessary variations claim.	pp43-49
8	Is Dock Street entitled to a deduction (by abatement or otherwise) in relation to any non-performed or defectively performed construction phase services?	p50
9	Breach, causation and loss in relation to post-construction phase services.	pp50-53
10	Is Dock Street entitled to a deduction (by abatement or otherwise) in relation to any non-performed or defectively performed post-construction phase services?	p53

2. HISTORY

2.1 This section is not intended to be exhaustive, but does include my findings on matters which are, to greater or lesser extent, in dispute. Where it is necessary to go into more detail to resolve specific issues, I do so at the relevant points in the judgment.

2006

2.2 In 2006 Mr Abbott acquired a large site at Dock Street, Fleetwood, in part for the use of his internet mail order company, Colourbanners, and in part for potential future development [**the development site**]. It was part financed by a loan from Barclays Bank, who took a legal charge. Mr Abbott had no previous experience in property development, but did have extensive previous business experience.

2009

2.3 By 2009 Mr Abbott was seriously considering embarking on the development of the site into a primary healthcare centre [**the centre**]. He had been negotiating to sell the development site to a company involved in a similar scheme in St Annes, Lancashire, where Clark was involved as QS, and where Parkinson was involved as building contractor, but those negotiations had fallen through, leaving Mr Abbott with the thought of doing it himself. The local PCT was in receipt of central government funding to provide primary healthcare centres, whereby a number of different medical services (such as medical practices, dental practices, pharmacies and the like) would be provided under one roof, and was particularly interested in doing so in deprived areas such as Fleetwood. Mr Hargreaves was responsible for such projects. In general terms, Mr Hargreaves's role was to assemble everything necessary for the project to proceed to a successful outcome, with the various end users being brought on board, the centre being built to an approved design and specification, with the developer granting a commercial lease to the PCT, and with the PCT in turn granting subleases to the various end users.

2.4 Mr Abbott was introduced to Mr Crewdson through a mutual contact, who was aware of Clark's

involvement in the St Annes project, and they met in May 2009. I am satisfied that both men saw considerable benefits in working together on the project. For Clark there was the opportunity to earn fees in a challenging market, to enhance its reputation in this niche area and, as Mr Crewdson believed, potentially to obtain a stake in business itself [§35 WS1]. For Mr Abbott there was the opportunity to engage a practice with specialist expertise to run the project from start to finish, especially in circumstances where without such involvement the PCT in general, and Mr Hargreaves in particular, was understandably wary of committing itself to a substantial project with someone with no track record of property development of any kind, let alone primary healthcare centres. I have no doubt that Mr Crewdson stressed Clark's knowledge and experience of this type of project, and explained that as an experienced quantity surveyor and project manager Clark would take responsibility for putting together the necessary design team, bringing on board a suitable contractor and dealing with the construction process from start to finish, including the necessary financial aspects.

2.5 I am also satisfied that following these discussions Mr Crewdson was willing to proceed on the basis that:

(1) Mr Abbott had made it plain that he did not have the means to fund this development privately, and would need to raise money from a commercial funder for the development to proceed.

(2) Clark and the rest of the design team would – as is not unusual in projects of this nature - have to be prepared to undertake the initial work on a speculative basis, so that unless the project proceeded they would not be paid.

2.6 Although it was Dock Street's pleaded case that Mr Abbott told Mr Crewdson that its budget for construction costs was no more than £7M, Mr Abbott did not say this in his witness statement and in cross examination [D3/131] accepted that he had not done so. I am satisfied that the question of the budget was addressed in the context of the discussions about Mr Abbott's funding arrangements. The reality, as Mr Abbott also accepted in cross-examination [D3/143], was that there was no set budget for the construction costs, or indeed for the project costs generally, because the crucial questions were: (i) whether a commercial funder was prepared to advance the necessary funds to cover the anticipated costs; and if so (ii) whether the repayment instalments could be covered from the rental agreed with the PCT for the lease of the centre to be entered into upon completion, leaving sufficient margin to make it worthwhile for Mr Abbott to undertake the project.

<u>The negotiated tender process</u>

2.7 By July 2009 enough had been done by Clark to persuade Mr Hargreaves to give his backing to the project. At this point in time the PCT was very keen to move quickly with a view to having the centre finished by December 2010. Clark, having regard to this time pressure, proposed that instead of running an open competitive tender process what is known as a negotiated tender process should be adopted, using Parkinson as the preferred contractor. The rationale was explained by Mr Brindle in a letter to Mr Hargreaves dated 8 July 2009. In short, it would obviously save considerable time and effort if the process of producing a detailed invitation to tender and undertaking a formal tender process could be circumvented by using the existing detailed information from the St Annes project where appropriate, adapted and augmented as necessary, and by asking Parkinson to provide an itemised quotation based on that information. Since: (i) it would be possible to compare Parkinson's quoted prices with those quoted and agreed on the St Annes project; (ii) Parkinson had been appointed as contractor on the St Annes project after running a competitive tender process; and (iii) there was general satisfaction as to Parkinson's performance as contractor on that project, adopting this process would, it was thought, result in a quotation which could be demonstrated to be competitive and could be relied upon as coming from a contractor who all concerned would be willing to appoint to undertake the works.

2.8 It is clear that everyone was willing to proceed on this basis, particularly Mr Hargreaves who had to be satisfied that the PCT could properly approve this procurement route as complying with good public sector procurement practice. The building contract value was important to the PCT because it would be used, in part, as the basis on which the rental payable under the eventual lease would be calculated. It is clear that Mr Hargreaves was satisfied that the project could properly proceed on this basis. Although he did at one point suggest obtaining an alternative quotation from another contractor, Allenbuild, who had undertaken another healthcare centre on a design and build basis at Lytham, Lancashire, in the end he was satisfied that the proposed procurement route was acceptable, particularly in circumstances where the various sub-contract elements of the works, including the mechanical and electrical [**M&E**] elements, were to be the subject of competitive sub-contract tenders in due course.

2.9 I have no doubt that this approach also had the benefit, so far as Clark and the other design team members were concerned, of reducing the time and effort they would have to put in on a speculative and, hence, potentially unpaid basis.

2.10 Although there is no evidence that Mr Abbott was given any formal advice as to the various tender options, it is quite clear in my view that he knew in general terms about what was being proposed, and in due course what had been agreed as the way forward, and the reasons behind it. Thus it is apparent from the agenda and the minutes that the process was discussed at a meeting held on 13 July 2009 at his offices, where he was present, and that he was also copied in to correspondence which referred to it. Whilst I entirely accept that Mr Abbott would not have had any real understanding of the detail of the procurement options commonly used in the construction sector, I am satisfied that at a basic level he knew as an experienced businessman and house-owner that there was a difference between: (a) seeking quotations from 2 or more contractors in competition; (b) negotiating a price with just one contractor, selected on the basis of their involvement on a previous project. I am also satisfied that he was happy to proceed with the second option on the basis that everyone else was happy with it, and that by saving time and money it improved the prospects of the PCT approving the project.

2.11 From July 2009 onwards the design team, including a firm of architects, Manning Elliott, was assembled and the scheme design progressed. The plan, noted by Mr Hargreaves in a "design brief" document, was to reach a point where the design was agreed and signed off prior to submitting an application for planning permission. It appears that this was done, and planning permission was duly applied for and obtained on 8 January 2010. In the meantime:

(1) Mr Abbott had instructed solicitors, Forbes of Preston, to prepare a draft agreement for lease and to negotiate its terms with the PCT who, on 3 December 2009, sent a letter of intent to Mr Abbott enabling him to proceed with the detailed plans.

(2) Mr Abbott had also instructed Gerald Eve, property advisers, to produce development appraisals for use in negotiations with the PCT as to the appropriate rental value. In November 2009 Mr Brindle was advising Gerald Eve, copied to Mr Abbott, that construction costs would be approx. £7.5M.

(3) Mr Abbott had begun the demolition of the existing structure on the development site at his own expense.

2.12 Once planning permission was secured Mr Abbott entered into discussions with potential commercial funders, including Aviva, with a view to securing finance for the development. Aviva was in principle willing to advance funds, but subject to various conditions, including a requirement that Mr Abbott should provide some initial equity investment, and also subject to some very detailed requirements as to

acceptable contractual structures, specifically the use of either a JCT standard building contract or a JCT design and build contract. It is clear that throughout this period Clark produced a number of different cost estimates, based on differing schemes, which were being used in the development appraisals both for the purpose of the negotiations with the PCT as regards the terms of the agreement for lease and the purpose of the negotiations with Aviva as regards funding.

2010

2.13 Mr Brindle had also secured a quotation from Parkinson. By February 2010 agreement had been reached in principle on a contract sum of £7,840,344. Mr Abbott was keen to proceed, even though there was still no concluded agreement for lease or confirmed offer of funding from Aviva. It appears that Parkinson was also keen to get started, because in the challenging prevailing economic climate it was not inundated with other good quality work. Accordingly Mr Abbott instructed Clark to instruct Parkinson to proceed under a letter of intent, which was produced and sent on 2 March 2010. Parkinson started works that same month. In cross-examination Mr Abbott readily accepted [D3/155] that this was a commercial decision which he alone made, and did not in any way seek to suggest that Clark was in any way responsible for this decision.

2.14 Although the letter of intent was ostensibly sent on behalf of "Dock St. PCT Ltd" it is common ground that the defendant company was not in existence at the time, not being incorporated until December 2010. What was proposed at that time was that the project would be undertaken by an offshore company which Mr Abbott, following financial advice, was intending to use as the vehicle for this project. However in fact the Jersey incorporated company known as Dock St PCT Limited was not incorporated until 16 April 2010, after the date of the letter of intent. There was some debate at trial as to who, if anyone, might have been liable to Parkinson under that letter of intent, had the question arose. It appears most probable to me that Mr Abbott would have been personally liable, as the person who had instructed Clark to instruct Parkinson to proceed on behalf of what was then a non-existent company. However there is no suggestion that anyone was alert to this as an issue either at the time or at any later stage during the life of the project. It is apparent that later on, when Parkinson made a claim against Dock Street which could only have been made under the letter of intent, it was dealt with by Dock Street as its liability without any analysis of the strict legal position, and passed on to and accepted in part by the PCT on a similar basis.

2.15 By May 2010 matters had still not been concluded with the PCT, and Parkinson ceased work on the basis that unless and until the agreement for lease was concluded and funding was obtained it was not going to be paid for the work which it was doing. At this stage the relationship between Mr Abbott and Parkinson was still perfectly amicable, with both parties proceeding on the basis that the job would be re-started as soon as it could. In August 2010 Parkinson submitted details of its "account to date if the project does not proceed". The account totalled £2.9M, although Mr Whittle very frankly admitted in cross-examination that the true value of the works actually undertaken was closer to £1M, with the balance representing primarily contingent claims for cancellation of sub-contracts which had not in fact been entered into, and Parkinson's prospective claim for loss of profit should the contract not materialise. It is apparent that this claim was therefore considerably inflated on any objective analysis, as all knew, with the commercial purpose of passing it on to the PCT to seek to put pressure on it to commit to the agreement for lease.

2.16 In the meantime, in June 2010, Mr Brindle had negotiated a reduction in the contract price with Parkinson from £7,840,344 down to £7,330,763.85, by what was described as a "comprehensive value engineering exercise". The email from Mr Brindle confirming this identified that savings had been made by reducing the scope of works in relation to three main elements, namely: (i) works to part of the building which the PCT did not want at that point but which Mr Abbott wanted to retain for future letting as a pharmacy; (ii) the M&E services; and (iii) the furniture. There is no suggestion by anyone that this was not a perfectly

genuine exercise.

2.17 However matters were going from bad to worse at a more fundamental level because at that stage, due to the general election, the PCT had decided that it was not prepared to commit to anything until it could be confirmed that the funding for the project would not be withdrawn under the incoming government. In October 2010 there was a discussion about reducing the contract sum still further, seemingly instigated by the PCT which was seeking to achieve a further rent deduction by reducing the construction costs, and a letter was sent to the PCT on 11 October outlining some further proposed savings. This letter, which was obviously written by Mr Brindle for Mr Abbott to send, referred to the previous savings already achieved, stating that they "did not leave a great deal of room for large cost deductions". Whilst this was obviously true, there is no suggestion that the further proposed savings identified in that letter, amounting to some £330,000, were not being put forward by Mr Brindle as genuinely achievable savings.

2.18 Fortunately, in November 2010 the PCT decided to proceed with the project, and provided a letter confirming its intention to enter into an agreement for lease in relation to the centre. At that point all involved started working again in earnest to resolve all outstanding matters so that the project could recommence without delay.

2.19 In December 2010 the decision was taken, and implemented, to incorporate Dock Street to undertake the project rather than using the Jersey company. Mr Abbott and Mr Crewdson were made directors of Dock Street, although Mr Abbott was the sole shareholder. I am satisfied that Mr Crewdson became director at his instigation, consistent with his previous representation that Clark would take care of everything, and with his interest in obtaining some financial share in Dock Street. I am also satisfied that it was done with Mr Abbott's full knowledge and consent, on the basis that it would allow Mr Crewdson to act on behalf of Dock Street in relation to the day-to-day matters requiring attention, without the need for Mr Abbott to be involved at every stage.

<u>The further reduction of the contract price</u>

2.20 At that point however a further potential major obstacle emerged. Part of the funds to be obtained from Aviva were to be used to fund the acquisition of the site by Dock Street, including redeeming the charge held by Barclays over the site. However Barclays decided in December 2010 that it was not prepared to redeem the charge unless Mr Abbott paid off around £1M of the monies he owed it, instead of the £700,000 which it had previously been understood it required. Unless the charge was redeemed, Aviva would not release the funds, and the project simply could not proceed. As Mr Abbott accepted, if the project could not proceed, he would have been in desperate straits, unable to meet a very substantial liability to Parkinson for the work it had already undertaken, and unable to take advantage of what appeared an extremely profitable development opportunity. Accordingly, he asked Clark to make further savings to the contract sum agreed with Parkinson, to allow a further £300,000 to be raised which could be used to pay off Barclays. It is common ground that Mr Brindle held further discussions with Parkinson, which resulted in a further agreed reduction of the contract price from the £7.3M figure down to £6,966,605. The reductions are shown in the handwritten amendments to the sums quoted by Parkinson against the bills of quantities [**BQ**] produced by Clark at [2/459]. They are also shown in a summary produced by Mr Brindle at the time [2/348], which includes a brief narrative as to the reasons for the reductions.

2.21 It has always been Clark's positive case (see §12 of the Amended Reply and Defence to Counterclaim and Crewdson §67-69, WS1) that this was an "artificial" reduction, which had not involved any genuine identified savings or reduction in the scope of works and which, as Mr Abbott well knew because he was specifically advised by Clark, left the contract sum short so that Mr Abbott would very likely have to find

the funds to make up at a later stage. I am unable to accept this case, for a number of reasons.

(1) At [§67, WS1] Mr Crewdson had referred to the reduction being "achieved by removing further provisional sums and contingency sums". However even a cursory examination of the contemporaneous documents shows that no contingency sums were removed.

(2) It is obvious, and in the end was accepted even by Mr Crewdson – who I am afraid to say was particularly evasive on this issue in cross-examination - and by Mr Brindle, that there were genuine substantial savings achieved by reductions in the scope of works, for example the removal of the wind turbine and the brise soleil. Moreover, there was no basis for any suggestion that the further reason given by Mr Brindle at the time, namely that the M&E consultant had expressed the view that savings could be achieved in relation to the M&E package, was in any way untrue or incorrect. In cross-examination Mr Brindle said that the M&E consultant was "invited to make a contribution" to the reduction which was required, but did not suggest that the consultant did not genuinely believe at the time that savings could not be made to the M&E package (and as indeed subsequently transpired to be the case).

(3) The savings achieved in this exercise were consistent in general tenor and value with the savings previously indicated as achievable by Mr Brindle in his earlier letter to the PCT dated 11 October 2010, to which I have already referred.

(4) There is no indication that Parkinson believed at the time that these were anything other than genuine and achievable reductions. Mr Whittle in his evidence confirmed as much. Moreover, although it appears clear from Mr Hargreaves' evidence that these reductions were not disclosed to the PCT, they were certainly disclosed to Aviva's monitoring surveyor, GVA Grimley, by email dated 23 December 2010, and GVA Grimley expressed no concerns that these reductions were not achievable.

(5) Although through her diligence Ms Colter had identified, in her closing submissions at §113, three individual items to the combined value of some £61,000 which appeared to have found their way back into Parkinson's final account, that does not of itself mean that they were always known the time to be artificial, and in any event it follows that the remainder of the deductions identified had indeed been achieved.

2.22 I am prepared to accept that Mr Abbott was aware in general terms that there was a risk that the eventual construction cost might increase for one reason or another, and that he might have to find some extra money to cover that increase. I did not accept his evidence that at the time he had no inkling that there was any risk of the costs increasing. I am satisfied that he is someone who has always been reasonably confident in his ability to find money from one source or another to cover his immediate cashflow requirements, and not particularly aware of, let alone troubled by, the niceties of keeping personal and corporate funds properly separated. I am also satisfied that he was reasonably confident he could provide short term funds in this case for that purpose, if the need arose. However insofar as it is suggested I do not accept that he entered into the project knowing that the reduced contract sum would be inadequate, and that he would have to find another £300k at some point to make up for the reduction. There is no evidence whatsoever that Clark ever told him this at the time, and I do not accept that they did.

2011

Dock Street enters into the various contracts

2.23 Once the potential problem with Barclays had been surmounted matters were able to proceed and in

January 2011 the contracts necessary to enable the project to proceed were entered into. In particular, Dock Street entered into: (a) a formal building contract with Parkinson on 17 January 2011; (b) an agreement for lease with the PCT on 13 January 2011; (c) a loan facility agreement with Aviva, also on 13 January 2011.

2.24 There is no need for me to over-lengthen this judgment with a detailed exposition of the terms of these documents. For present purposes it suffices to say that:

(1) The building contract was, as required by Aviva, in the form of the 2005 edition of the JCT standard form of building contract with quantities. It incorporated the bills of quantities produced by Clark and the specification produced by the design team, and the contract sum was the reduced figure of £6,966,605 previously agreed. It appears to be the case that the detailed design of the works, as contained in the building contract documents, had evolved very little since planning permission had been obtained in January 2010, save in so far as reductions in scope had been made in June 2010 and again in December 2010, as described above. There is no indication that prior to the building contract and the agreement for lease being entered into there had been any further extensive input from the PCT or its prospective tenants into the detailed design.

(2) The contract administrator under the building contract was identified as being the project architects, Manning Elliott, and the quantity surveyor was identified as being Clark. There were the usual provisions for interim and final valuations and certificates, for the instruction of and valuation of variations, and for either party to be entitled to refer any dispute to adjudication in accordance with the provisions of the Housing Grants Construction and Regeneration Act 1996.

(3) The agreement for lease referred to various documents, attached to it, which identified Dock Street's obligations in terms of the detailed design and build of the centre, namely various room data sheets, a list of items and equipment (known as an "ABC list") and various drawings and specifications. The room data sheets are important documents because they identified in some detail what was required to be provided in relation to each of the rooms in the centre, the room layout within the centre being identified by the drawings.

(4) The agreement for lease also contained, in clause 7, a formal process for the ordering of variations by the PCT. In summary if the PCT required any variation to the works it was to forward plans and specifications showing the varied works, which Dock Street could not unreasonably refuse to undertake, and whereupon the PCT should "pay all proper and reasonable costs and proper and reasonable expenses incurred by the landlord in connection with such variation". Clause 7.6 required any such variations to be notified in writing to the District Valuer who was, in effect, the PCT's financial watchdog, and who had been involved in agreeing the rent payable under the eventual lease.

2.25 Dock Street also entered into formal deeds of appointment with the various members of the design team, including Clark. The entry into these agreements, coupled with the first drawdown of funds from Aviva, enabled Dock Street to make payments to the design team, again including Clark. There is some controversy between the parties, which was explored at trial, as to the circumstances in which Clark's fee, previously identified as 2% of the project cost, came to be fixed at £300,000 in the deed of appointment as entered into on 13 January 2011. The experts are agreed that this fixed lump fee exceeded the then current market rate by some 40%. However, since it is accepted by Dock Street, as it must be given the pleaded case, that the deed of appointment is a valid and binding contract as between the parties, it is not necessary for me to resolve the dispute as to whether or not Mr Abbott was aware that the fee had been changed from 2% to £300,000. What is, I think, reasonably clear is that it was Clark's view that it

was entitled to more than 2% because of the extensive time and effort it had already put in on a speculative basis, because of the extensive range of services to be provided, and because of the extensive range of individuals and entities with whom it needed to deal to bring the project to a successful conclusion. If I had to decide the point, I would conclude that Mr Abbott was aware at the time of the increase in fee level, and was prepared to agree it at the time because he appreciated that without Clark's involvement he would never have got the project off the ground, because he also believed that Clark was providing a complete service enabling him to leave everything that needed to be done to Clark, and because the extra cost would not come out of his or Dock Street's pocket anyway since the design team funds were being covered by funds from Aviva.

2.26 It is necessary for me to refer to some of the relevant terms of the deed of appointment at this point:

(1) By clause 1, it was provided that any services already provided in relation to the development were to be treated as having been provided under the terms of the deed of appointment.

(2) By clause 3, the services to be provided by Clark were specified in Schedule 1. Schedule 1 identified the services to be provided by Clark as project manager and as quantity surveyor separately. In each case, the services were also separated into pre-construction services, construction period services, post-construction services and general services. Schedule 1 extends over 7 pages, and rather than attempt to summarise the specific services included I will address them as necessary when I come to consider Dock Street's case on breach.

(3) By clause 4.1, Clark was to have "due regard" in the performance of its services to Dock Street's budget and programme requirements, and to inform Dock Street without delay if it became aware of circumstances which might prevent it from carrying out the development in accordance with its budget or programme.

(4) By clause 5.1, Clark undertook to exercise the professional skill and care and diligence reasonably to be expected of duly qualified and experienced consultants undertaking the services contracted to be provided on this project.

(5) Clause 7 provided for remuneration as specified in Schedule 2. That provided for the inclusive fee of £300,000, to be invoiced in the following instalments: "65% at completion of tender stage and the balance by equal monthly payments over the contract period". It also provided for contractual interest. There was no express provision entitling Clerk to suspend works in the event of non-payment, although it is common ground that such a right would be implied pursuant to, but in accordance with, the terms of the Housing Grants Construction and Regeneration Act 1996. There was, however, an express provision for termination by Clark in the event of material breach by Dock Street.

<u>No competitive tender process</u>

2.27 It is common ground that there was no suggestion by Mr Crewdson or Mr Abbott (or anyone else involved in the project) at any time prior to the building contract being entered into that the negotiated tender process already completed with Parkinson should be jettisoned and a competitive tender process should be run in its place. It is quite apparent that this is something which did not occur to anyone at the time as being necessary or appropriate notwithstanding that on first reading the quantity surveying services contained in schedule 1 to the deed of appointment envisaged a competitive tender process. The reasons why this was not thought of as being necessary or appropriate at that time are self evident. First, even though the appointment did appear to envisage a competitive tender process, that had not been the

subject of any conscious thought, discussion or agreement. At the time everyone wanted the project to proceed without further delay or risk, and everyone was perfectly happy for the project to proceed with Parkinson as the contractor on the basis of the already significantly renegotiated reduced contract sum. It appears that the schedule of services were largely cut and pasted from those previously used by Clark on the previous St Annes project without the parties applying their minds to what amendments if any should be made to reflect the differences between the two projects. As Mr Crewdson agreed in cross-examination [D1/144], when being asked about the fact that the schedule made no reference to assisting Dock Street in seeking to recovering variations against the PCT under the agreement for lease, the appointment document "didn't really fit in with what was happening on this project".

2.28 Undertaking a competitive tender process would inevitably have involved some further delay, and it would also have involved some further risk, for little obvious benefit to Dock Street. That is because Parkinson would undoubtedly have been very unhappy about having to re-tender in competition and, if it had not won the tender, would almost certainly have looked to Mr Abbott personally for payment of the costs it had already incurred, which Mr Abbott had no way of discharging other than by raising funds from Aviva or another lender. Even if Parkinson had re-tendered the most competitive tender there was no guarantee that the process would have produced a cost saving of any significance, in circumstances where there had already been two rounds of value engineering in which the price had been reduced by around £900k. Most significant of all so far as Mr Abbott would have been concerned, it would not have been perceived by him as obvious that Dock Street would see the benefit of any cost saving achieved. That is because if the PCT became aware of the saving it would likely have wanted to renegotiate the agreed rental downwards to take that into account. It was Mr Hargreaves' evidence that up to and until contracts being signed the PCT's view would have been that it should see the benefit of any contract sums reductions. Further, and additionally, if Aviva became aware of the saving it might have wanted to reduce its loan facility to reflect the decrease in contract cost. In short, and as Mr Abbott really accepted in cross-examination [D3/172], I have no doubt that if it had been suggested in January 2011 that a competitive tender process be undertaken, with Clark giving proper advice as to the pros and the cons, Mr Abbott would not have wanted to go down that route.

Changes to the works

2.29 It is Clark's case that there were significant changes to the works after the building contract was entered into. Clark contends that there were two principal reasons for this. The first is that the works as specified in the building contract, particularly the internal works, had not been fully designed out, because whilst the initial design had been sufficient to obtain planning permission in January 2010, the design team had not been required, nor would they have been willing, to undertake further design work "on spec" prior to the project being given the go-ahead, prior to contractual appointments being entered into, and prior to receiving the first of the payments due to them. The second is that once the agreement for lease had been concluded the PCT began to involve the prospective sub-tenants in the detailed internal design and, as a result, extensive alterations to the internal design were requested.

2.30 It is not disputed by Dock Street that there was some element of change to the works for both reasons, but there is a real dispute as to the nature and extent of those changes and also whether the change process continued to a very significant extent over the whole duration of the works, as Clark contends, or were limited to the early stages, during the course of the initial internal design exercise which, it is common ground, largely occurred from January 2011 to around March 2011.

2.31 It is very difficult if not impossible on the information produced to the court to reach clear or detailed conclusions on these issues. Looking ahead for a moment, the final account submitted by Parkinson at the conclusion of the works included voluminous details as to the changes to the works which had resulted,

in Parkinson's assessment, in the cost increasing dramatically. However Clark itself has not, whether at the time or subsequently in connection with this litigation, conducted or provided details of any detailed analysis of that final account submission which specifically identifies the detailed design changes made, or the alterations requested by the PCT or its sub-tenants, whether by reference to their timing or their impact or their cost. Nor has Mr Baldwin, Dock Street's expert, nor anyone else on Dock Street's side, conducted such an analysis. Nor for that matter has Mr Martin, Clark's expert.

2.32 In Mr Crewdson's witness evidence [§137, WS1], where he summarised the reasons for the increase in the cost of the project, he included a figure of c.£63,000 for "changes and details requested by the PCT", but nothing for detailed design and development. Mr Brindle in his first witness statement stated that he agreed with the contents of Mr Crewdson's statement. Neither sought to explain in their witness statements documentation produced by Mr Brindle in January / February 2013, in which a substantial, but unparticularised, allowance was made for non PCT variations. Furthermore, it is a striking feature of this case that there is no contemporaneous letter from Clark, or even a passing reference in any e-mail or record of meeting, let alone a formal cost report or formal minute of any meeting during the course of the works, in which advice is clearly given by Mr Crewdson or by Mr Brindle to Mr Abbott to the effect that the cost of the project was likely substantially to increase as a result of PCT or sub-tenant instigated changes or ongoing detailed design and development.

2.33 In her closing submissions Ms Colter relied upon certain contemporaneous documents as showing that there were such significant changes. In particular she placed reliance upon:

(1) An e-mail from Mr Whittle to Mr Brindle dated 5 April 2012 in which he said that:
"As we are all aware, [the] BQ bears no resemblance to the works we were ultimately instructed to carry out due to additional works and specification changes. That is the main reason the account has gone up in value. IE doors staircases partitions flooring ironmongery clean lines. The list goes on and is highlighted in the latest valuation.
I have been offering my concerns over finances for many months now, in September I thought we were £400k over the contract sum when we met at your offices.
Even as we speak we apparently need another lamp in one of the rooms costing another 4k. More boxes for electric equipment. Pebbles to the courtyard, attendance works to x ray room, etc, etc. Should we be doing these works or are we compounding a problem?"

(2) A letter from Mr Brindle to Mr Hargreaves dated 24 May 2012 in which, responding to Mr Hargreaves' request for more detail to support a claim for increased design team fees as a result of internal layout changes, Mr Brindle set out a summary of the alterations required by the PCT and tenants, and concluded: "The value of works affected in this exercise are in excess of £3 million so approximately half of the project content had to be revisited". She also relies upon the fact that Mr Hargreaves, when this was put to him in cross examination [D4/266], did not without reference to the drawings feel able to dispute its accuracy, although I do not for my part take this as anything more than natural prudence on his part.

(3) A comparison between the original and the revised layout drawings, and the minutes of some of the meetings, which appear to show the production of revised room data sheets sometime in 2011.

2.34 Whilst I accept that these documents do indeed provide support in general terms for Clark's position they do not, in my view, provide any real assistance in enabling me to understand the sheer scale of the changes, let alone the extent to which some or all represented PCT or sub-tenant instigated changes as opposed to ongoing detailed design and development, and let alone (in either case) the extent to which these changes continued to occur to a substantial extent even after the initial redesign in early 2011, or the

scale of the actual costs associated with each. In so finding I am not to be taken as implicitly finding that Clark bears any onus of proof as such, only that insofar as Clark seeks to persuade me by reference to detailed evidence that I am able to make positive findings in its favour that these changes were extensive, both in substance and duration, and that their cost and impact was equally extensive, it has not succeeded in doing so.

2.35 However I am satisfied that Clark cannot be blamed for the lack of detailed design as at the point these contracts were entered into, even if there had been – which there is not - a detailed pleaded case supported by evidence setting out Dock Street's case as to precisely in what respects it was incomplete or inadequate, let alone why Clark ought as project manager and/or quantity surveyor to have known it to be so. Since the design team were working on a speculative basis Clark, in its capacity as project manager, had no lever to compel the architect, for example, to do further detailed design work until such time as it was formally appointed and received some payment. Furthermore, Clark had no ability to compel the PCT or its proposed tenants to provide detailed design input prior to conclusion of the agreement for lease. Finally, I have no doubt that the last thing that anyone, including Mr Abbott, would have wanted was to have a lengthy hiatus immediately prior to contracts being signed in order to complete the design first, followed by some form of Mexican standoff whilst everyone wrangled about who should absorb the extra costs of the design development or changes and how if at all the contracts should be amended accordingly.

Valuation of changes

2.36 I am unable to accept Clark's case that Mr Abbott was given oral advice on a regular basis throughout the course of the works as to the nature and extent of the changes and the scale of the actual or likely costs associated with them. Indeed there is no hard evidence that at any time during the course of the works Clark attempted to put any detailed or reasoned valuation on these costs, even though it was apparent from communications from Parkinson that it considered that it was incurring significant costs as a result. There is an e-mail sent by Mr Whittle to Mr Brindle on 22 September 2011[2/701] in which he referred to the fact that his final account assessment, albeit very provisional at that point, was indicating a predicted overspend of £457,000, and expressed his concern as to Mr Abbott's ability to fund any overspend. The further email exchange on 28 and 29 September 2011 [2/702] indicates quite clearly in my view that Mr Brindle wanted to roll any variations up within monthly valuations, without identifying them as such, but Mr Whittle's view was that this was simply storing up trouble for the future. Mr Whittle in his further e-mail to Mr Brindle dated 6 October 2011 [2/613] referred to the "potential overspend" and chased Mr Brindle for figures to input into his "variation schedule". Mr Brindle in his e-mail responses of 11 and 17 October 2011, referring to Parkinson's figure of £457,000, did not address the variation schedule, instead suggesting ways in which variations might be cancelled out by other costs savings, or by passing costs over for recovery from the PCT. There is no indication that any of this information was provided to Mr Abbott at the time. There is a further email from Mr Whittle to Mr Brindle dated 24 January 2012 [2/703], in which he expressed his concern that variations are "running away", to which there appears to have been no response. By February 2012 there was an indication that Mr Whittle was aware that Mr Brindle was anticipating a final account of £7.3M, and worrying how the increase from the contract sum was going to be funded, but again there is no indication that this was raised by Mr Crewdson or Mr Brindle with Mr Abbott.

2.37 I have not been referred to the detail of the interim payment applications submitted by Parkinson, which do not appear to have been disclosed either by Clark or by Dock Street (assuming it ever received copies). Nonetheless it is clear from these e-mails that Mr Brindle realised that Parkinson was claiming substantial extra payment on the basis of increases in the provisional sum allowances and variations. It appears that Mr Brindle's response was simply to refuse even to embark upon the exercise of considering,

let alone valuing, those claims. Instead, what he appeared to do was to value interim applications on the basis of a percentage assessment of the value of the bill item sums. An example is at [2/694-697]. He made no attempt to produce monthly valuations on a more detailed basis, valuing omitted and added work under each BQ item and separately itemising additional work, so as to produce a more detailed valuation. Given that it was Mr Brindle's position in cross-examination [D3/005] that there was no need for him to produce a cost plan, since the BQ was the equivalent of, and in fact far superior to, any cost plan, it is all the more surprising that he did not seek to update the BQ on that basis so that cost increases could be tracked and reported, even if only in general terms.

2.38 I am satisfied that Mr Brindle did not make any attempt to value the variations for at least two reasons. The first was that if he had produced monthly valuations on that basis they would, towards the later stages of the project, have shown the contract sum being exceeded, with the result that Dock Street would have had to fund the shortfall, which it was in no position to do: see the email exchange in April 2012 at [2/624]. The second was that it saved him the time and trouble of having to embark on the process of scrutinising the individual valuation claims and considering whether or not they were valid and, if so, whether or not they could be passed on to the PCT. I am satisfied that neither he nor Mr Crewdson explained to Mr Abbott that the reason he was not valuing variations was to assist Dock Street's cash flow. However I am also satisfied that if they had done so Mr Abbott would willingly have gone along with it, for obvious financial reasons. Plainly, however, since Mr Brindle had made no attempt even to begin to try to quantify the additional costs, it is most improbable that either he or Mr Crewdson would have been in any position to give any useful advice to Mr Abbott as to those costs and it follows, I am satisfied, that neither he nor Mr Crewdson did so.

2.39 Another factor in play at this time, which also contributed to the lack of clarity about variations and their recovery, was that Mr Abbott had reached some understanding with Mr Hargreaves that he would not seek to make any claim against the PCT for extra costs due to changes made by the PCT or the tenants, so long as they were not significant. Mr Abbott agreed that he had done this in cross examination, and it is referred to in an exchange of emails between Mr Crewdson and Mr Hargreaves in February 2011 [10/2323]. As Mr Abbott said however, and as I accept as being consistent with my overall impression of him, when he reached this understanding he believed that he was talking about relatively minor changes with relatively minor cost implications. He had no idea at that time or subsequently as to the true magnitude of the cost implications of what was happening. If he had done so he would have been far less sanguine, I have no doubt.

2.40 In the email correspondence of February 2011 referred to above Mr Crewdson was complaining to Mr Hargreaves that certain changes then under consideration were significant and may well have significant cost consequences. Mr Hargreaves did not agree. After some delay Mr Crewdson responded, maintaining his position, but there is no indication that he stood his ground and argued that unless the changes were treated as formal variations with potential cost implications under clause 7 of the agreement for lease they would not be accepted. Mr Crewdson and Mr Brindle suggest that this is because they were told by Mr Abbott that they should give the PCT what it wanted, and he would find the money. There is no documentary evidence to support this, and I do not consider that Mr Abbott is the sort of businessman who would give anyone licence to spend what he would have regarded as his own money on a completely uncontrolled basis. I am prepared to accept that some conversation to that effect did take place at some stage, but only in the context of what Mr Abbott was led to believe were relatively modest changes with relatively modest amounts involved. I do not consider that this was, or reasonably capable of being understood as, a licence to Clark to allow the PCT to have what it wanted regardless of cost. Indeed that would be inconsistent with Clark's subsequent attempts to recover certain variation costs from the PCT.

2.41 I am however satisfied that Mr Crewdson and Mr Brindle proceeded on the basis that they were free from what would otherwise be the burdensome necessity of having to keep a very tight control on the cost implications of ongoing design development and ongoing design choices made by the PCT and proposed tenants, in terms of ensuring that: (i) these changes were recorded at the time; (ii) costings for these changes were obtained from Parkinson and, where possible, agreed with Parkinson at the time; (iii) Mr Abbott was kept informed of these changes and their cost implications, so that he could decide whether or not to sanction them, or to explore other alternatives, and in either case whether to absorb those costs himself or seek to pass them on to the PCT; (iv) in so far as a decision was made to seek to claim these costs over from the PCT, to communicate such intention and the costs involved at the time, no doubt thereby provoking a further disagreement with Mr Hargreaves.

2.42 I am also unimpressed by Mr Brindle's explanation that it was simply not possible to attempt to cost the changes at any stage up to practical completion. If, as I am satisfied, the major internal design changes as instigated by the PCT and proposed subtenants were largely completed by March 2011, it is difficult to understand how it could have been impossible to put any figure on the cost of these changes for a full 12 months thereafter, or thought to be justifiable not to do so, especially when: (a) it is clear that Parkinson was putting figures on variations over this period, and positively inviting Mr Brindle to do the same; (b) Mr Crewdson and Mr Brindle must have known that Dock Street would be at risk of having to fund any shortfall between its liability to Parkinson and its recovery from the PCT. I note that Mr Martin was, not surprisingly, unable to defend this explanation in his evidence.

2.43 In reaching these conclusions I am not, I hope, downplaying the difficulties which I am sure Mr Crewdson and Mr Brindle faced in this context. One can see from the minutes just how difficult it must have been at times to try to keep this project properly managed as regards changes and their costs implications, in circumstances where there were so many different actors involved and interests in play. However, the firm conclusion I have reached is that from a relatively early stage Mr Crewdson and Mr Brindle largely abandoned any attempt to do so, in favour of an optimistic expectation that all would come good in the end, assuming that insofar as there was a significant cost overrun it could be resolved by reaching some accommodation with Parkinson and the PCT whereby the financial impact was agreed with Parkinson and then settled by the PCT. Indeed it appeared from cross-examination of Mr Crewdson [D1/230-1] that he was operating under the belief that Dock Street was in some way obliged to give the PCT what it wanted, because if it did not the PCT would not take up the lease. That belief was clearly erroneous, because the PCT was already committed to take the lease under the terms of the agreement for lease, and because the agreement for lease did not permit the PCT to demand unreasonable variations, or to demand variations without paying for them. Even if it was correct, it did not absolve Clark from ensuring that changes were accepted by the PCT as being its financial responsibility, or otherwise monitoring them and their cost. Mr Crewdson and Mr Brindle appear to have concentrated their time and energies on the wholly laudable objective of getting the project completed within a reasonable time and to the satisfaction of all involved. Regrettably, that also appears to have involved taking the path of least resistance as regards design changes and costs, and failing to appreciate the difficult position in which that would leave Clark's clients, Dock Street, if financial matters could not be resolved to everyone's mutual satisfaction at the conclusion of the project.

Progress of the works

2.44 The contract commencement date under the building contract was stated to be 17 January 2011, with a contract period of 48 weeks. There is some issue as to when Parkinson started back on site, but it is common ground that practical completion was certified as having been achieved on 23 March 2012. It is clear from the documents that all parties proceeded on the basis that there was a delay of 8 weeks in achieving practical completion. It appears from the final account claim advanced by Parkinson that this

was on the basis of a start on site of 31 January 2011 [22/2012].

2.45 I am not invited, nor am I in a position given the lack of evidence adduced on the point, to undertake a detailed review of the progress of the works. I have been referred to various minutes of project team meeting, of site meetings and of design team meetings. Reference has also been made to various items of correspondence over this period. However, in the same way as with the changes and their cost implications, neither party has undertaken the task, whether in witness or expert evidence or otherwise, of analysing the progress of the works, and tracking the dates when, for example, updated drawings or room data sheets were issued and their impact. Indeed Dock Street does not even plead such a case. In such circumstances it is simply not possible, nor even proper, for the court to undertake that task itself. There is no suggestion in the contemporaneous documents, nor any obvious basis for considering, that all or indeed any substantial part of such delay as occurred was due to any default on the part of Parkinson. Although Clark appears at various times to have suggested that Dock Street would be entitled to deduct liquidated damages from Parkinson, that appears to have been on the basis that no formal extension of time had been granted by the contract administrator, Manning Elliott, rather than because a considered view had been formed by Clark or Manning Elliott that Parkinson would not have been entitled to an extension of time on the merits. Furthermore, there is no clear evidential basis for any conclusion that Clark was responsible, whether in whole or in substantial part, for any such delay. All that could be said was that since Clark was project manager it was its responsibility to ensure that the project was completed on time, but since it cannot be suggested that: (a) Clark gave a contractual warranty to Dock Street that the project would be completed by the contractual date for completion under the main contract; (b) Clark was able to control every potential cause of delay, that does not of itself enable Dock Street to succeed without pleading and proving a positive case as to why all or some identified part of the delay was due to Clark's breach of duty.

2012

Parkinson's final account

2.46 By the date of practical completion attention was of course turning to the question of the final account. Thus on 14 March 2012 Mr Crewdson wrote to Aviva [2/623], stating that the "anticipated final account" was £7.3M. Reference was made to an ongoing claim against the PCT for the "delayed start and variations attributable to the PCT" of £371,000, and to levying liquidated damages of £116,000. He stated that "we expect the final account to settle at £7 million". Mr Crewdson was unable to my mind to provide any coherent explanation as to his reasoning process when asked about this in cross-examination, and Mr Brindle was unable to do any better. It appears to me that the purpose of this letter was simply to keep Aviva happy, rather than to serve as some reasoned assessment of the likely final account.

2.47 By early April 2012 Parkinson was understandably concerned that Mr Brindle was not producing further interim valuations or procuring the issue of further interim certificates. It appears that the March 2012 application produced by Parkinson was in the form of a projected final account, in the sum of £7,989,031 [2/625]. It is worth noting that this claim included a sum of £260,000 odd which represented Parkinson's assessment of its claim for the consequences of having its works suspended from May 2010 through to January 2011. This claim had previously been notified in October 2010, and was referred to by Mr Brindle in his email to Mr Whittle of 11 October 2011 as amounting to £164,000, but an increased figure was provided by Mr Whittle to Mr Brindle on 9 January 2012 [5/531] and details provided in February 2012. This claim was clearly intended to be included in the figure of £371,000 referred to by Mr Crewdson in his March 2012 e-mail, noted above.

2.48 Mr Brindle says in his witness statement [§70, WS1] that he reviewed Parkinson's projected final account submission, it would appear sometime in or around May 2012, and valued it in the sum of £7,472,000.

He was cross-examined in some detail about this. What is apparent from the document at [2/626] is that Mr Brindle had reproduced Parkinson's draft final account breakdown, and then produced his own valuations of the various additions to arrive at a final figure, inclusive of the suspension claim and overhead and profit allowance, of £7,472,000. However there is no explanation on the face of the document itself as to why his assessment of many of the additions was significantly less than Parkinson's assessment.

2.49 In cross-examination Mr Brindle agreed that there was no Excel spreadsheet or similar evidencing the detail of his assessment. He had said that the supporting detail was to be found in various documents, with his handwriting appearing upon them, beginning at [8/1643]. Unfortunately for Mr Brindle, it became quite apparent when he was cross-examined about these documents that they are both manifestly incomplete and provide little or no rational explanation for his assessment of £7,472,000. Mr Martin accepted as much in cross-examination [D5/22]. Mr Brindle insisted in cross-examination [D2/203] that he had conducted a "proper thorough analysis" of Parkinson's submission, going through "absolutely every page, absolutely every item" [D2/202], and that had he needed to do so he could have obtained the relevant information to support his adjustments. However he was unable to explain what had happened to the missing documents, if indeed there are any, and I regret to say that I am unable to accept that there ever were any such documents. In my view it is apparent that Mr Brindle had in fact undertaken a very limited exercise, as is apparent by the complete absence of anything that confirms that he had in fact undertaken a proper, thorough detailed item by item analysis of the claim, as well as by the very generalised nature of the adjustments made.

2.50 My view is also confirmed by the contemporaneous e-mail sent by Mr Crewdson to Mr Abbott, copied to Mr Brindle, on 14 May 2012, where he referred to "Fred's final account" as being £7,350,000, compared to "Parkinson's final account" figure of £7.6M. It is not at all clear how either figure was arrived at, since there is no detail provided to support the former figure, and Parkinson's final account figure at that time was £7.989M and not £7.6M. In his witness statement [§73, WS1] Mr Brindle suggested that this email recorded that his contemporaneous assessment of the final account was that "likely settlement would be around £7.5M". It was clear in my view from his cross-examination when asked about this that he had seen no purpose in conducting a more detailed analysis, because in his view Dock Street did not have the money to pay Parkinson anyway [D2/183]. Whilst I accept that Mr Brindle did indeed believe at the time that Parkinson would be willing to settle the final account at around that sum, that was in my view a belief based on what was only the most cursory and incomplete of assessments.

2.51 In his cross-examination [D1/155-6] Mr Crewdson made it clear that by this time Clark had stopped giving the project the necessary input that it should have received, because it was not being paid. This supports my view that Clark did not undertake a detailed and professional examination of the draft final account, or of the formal final account when subsequently that was produced by Parkinson. Whilst I have every sympathy with Clark's frustration at not being paid, especially when Mr Abbott was quite willing to admit in cross-examination that he had taken the decision not to pay outstanding invoices to the design team for his own personal financial reasons, that does not as a matter of contract law excuse its under-performance of its contractual obligations, in circumstances where Clark had the remedy of termination available under the contract and the further remedy of suspension of works under and following the procedure in the Housing Grants Construction and Regeneration Act 1996, but chose not to invoke either remedy.

2.52 By July 2012 Parkinson had lost patience, and instructed solicitors to pursue its entitlement. That led to some further discussions. There is an email from Mr Eyre of Parkinson to Mr Crewdson dated 28 June 2012, referring to a meeting between Mr Eyre and Mr Abbott earlier that day at which, it was said, an agreement had been reached as to a final account figure of £7,662,500. The e-mail continued "I have

agreed with Mark that we will draw up an agreement for payment of this over the coming days for agreement and sign off". Although under cross-examination Mr Abbott said that he had no recollection of that meeting, or recollection of having agreed a final account figure in that sum at that time, I have no doubt that what Mr Eyre wrote at the time represented the true position. It is entirely consistent with the clear impression I have formed of Mr Abbott which is that, when matters came to the crunch, he preferred to do a deal direct with the appropriate representative of the other party, rather than waste time in correspondence bandying different figures around.

2.53 Mr Crewdson replied, asking Parkinson to provide payment terms for agreement. On 5 July 2012 Parkinson provided a draft payment arrangement for consideration by Mr Crewdson. It provided [5/559b-d] for Dock Street to pay the balance of around £879,000 to Parkinson by 31 August 2012, and in default interest at 8% above base. It is apparent that Mr Crewdson and Mr Abbott considered this and together decided that they were not prepared for Dock Street to enter into an agreement on those terms. That is understandable, because to do so would require Dock Street to come up with funds which it did not have, with the potential risk of insolvency in default, or at least pay a very high interest rate. Accordingly Mr Crewdson wrote a letter on 18 July 2012 on Dock Street letter-heading to Mr Glenn at Parkinson in which he attempted, effectively, to reopen the negotiations. Mr Crewdson confirmed in cross-examination [D2/80] that it was effectively a joint letter. In short, as is apparent from the attached statements, what he sought to do was to reduce what he described as the "agreed figure" of £7,662,500 by applying certain specified deductions totalling £487,056, so as to produce a revised figure which, net of retention and various other matters, produced a balance of £376,052, payment of which was proposed by instalments, of which only £250,000 was to be made by the end of August 2012 (and even that was not a binding commitment). It is not necessary to seek to unpick this proposal. It is quite clear that there was no substance behind most, if indeed any, of the proposed revisions. It is not surprising that Mr Brindle was keen to distance himself from this in cross-examination, or that it was rejected by Parkinson in its letter dated 27 July 2012. That letter made it clear that Parkinson was prepared to take legal action if no settlement could be reached, but also ended by saying that: "We are willing to work with you on all matters including cash flow problems, although a formal agreement for the final account and payment agreement is required".

2.54 Although both Mr Crewdson and Mr Brindle were very eager to blame Mr Abbott for not going through with the settlement at the figure of £7,662,500, it seems to me that they were as much to blame as Mr Abbott. Mr Crewdson was perfectly willing to put his name to the counter-proposals and there is no suggestion from him, nor basis for suggesting, that he advised Mr Abbott at the time that the proposed deductions had no merit, so that in fact there was no genuine basis for disputing the settlement figure. Moreover Mr Brindle could not properly have advised that the settlement was a fair final account settlement in circumstances where he had, I am satisfied, not conducted the analysis with sufficient detail to satisfy himself what the true final account was likely to be.

2.55 I am satisfied that there were only two options realistically open to Dock Street at that time. The first was to do what Mr Abbott and Mr Crewdson attempted to do, which was to raise various spurious counter-arguments and seek to negotiate a reduced final account figure and no commitment to a sensible payment timetable. The second was to stick with what was an agreed final account figure, and then to seek to renegotiate a mutually acceptable payment timetable with Parkinson. The second could always have been attempted after the first, if that failed, as evidenced by Parkinson's response of 27 July 2012. It is noteworthy than when Mr Abbott was left alone to negotiate with Parkinson he was willing and able, in July 2012 and again in January 2013, to reach a mutually acceptable final account figure and (in January 2013) to reach a mutually acceptable payment timetable. It seems to me, therefore, that if Mr Brindle and Mr Crewdson had advised at the time and in terms that the agreed final account figure appeared reasonable, that there was no justified basis for seeking to make any deductions from it, and that unless

Mr Abbott reached some acceptable negotiated payment terms with Parkinson Dock Street would inevitably be faced with a much higher formal final account submission followed by an adjudication, then that in my view on the balance of probabilities is what would have happened then as well.

2.56 In cross-examination Mr Abbott said that if he had needed to do so he would have been able to have paid off Parkinson by procuring funds which he anticipated becoming available on receipt of a premium in relation to the proposed lease of the pharmacy space within the centre. His evidence, which is consistent with the contemporaneous evidence [5/566], was that he was still negotiating terms in relation to the pharmacy, because he regarded the current offer as insufficient, and had taken a conscious decision to put off paying Parkinson and the design team by doing a deal on the pharmacy on the basis that he could obtain more by waiting. Whilst I am not convinced that he would have been able to gain access to sufficient funds to pay off the full amount of the liability by 31 August 2012 I am prepared to accept, based upon the evidence of his financial dealings both before and after this date, that he would have been able to access sufficient funds to make a payment proposal which Parkinson would, albeit reluctantly, have been prepared to accept. That is consistent with Dock Street paying Parkinson £150,000 in relation to the pre-contract suspension claim in June 2012 and a further £200,000 in December 2012 (as stated in the Adjudication Notice), and with reaching a mutually acceptable deal with Parkinson in January 2013.

2.57 On 10 September 2012 Mr Brindle issued a further valuation in the amount of the original contract sum. It is not immediately apparent why he did this, notwithstanding his witness statement [§76, WS1]. He does, however, also say in §76 that at that time he reminded Dock Street that in his opinion the final account with Parkinson was around £7.5 million, and that any attempted contra charges were unlikely to be successful. I do not accept this, there being no contemporaneous evidence to support it, and it being inconsistent with the clear impression I have formed that Mr Brindle was not willing to provide any advice as to the contra-charges, but it is in my view the sort of advice which should have been given from May 2012 onwards, but was not in fact given.

2.58 On 21 September 2012 Parkinson submitted its formal final account submission, in 6 files, claiming the sum of £8.4 million. As Dock Street contends, and Clark is unable to dispute, that submission triggered the timetable provided for by clause 4.5.2 of the building contract conditions, so that Clark as the quantity surveyor was obliged to produce the final account within three months, thus by 21 December 2012. Clark is also unable to dispute that it failed to take any steps whatsoever to produce a final account within that period. In their witness statements, Mr Crewdson and Mr Brindle appear to contend that they had undertaken a full final account analysis in around May 2012 but that they deliberately decided not to provide Dock Street with "the full details of the final account", because of their concerns that Dock Street was not paying Clark what it was due under the fee agreement. For the reasons I have already given, I am unable to accept this as a credible account. I am satisfied that Clark simply did nothing in response to this claim, both because they were ignorant as to the contractual obligation and because they were not willing to do this work without payment.

<u>The adjudication by Parkinson and the settlement of its final account claim</u>

2.59 In the absence of any response to its final account submission, and in the absence of any settlement or payment proposals, Parkinson prepared to make a claim. On 11 January 2013 it gave notice of adjudication, and on 18 January 2013 it served its referral notice, accompanied by a further 3 files containing the material in support. The referral notice valued the final account in the sum of £8,109,127.66. It was plain from the referral notice that Parkinson was not making any claim for the pre-contract suspension costs. That is because, as Mr Whittle explained, he had been advised, as is well known to lawyers practising in the field of construction adjudication, that it was not possible to refer in one adjudication disputes arising under more than one contract, and the claim for the pre-contract

suspension costs would have to have been made under the letter of intent, rather than under the building contract. The referral notice did however include a claim for post-contract delay costs.

2.60 The appointed adjudicator gave Dock Street until 23 January 2013 to provide its response. Mr Abbott instructed Forbes Solicitors to provide assistance. A contemporaneous e-mail from Forbes dated 21 January 2013 [8/1639] to Mr Abbott, Mr Crewdson and Mr Brindle records that:

(1) There had been a meeting the previous week with all three men, at which various responses to the claim had been discussed.

(2) Forbes had not been instructed to prepare a response in relation to the adjudication, but was prepared to do so on payment of £7-8,000 on account of costs and detailed instructions.

(3) Forbes had been asked and was willing to attend a without prejudice meeting to be held that same day involving Mr Abbott and Parkinson (but not Mr Crewdson or Mr Brindle).

2.61 It appears that neither Mr Crewdson nor Mr Brindle were prepared to provide any detailed assistance to Dock Street as regards its defence to the adjudication, for the same reasons as before. It should be noted however that it was not something which was expressly required of them under the terms of the deed of appointment in any event, and it also appears that by this stage Mr Abbott had begun to lose confidence in them. There is an e-mail from Mr Crewdson to Mr Abbott dated 18 January 2013 [11/58] in which it appears to be suggested that Mr Brindle's final account assessment was in the sum of £7.6M including the pre-contract suspension costs, and that Mr Abbott's options involved reaching an agreement with Parkinson on a final account valuation of between £7.65 and £7.7 million.

2.62 It is apparent that a settlement was achieved at the meeting on 21 January 2013, at which Mr Abbott effectively reached a commercial agreement with the representatives of Parkinson present. In short, a settlement of the final account was agreed in the sum of £7.7 million, which was not broken down in any way. Although Mr Abbott said that the meeting lasted for some considerable time, he claimed to be unable to recall much, if anything, of the detail, and the impression he gave was that the settlement in relation to the value of the final account took little time to achieve, whereas the real negotiations dealt with the payment arrangements. Mr Whittle's evidence was to similar effect, and that appears consistent with the fact that Mr Abbott would have had no real material let alone expertise to put to Parkinson to seek to challenge individual items of the final account. A deed of compromise was entered into on 6 February 2013 [6/835]. In short, Dock Street agreed to pay the outstanding balance of around £843,000 by two instalments of around £225,000 by the end of March 2013 and the balance by monthly payments of £1,000, with security being provided by Dock Street in relation to the centre and another property. Dock Street also agreed to make a contribution of £20,000 towards Parkinson's costs of the adjudication, and to pay one half of the adjudicator's fees. As matters currently stand, substantial monies remain outstanding under that compromise, but there is no suggestion that Parkinson have any direct financial interest in the outcome of this litigation.

2.63 The settlement, as reflected in the deed of compromise, was a compromise of the final account claim under the building contract, and did not specifically refer to any remaining liability in relation to the pre-contract suspension costs claim. For the jurisdictional reason I have already explained, it was not included in the adjudication. Mr Whittle said that at the time he was of the belief that this claim remained outstanding, and that the £150,000 previously paid was only a payment on account, but he had more recently been told that it had been settled by the payment of £150,000. The explanation that it had previously been settled was consistent with Mr Abbott's evidence and, although the picture is not entirely clear, and although it is rather surprising that Mr Whittle was not aware of this earlier, nonetheless on

balance I accept that the claim had already been settled by payment and acceptance of £150,000.

2.64 On 14 February 2013 Mr Crewdson sent an e-mail to Mr Abbott [2/537], responding to a complaint by Mr Abbott that he had not been informed why construction costs had overrun. Inconsistently with Mr Crewdson's and Mr Brindle's insistence that Mr Brindle had already produced a detailed final account in around May 2012, Mr Crewdson said this:

"I also asked Fred to prepare his assessment of the final account which I will have him send to you, but I summarise the headline figures below:

Contract sum	6,966,605
Delay / suspension	241,675
Variations PCT	61,836
Variations	235,675
Final account	7,588,153."

2.65 This figure is consistent with the £7.6M assessment stated in the email dated 19 January 2013. Clark has also produced [2/634] what appears to be a further draft final account, produced by Mr Brindle, dated January 2013, which provides a breakdown of the sum of £7,588,153, although there is no indication that it was sent to Dock Street, either then or subsequently. It is in a similar format to the version produced in around May 2012, but there is very little correlation between the individual valuation sums. It states, at the bottom of the page: "NB: Scope change / variations = £357,511". It is not immediately apparent how this ties in with the items entitled "variations PCT" and "variations" in the e-mail above. There is an implication that Mr Brindle must have attempted some analysis, and broken down the variations into those for which the PCT was responsible, and those for which it was not, but no detail has ever been provided by Clark as to the process by which these figures were arrived at. When asked about this in cross-examination Mr Crewdson suggested [D1/93] that all variations other than the PCT variations related to design development, but as I say no further detail is available.

<u>The claim against the PCT</u>

2.66 That brings me back, penultimately, to the circumstances in which a claim was advanced and concluded as against the PCT. As I have said, Parkinson had provided Clark with a schedule of costs incurred as a result of the pre-contract suspension, in the sum of around £260,000. In August 2011 Clark had also provided a schedule of costs said to have been incurred by Dock Street due to the suspension and redesign in a total of around £270,000. Nothing concrete appears to have happened to progress these potential claims until 19 April 2012, when Mr Brindle wrote to Mr Hargreaves providing details of a claim in the total sum of £454,770 in relation to what was said to be:

"1) the delay effecting main contractor and design team.
2) the redesign affecting the work required of the design team initially."

2.67 It is apparent from the letter and supporting schedule that the claim being advanced was in two parts, the first being the claim, including but not limited to the Parkinson claim, for the cost consequences of the delay to the project caused by the PCT's change of mind following the general election, and the second being the costs arising from the redesign of the internal layout. The letter explained, as was made clear by the schedule, that the principal claim under the second head related to extra design team fees. So far as building costs were concerned, some relatively minor individual items were identified at 2, 5 and 7-11, whereas item 6 said: "internal layout redesign - increased doors, ironmongery, walls – tba". No express reference was made to item 6 in the covering letter, which explained that the variations figures were "taken from the contractor submitted final account".

2.68 It is common ground that Mr Hargreaves requested further details, particularly in relation to the design team fees and costs, which were provided in Mr Brindle's letter of 24 May 2012. At around this time, a revised schedule dated 22 May 2012 was produced which, rather surprisingly, reduced the Parkinson claim by a full £100,000, without explanation, but added back the equivalent amount under the claim for the design fees relating to the internal layout changes. In their witness statements Mr Crewdson and Mr Brindle had not addressed in these circumstances in which the schedule came to be revised. In cross-examination of Mr Abbott [D4/130] and Mr Hargreaves [D4/261-2] it was suggested that it was at Mr Hargreaves' instigation, because it was perceived that it would be easier to recover the costs if said to be related to internal design changes than if said to be related to the scheme deferment. It was said that this was supported by a note made by Mr Brindle on the version at [5/555]. Mr Abbott denied this. Mr Hargreaves did not have any recollection of having suggested this. It seems to me to be unlikely, and I do not accept it, because my view is that Mr Hargreaves, as an architect and someone with considerable practical experience in project design, management and costs, would not have been remotely impressed by an obviously over-inflated and unrealistic claim for extra design fees, in circumstances where the cost of the additional works to which the design fees claim relates was insofar as particularised said to be only around £260k. Indeed he said as much in cross-examination in pungent terms.

2.69 In any event, what is abundantly clear is that there was no justification whatsoever for including these substantial claims for additional design team fees, and I have no doubt that Mr Hargreaves was fully justified in his evident scepticism as to their genuineness. Indeed at around the same time Mr Crewdson's view, as stated in his email of 14 May 2012 to Mr Abbott and Mr Brindle, was that the value of these "PCT costs" was £320,000, not the £454,770 asserted. This is consistent with Mr Brindle's description of the £454,770 claim in cross-examination as being a figure to "open the dialogue with the PCT" [D2/188].

2.70 Perhaps more significantly, it also emerged clearly only for the first time in the cross-examination of Mr Brindle that it was Clark's case that he had included item 6 as "tba" on the basis that it related to the extra costs incurred as a result of the internal layout redesign instigated by the PCT and proposed tenants, in circumstances where Mr Brindle was aware that it was potentially a substantial claim, but one which would be difficult and time-consuming to put together, so that his strategy was to put it to one side for the time being and concentrate on recovering as much as could easily be obtained in the short term, to assist Dock Street's cash flow, with a view to making the further claim as and when the opportunity arose. This explanation also assisted Mr Brindle to avoid the difficulty of otherwise having to explain why the actual internal redesign costs as claimed against the PCT were so low, in circumstances where it was Clark's positive case that they were major changes with major costs implications. Finally, it enabled Clark to criticise Mr Abbott for, as it is contended, under settling the claim against the PCT in direct discussions with Mr Hargreaves and others, in the sum of £278,000. Otherwise, it would have been difficult to criticise Mr Abbott for settling such a poorly presented and substantiated claim for what appears to be a reasonable amount, especially given that Mr Crewdson's contemporaneous assessment was only £320,000.

2.71 However I am afraid that I found this explanation wholly unconvincing. There was absolutely no suggestion in the letters of April or May 2012 from Mr Brindle to Mr Hargreaves that a further substantial claim was to follow. Whilst that, it could be said, was not inconsistent with the strategy as explained by Mr Brindle, the failure to make any reference to this in any contemporaneous e-mail, the failure to produce any subsequent claim following the initial schedule, the failure to refer to the variations claim against PCT as being any more than £60,000 odd in the schedule of January 2013 and e-mail of February 2013 already referred to, and finally the failure to refer to this point prior to oral evidence at trial, all satisfies me that it is a recent invention.

2.72 It follows, I am satisfied, particularly with the benefit of Mr Hargreaves' evidence, in which he voiced his evident scepticism at what he obviously regarded as a wildly overstated claim, that Mr Abbott cannot be criticised for achieving the settlement which he did from the PCT, based upon what he was told by Clark as to the amount of and justification for that claim. Indeed, since Mr Brindle himself had no idea what the value of this claim might have been, and accepted in cross-examination [D3/008] that he had not advised Mr Abbott as to its approximate value, there can be no basis for complaining that Mr Abbott should somehow have been aware that it was a substantial claim which should have been excluded from any agreement with the PCT even assuming, which I doubt, the PCT would have been prepared to do so.

2.73 Mr Abbott told me, and I accept, that he passed on the sum of £150,000 to Parkinson in settlement of its claim for pre-contract suspension costs, and on the basis of a prior agreement that it would accept in settlement its share of the proportionate recovery which Dock Street was able to achieve from the PCT. It is also right to record however that as regards the balance Mr Abbott chose to use it for his own financial purposes. It is a feature of this project, much emphasised by Clark, that Mr Abbott was very ready to use funds, particularly those provided by Aviva, which ought to have been used only by Dock Street for the purposes of this development, to suit his own multifarious business purposes. Clark is, not surprisingly, particularly aggrieved that it was not paid its design fees in accordance with its invoices, themselves rendered in accordance with the deed of appointment, in circumstances where it has subsequently discovered that Mr Abbott was using funds which Dock Street could have used to pay its liabilities for his purposes. However, apart from an argument that Dock Street's inability to pay Parkinson was the true cause of its being faced with the adjudication claim, and forced into a settlement, rather than any breach on the part of Clark, and which I have already dealt with above and rejected, it does not seem to me that this has any direct relevance to the issues which I have to resolve.

2013

2.74 Finally, to complete the chronology, all that I need to say is that: (1) in April 2013 Mr Crewdson resigned as director of Dock Street, giving reasons in a subsequent letter dated 17 June 2013; (2) in May 2013 Clark wrote to Dock Street chasing its outstanding fees; (3) from July through to October 2013 the parties engaged in pre-action correspondence in relation to their respective claims and complaints; and (4) the instant proceedings were commenced by Clark in December 2013.

3. BREACH, CAUSATION AND LOSS IN RELATION TO PRE-CONSTRUCTION PHASE SERVICES.

3.1 The pre-construction services required of Clark in its capacity of quantity surveyor followed a logical progress from project inception through to entry into a building contract. Obligations of particular relevance to this case, some of which were required to be done in conjunction with other consultants, may be summarised as follows:

(1) To prepare the required specification documents and estimate of construction costs for the chosen design scheme, to advise on the cost implications of any changes to the scheme design, and to prepare a final cost plan in respect of the detailed design proposals [§1.5 - 1.7].

(2) To advise as to appropriate tendering and contractual arrangements, including the terms of the building contract, to prepare tender documents and the BQ, to issue tender enquiries, to receive and analyse tenders and report on tenders received, to negotiate terms, amend tender documents as necessary, and prepare contract documents for execution [§1.8-1.12].

(3) To provide written confirmation that a state of readiness had been achieved for construction to commence [§1.13].

3.2 The pre-construction services required of Clark as project manager followed the same structure. They included certain obligations perhaps more relevant to the construction phase, such as obligations to: (a) "establish cost monitoring and cost control procedures and report regularly on such matters" [§1.8]; (b) convene … design team [and] progress meetings whenever reasonably necessary" [§1.9]; (c) "monitor and expedite the activities of our other consultants" [§1.10]. They also included the following, again some of which were required to be done in conjunction with other consultants:

(1) To advise on comparative costs of alternative designs and construction methods and on the cost and programme implications of design scheme changes [§1.8, 1.14].

(2) To advise as to appropriate tendering and contractual arrangements, to compile the tender documents, issue tender enquiries, receive, analyse and report on tenders, negotiate terms, amend tender documents as necessary, and prepare contract documents for execution [§1.16-1.19].

3.3 There was also an obligation under the sub-heading "General services" to "assist in arrangements for funding the development" [§4.4].

3.4 The criticisms made of Clark in relation to pre-construction phase services may be summarised as follows:

(a) The failure to ascertain Dock Street's budget

(b) The failure to provide a cost plan.

(c) The failure to advise regarding or to undertake a competitive tendering process.

(d) The failure to advise in relation to a guaranteed maximum price [**GMP**] contract.

(e) The failure to conduct a proper analysis or report on the state of readiness achieved for construction to commence.

(a) Budget

3.5 I have already dealt with this at §2.6 above, and am satisfied that this allegation is not made out. In any event, since there was no budget as such, even if there was a technical breach there is no causative impact.

(b) Cost plan

3.6 It is clear that Clark did not provide any cost plan as required by the deed of appointment. This was Mr Baldwin's opinion in his report and in his oral evidence. Mr Martin did not address it in terms, but Clark has been unable to produce or to point to anything which could be said to be a cost plan. Insofar as it is suggested that it was provided informally, whether orally or otherwise, I am unable to accept that.

3.7 However what Clark can and does say is that development appraisals were undoubtedly produced through 2009 and 2010, which included its assessment of estimated construction costs on the basis of the design schemes under consideration from time to time. Of course they gave only a headline figure, as opposed to a breakdown, but they performed substantially the same purpose. Furthermore, it can also say that it subsequently produced a detailed specification and BQ which, once priced by Parkinson, operated as an effective and much more detailed cost plan. Although in cross-examination [D5/144] Mr Baldwin said, correctly in my view, that a cost plan and a BQ were not the same thing, being intended to be produced for different purposes and at different times, he also accepted, again correctly in my view, that since the cost plan would pre-date the BQ it would be overtaken by it anyway.

3.8 It follows, in my view, that it is not possible to point to any specific prejudice or loss to Dock Street in not having had these initial cost plans, in circumstances where: (a) it did have the benefit of Clark's cost estimating input into the development appraisals at the time when the cost plan would have been expected to have been available; (b) the BQ could perform the role of the cost plan for all subsequent purposes. Dock Street is unable to point to any respect in which it was prejudiced or suffered loss due to having only a headline figure in a development appraisal as opposed to a more detailed breakdown in a cost plan. Further, although Mr Baldwin said that it was possible that a prior cost plan might pick up shortcomings in the BQ which were not otherwise identified, that would not appear to be of any relevance to this case, where Mr Baldwin has failed to identify any such shortcomings which he says could or should have been picked up had a proper cost plan been produced previously.

(c) Competitive tender process

3.9 There are two separate issues here; the first being whether or not Clark complied with its obligation to advise as to appropriate tendering arrangements by advising as to the benefits of a competitive as against a negotiated tender process, and the second being whether or not Clark was in breach of an obligation to undertake a competitive tendering process on behalf of Dock Street.

3.10 As to advice, I am satisfied that Clark did advise Mr Abbott in general terms in 2009 as to the advantages of undertaking a negotiated tender process with Parkinson over a competitive tender . Mr Crewdson said as much in his witness statement [§43, WS1], and I accept that as consistent with the documents and inherent probabilities. I am quite satisfied that Mr Abbott was always aware in general terms as to the difference, and was happy to go down the negotiated tender route. I am also quite satisfied that it would have been perfectly proper for Clark to have advised Mr Abbott that in its opinion the negotiated tender route was the preferred option in this case, as Mr Baldwin was willing to accept in evidence [D5/153-54, 157]. I accept that Clark did not give this advice in a detailed structured format, and also that it would have been better for Clark to have provided or at least confirmed this advice in writing. However, insofar as pursued, I reject the allegation at §23(3) of the schedule of breaches that Clark positively advised Mr Abbott that there was "no need to hold a tender competition". I am satisfied that nothing turns on those arguable failures in any event, because: (a) the advice was sound; and (b) I am also satisfied that whatever further or more detailed advice might have been given to him by Clark as to the alternatives, Mr Abbott would undoubtedly (and quite correctly, in my view) have chosen the negotiated tender route. Thus I am satisfied that even if there was any breach it was technical and caused no loss.

3.11 As to the second limb of this allegation, it rests on an allegation that the deed of appointment properly construed imposed a positive obligation upon Clark to undertake a competitive tendering process on behalf of Dock Street at that stage, regardless of the fact that there had already been, as I have found, a previous decision to proceed down the negotiated tender route which had then been undertaken with Parkinson to the satisfaction of all.

3.12 Although in that factual context the allegation has an air of unreality, it is pursued and thus must nonetheless be addressed in circumstances where Clark must accept that it did not in fact undertake a competitive tendering process.

3.13 In §25 of its Reply and Defence to Counterclaim Clark pleaded that in the circumstances in which the deed of appointment was entered into (and in circumstances where the deed was expressly said to have retrospective effect) then either: (i) it did not agree to carry out this work, which was neither wanted nor required nor possible given the circumstances; (ii) it was an implied term of the appointment that this work was not required; (iii) the deed was varied to omit such work; (iv) Dock Street is to be estopped from contending that this work was required.

3.14 In my view Clark's case succeeds, on one or more of these legal bases. I accept, as I have already said, that read literally the relevant clauses require invitations to tender to be issued to more than one prospective contractor and, hence, at least on first reading envisage a competitive tendering process. However the factual matrix against which the obligation is to be analysed must include the facts that: (a) the deed of appointment was being entered into at a time where Clark had already performed (or should have performed) all of its pre-construction phase services; (b) the deed was expressed to have retrospective effect, for precisely this reason; (c) the deed was intended to be entered into as part of a package of contracts, including the building contract, so that it was not intended that Clark should, nor would it have been practicable for Clark to, undertake a competitive tendering process at that point. Furthermore, if the relevant clauses were to be construed as imposing strict unqualified obligations on Clark to undertake and complete a competitive tendering process, regardless of what had already happened, that would be inconsistent with the prior advisory obligation as regards tendering arrangements, because it would require Clark to undertake a competitive tendering process even if it had advised, and Dock Street had accepted, that this was not appropriate in this case. Moreover, what if invitations were issued to more than one prospective contractor but only one tendered? Read literally Clark would be in breach by being unable to perform its obligation to analyse and report on "tenders received". Still further, it is apparent that the parties proceeded after execution of the deed in particular with Dock Street's entry into the building contract on the basis that Clark had already fully performed its obligations in relation to the tender stage by undertaking and completing the negotiated tender process.

3.15 In such circumstances, I am satisfied that as a matter of law, either:

(i) The clauses are to be construed as including an implied qualification that all references to the plural in the particular clauses are to be read as including references to the singular as appropriate, in circumstances where: (a) it is envisaged in the Schedule itself that a competitive tender may not necessarily be required; (b) the factual matrix shows that at the time of formation of the contract the parties had already agreed that there was no need to undertake a tendering process afresh with more than one prospective contractor; or

(ii) The clauses are to be construed as not requiring Clark to undertake a competitive tendering process upon entry into the deed in circumstances where Clark had already performed its tender stage obligations and the building contract was about to be entered into making further performance of that obligation otiose; or

(iii) By virtue of the retrospective effect of the deed, the clauses are to be treated as having already been effectively varied so as to impose an obligation to undertake a negotiated tendering process instead of a competitive tendering process (where the consideration for the variation, past at the time of entry into the deed but not at the relevant time when the tender process was under discussion, was Clark agreeing to undertake the negotiated tender process instead); or

(iv) Dock Street is estopped by convention from contending that Clark was obliged to undertake a competitive tendering process.

3.16 Even if I was wrong in these conclusions, and there was a breach, I am satisfied that Dock Street has been unable to establish any causative effect. That is because I accept that, whether as a result of his experience or through good luck, Mr Brindle was right to describe the overall tender figure as representing a fair market price tender. Mr Whittle did say in re-examination that Parkinson would have had "more margin" in its OHP figure in the negotiated tender, but he was unable to say how much. He did not give the impression that it was substantial. He said that the other rates would be the best rates. As

he confirmed in cross-examination, this project came along in the depths of the recession in the construction sector, so that Parkinson was short of work and keen to get and stick with the project. He also confirmed in cross-examination that Parkinson would have included the most competitive sub-contract tender in its pricing so that, contrary to what was suggested in cross-examination of Mr Brindle, this was not a case where Parkinson as main contractor made an extra profit by inflating its tender as regards the sub-contract elements of the works.

3.17 Mr Mort cross-examined Mr Crewdson and Mr Brindle on the basis that it went without saying that the amount quoted under a competitive tender would be less than the amount quoted under a negotiated tender. That may be true as a matter of liberal economic theory. It does not seem to me however that I can safely assume that it would always make a significant difference to the quoted price, either in the context of construction contracts generally, or more specifically this particular project. Mr Martin and Mr Baldwin agreed [§7.01 first joint statement] that "negotiation with a selected contractor leading to a tender open for acceptance or rejection is accepted as a method of procurement". Clearly negotiated tenders would never be accepted as appropriate procurement methods if they always resulted in significantly higher prices. Furthermore, as Mr Martin observed, there is a difference between the amount quoted and the outturn cost, and a hungry contractor may often price low to get the work in a competitive tender but then ensure that he recovered his margin through the contract process. In short, I cannot be satisfied that any savings achieved would inevitably have substantially outweighed the extra costs (design team and time related) of having to run an open competitive tender process, let alone the risk of the difference coming back in the final account and eventual outturn cost.

3.18 Finally, I do not think that I can ignore the facts that the negotiated tender process actually resulted in two renegotiated prices, so that one is not just comparing Parkinson's original tender with the hypothetical competitive tender – a contractor chosen after a competitive tender may well have been less willing to reduce his price yet further in a "value engineering" exercise. Furthermore, even if I had felt able to conclude that there would have been a difference, there is no evidence before me upon which I could arrive at a figure for that difference, because Dock Street has not been able to produce evidence to show that a competitive tender process would have resulted in a tender which could safely have been accepted in a particular specified lower amount.

3.19 Accordingly, this allegation fails.

(d) The failure to advise in relation to a GMP contract.

3.20 This pleaded allegation did not feature in the case at trial to any great extent. Insofar as still pursued, it was fatally holed when Mr Baldwin confirmed in cross-examination [D5/158] that he could not support it as an allegation. He was right to do so in my view. It is obvious that the only way in which a GMP contract could work would be if the works were fully designed and specified so that there is no risk of unforeseen change which the contractor would need to price against. Here that was very far from being the case, for reasons which are not pleaded as being, and cannot be said to be, Clark's fault. The reality is that no sensible contractor would have agreed to enter into a GMP contract in this case, without at the very least requiring a hefty premium to cover the contractual risk allocation. Furthermore, since the agreement for lease specifically permitted the PCT to request changes, a GMP contract would always have been unsuitable on that basis as well. In short, I am satisfied that: (a) it was not negligent of Clark not to raise this; (b) even if it had done so, there was never any realistic prospect of Dock Street or Parkinson or any other contractor agreeing to enter into such a contract on terms acceptable to both, even if Aviva and the PCT would have been willing to endorse it, which I doubt; (c) even if a GMP contact had been entered into, there is no evidence that it would have produced a materially different result given the extra premium and/or the inevitable exclusions and qualifications which I have no doubt there would

have been.

(e) The failure to conduct a proper analysis or report on the state of readiness achieved for construction to commence

3.21 It is true that Clark did not issue a formal written confirmation at completion of pre-construction phase stage as was required by §1.13. However that would not take Dock Street anywhere unless it could be shown that it was a serious breach with a significant impact.

3.22 In its schedule of breaches Dock Street contends that any such confirmation could not properly have been given, in circumstances where it is said that [§30]:

> "(1) the project was not ready for construction to commence given that there was considerable further design required;
>
> (2) there was no or inadequate cost certainty;
>
> (3) there was no possibility of the construction work proceeding without
> (a) substantial variation in scope, with consequent risk to any programme;
> (b) material deviation from the contract sum."

3.23 It does appear to me that there is some scope for justified criticism of Clark in failing to advise Dock Street at this point that the internal layout design was not, and would need to be, fully designed out during the course of the works, and that the scope and cost of that exercise would need to be carefully monitored to ensure no significant irrecoverable overspend resulted, given that: (a) there was no promise of more funding from Aviva to cover such overspends; (b) the PCT would, as a publicly accountable body, need to be satisfied that it should bear the cost of any changes; (c) Clark had no positive grounds for believing that Dock Street or Mr Abbott would be able to fund the cost of significant overspends. Indeed more generally it does not appear that any satisfactory advice was given at this important pre-start stage as to the whole change process and, specifically, as to the costs implications of changes and as to how that process would be dealt with so as to monitor and control costs.

3.24 However, by reference to my assessment of Mr Abbott I am satisfied that even if this advice had been given he would not have caused Dock Street to have acted in any different way. Mr Abbott would not have wanted to take the risk of putting the project on hold whilst this design took place, even if that had been feasible, which I doubt. I refer back to §2.35 above. I am satisfied that he would have done what he did in fact, which is to reach some understanding with Mr Hargreaves that Dock Street would absorb the cost of any minor changes, and he would have expected that if there were any significant cost increases he could reach some agreement with Parkinson and the PCT.

3.25 I should also record that Dock Street has not pleaded or advanced a case to the effect that in relation to specific identified elements of the works: (a) they had not, but should have, been fully or properly designed as at the contract start date; (b) Clark is responsible as quantity surveyor or as project manager for that failure; (c) there is a causal connection between the breach and a relevant loss.

Conclusions

3.26 It follows in my view that Dock Street has not made out a case that it has suffered any relevant loss or damage as a result of any breach by Clark in relation to its pre-construction phase services.

3.27 For completeness I should record that Mr Brindle was cross-examined on the basis that he had not undertaken a detailed analysis of Parkinson's tender. It was put to him that he had allowed Parkinson an excessive percentage addition of 7.5% for overheads and profit [**OHP**]. Furthermore in his report [§3.55] Mr Baldwin had identified a number of shortcomings in the BQ. These were considered by the experts in their joint statement. There were a number of disagreements in relation to the individual items. However, since the majority were said to be under-measures or under-allowances, they received no attention at trial, for the obvious reason that insofar as they related to works which would always have been needed, it is difficult to identify any resultant loss due to their initial omission. There was only one item to which this did not apply, which was the rate for excavating to reduce level, where £46.20/m3 was quoted and agreed, whereas the experts were agreed that a reasonable rate was in the order of £3.20/m3. This substantial difference produced, they agreed, a total excessive cost of £36,887. In his report [§4.4] Mr Martin suggested, based on a discussion with Mr Crewdson and Mr Brindle, that the rate included sub-contractor preliminary costs and, hence, was not excessive. None of this was investigated at trial, not surprisingly since it was not a pleaded allegation. In the circumstances I need not deal with it other than to say that if the point had been pleaded it would appear that Clark would have had an answer to it anyway, not least because otherwise it would have been a very surprising mistake for both Parkinson and Clark to make.

4. WAS THE CONTRACTUAL TRIGGER POINT FOR PAYMENT OF CLARK UNDER THE DEED OF APPOINTMENT SATISFIED?

4.1 It is common ground that the deed of appointment entitled Clark to invoice 65% of the total fee (i.e. £195,000) at completion of tender stage, and to invoice the balance in equal instalments at monthly intervals. Mr Mort contends, and I did not understand Ms Colter to dispute, that "completion of tender stage" is to be equated with completion of the pre-construction services identified in schedule 1 of the deed of appointment.

4.2 Mr Mort contends that it follows that Clark was obliged substantially to perform the pre-construction services before it became entitled either to invoice the 65% fee or to invoice the balance by instalments. He accepted in closing submissions, rightly in my view, that as a matter of construction of the deed of appointment if Clark could establish that it had substantially performed the pre-construction services then it was entitled to render those invoices, and it would not avail him to point to allegations of substantial non-performance in relation to Clark's performance of the construction and post-construction phase services.

4.3 Having regard to my findings under section 3 above, I am satisfied that Clark did substantially perform its pre-construction phase services and, hence, was entitled to render the invoices the subject of the claim. Whilst Dock Street has established that Clark failed to perform all of its pre-construction phase services down to the last letter and, in particular, has established a failure to provide cost plans and to issue a written confirmation of readiness to proceed to construction phase, it has failed on the most substantial allegation of non-performance, viz. the failure to undertake a competitive tender, and I am satisfied, having regard to the findings I have already made, that the failures it has established cannot be regarded as so significant in the factual context of this case as to justify a finding that Clark did not substantially perform the pre-construction phase services.

4.4 In the circumstances, and subject to the defences of deduction by abatement or otherwise and/or set off, I

am satisfied that Clark has established its entitlement to its remaining fees, and that there is no basis for Dock Street claiming repayment of the monies already paid.

4.5 It is thus unnecessary for me to consider the question as to whether or Dock Street would have been entitled to repayment of the £195,000 invoiced and paid on the pleaded basis [§85-86 Defence and Counterclaim] that it was paid "in error". It seems to me that there may be valid objections to allowing Dock Street to recover a payment, freely made at the time on the basis that: (1) Mr Abbott did not believe that Clark was even required to undertake a competitive tender exercise; (2) without such payment Clark would not have provided the construction phase services and Dock Street would have been unable to proceed with the project (at least without replacing Clark first).

5. IS DOCK STREET ENTITLED TO A DEDUCTION (BY ABATEMENT OR OTHERWISE) IN RELATION TO ANY NON-PERFORMED OR DEFECTIVELY PERFORMED PRE-CONSTRUCTION PHASE SERVICES?

5.1 Having regard to my findings under section 3 above, it is only necessary to consider the question of deduction (by abatement or otherwise) in relation to the failure to prepare a cost plan.

5.2 As to that, the experts have agreed (subject to liability) that the time saved by Clark in not undertaking the pre-construction phase services of preparing a cost plan and cost monitoring was 100 hours and the value of that saved time, pro rata to the total fee, is £12,500.

5.3 The experts have not considered what if any time was saved by Clark in not undertaking a competitive tender process, or in relation to any other of the pleaded allegations of failure to perform pre-construction phase services. It follows that even if I was wrong about the other pre-construction phase breaches alleged by Dock Street, and that I should have considered deduction (by abatement or otherwise) in relation to those allegations, I have no material upon which I could assess the value of a proper deduction in that respect. That is particularly so in terms of an assessment of the time that would have been taken in undertaking a competitive tender process, or indeed the more nuanced assessment of the extra time that it would have taken, over and above the time spent on the negotiated tender process if, contrary to my actual finding, Clark had been obliged to undertake a competitive tender exercise after entry into the deed of appointment in January 2011.

5.4 The question of principle which arises, however, is whether deduction (by abatement or otherwise) should apply at all in these circumstances. I have used the expression deduction (by abatement or otherwise) because in his submissions Mr Mort argued that even if abatement properly so called was not available there was no reason not to allow a deduction on some other appropriate legal basis.

5.5 The issue as to whether Dock Street was entitled to abatement was raised in the statements of case. In §74(2) of the Defence and Counterclaim a right to abatement was pleaded, and in §63(b) of the Reply and Defence to Counterclaim it was denied that the right of abatement is available as a defence to a claim for payment in respect of professional services. Reliance was pleaded on the decision of Jackson J (as he then was) in Multiplex v Cleveland Bridge [2006] EWHC 1341 (TCC).

5.6 In her written opening [§86-87] Ms Colter repeated that submission, and also referred to a previous decision of mine, Pickard Finlason Partnership Limited v Lock [2014] EWHC 25 (TCC) at §318 where I said that:

> "…it is regarded as well-established that in relation to contracts for professional services where the

obligation in question has been substantially performed the professional is entitled to his fee and there is no scope for applying the doctrine of abatement: see the discussion in Jackson & Powell on Professional Liability at paragraphs 3-008 to 010 and at paragraphs 9-331 to 332, referring in particular to the decision of the Court of Appeal in Hutchinson v Harris (1978) 10 Build LR 19 and the review of the law by Jackson J (as he then was) in Multiplex Construction v Cleveland Bridge [2006] EWHC 1341 (TCC)."

5.7 Mr Mort made detailed submissions in relation to this aspect of the case in his opening submissions and again at §237-261 of his closing submissions. In summary, his position is as follows:

(1) Jackson J in Multiplex recognised a distinction between abatement in its true sense and a right of deduction. Thus whilst he did hold [§652(vi)] that "abatement is not available as a defence to a claim for payment in respect of professional services" he also held, in the context of a defence to a claim for payment for professional services in the production of drawings that [657]:

"Schedule 1C is a claim for defective design work. This is a claim in respect of professional services. Accordingly, the defence of abatement is not available.
Multiplex's only remedy for unsatisfactory drawings which required revisions or modifications is a claim for damages for professional negligence.
However, if there are some drawings which were so unsatisfactory that they were discarded and no use was made of them, in my view Multiplex could refuse to make any payment whatsoever in respect of those drawings.
However, any defence on this basis or any claim for repayment on this basis would not be a plea of abatement. It would simply be a contention that no payment should be made at all for professional services which were worthless."

(2) It follows, he submits, that a client is not obliged to pay a professional for discrete services which were not performed at all or which were performed so poorly that they were worthless. Although that may not, in Jackson J's analysis, be abatement properly so called, it is sufficient for the purposes of his argument in this case.

(3) He submits that Jackson J's analysis is consistent with the prior decision of the Court of Appeal in Hutchinson v Harris [1978] 10 BLR 19, in which at p.32 Stephenson LJ appeared to accept the argument that if an architect had not done a particular piece of work the cost of that work should be knocked off the total amount of the fees.

(4) He submits that the distinction between the right of abatement and this wider right of non-payment for discrete items of non-performed or poorly-performed services (which I shall refer to for shorthand as deduction) is better understood once one understands the historical origin of abatement as being a right of set-off only available in cases of contracts for the sale of goods or for work and labour. He refers to the decision of the Court of Appeal in Hoening v Isaacs [1952] 2 All ER 176, where the Court of Appeal held that the claimant, an interior decorator and designer, was entitled to payment for the balance of the price notwithstanding defects in the completed works, on the basis that there had been substantial performance of the contract, but that there should be a deduction for the cost of remedying the defective works, applying the right of abatement as established in Mondel v Steel (1841) 8 M&W, 858. In Mondel v Steel the right of abatement was described as the right of a defendant to "defend himself by shewing how much less the subject matter of the action was worth by reason of the breach of contract". He observes that in Hutchinson v Harris [1978] 10 BLR 19 the Court of Appeal appeared to distinguish Hoening v Isaacs on the basis that in that case the claimant was "not a professional person".

5.8 The starting point for my consideration must be the decision of Jackson J in Multiplex. In that case Jackson J reviewed every authority relied upon by the parties in relation to abatement [640-651] and then set out the 7 legal principles to be derived from the authorities at [652], including principle (vi), that abatement is not available as a defence to a claim for payment in respect of professional services. Although some have questioned the continuing validity of the distinction between professionals and non-professionals, the Court of Appeal (including Jackson LJ) has in Robinson v Jones [2011] EWCA Civ 9, albeit in a different context, affirmed that the distinction still holds good. In the circumstances I am not prepared to doubt the correctness of the principle stated by Jackson J, even if invited to do so.

5.9 However, as Mr Mort rightly submits it is not necessary for me to do so in this case, given what Jackson J also said at [657]. In short, I am satisfied that it is open to Dock Street as a matter of law to defend itself in relation to a claim for payment for services rendered by a professional by contending that all, or some specific part, of those services were either not performed at all or were performed so poorly that they were worthless. Insofar as the complaint only applies to a specific part of the contracted-for services, Dock Street may defend itself by reference to the value of that specific part. What Dock Street may not do, however, is to defend itself by contending that all, or some specific part, of the services were performed, but not fully or properly in every material respect, so as to seek a reduction of the price payable in relation to the whole or the specific part.

5.10 When applying that principle to this particular issue it is important to bear in mind that Clark's obligation to produce cost plans as set out in the relevant part of the Schedule was an ongoing obligation, to be provided not in isolation but as part and parcel of the ongoing scheme design process. Thus Clark was obliged to: (a) advise on the comparative cost of alternative designs [§1.1]; (b) prepare cost estimates of the outline proposals [§1.4]; (c) prepare a construction cost estimate of the chosen design scheme [§1.5]; (d) advise of the cost implications of any design changes [§1.6]; and (e) prepare a final cost plan in respect of the detailed design proposals, prior to moving into tender stage [§1.7]. In my judgment Clark did indeed, through providing estimates of construction cost for inputting into the various versions of the development appraisals, comply with some, if not all, of these obligations. With the possible exception of the final cost plan, there is no express or implied requirement that these obligations could only be satisfied by the provision of some form of written report with some minimum degree of supporting detail.

5.11 The experts have not, understandably, attempted the exercise of ascribing a value to the work required under the Schedule as compared with the work they think that Clark might have done in producing the cost estimates for inputting into the development appraisals. Even if they had done so, it would have been a futile exercise, because it is quite apparent in my view that this is not a case where Dock Street can demonstrate that Clark was obliged to undertake a clearly separate service, viz the production of a series of cost reports, which it completely failed to undertake or undertook so badly that the service was worthless. In the circumstances I am satisfied that the claim to be entitled to deduct the cost of that service must fail.

6. BREACH, CAUSATION AND LOSS IN RELATION TO CONSTRUCTION PHASE SERVICES: THE GLOBAL LOSS CLAIM

6.1 The allegations of breach are separated out into the pre-construction, construction and post-construction phases, and I have addressed them on the same basis. I have also addressed the consequential issues of causation and loss on the same basis. I am however conscious that Mr Mort has submitted that the pre-construction, construction and the post-construction phases cannot sensibly be separated, because this is one of those exceptional cases where the extensive nature of Clark's breaches in all phases, in particular

its fundamental breach of its cost control obligations, is such that it can be concluded that the cumulative effect of these breaches is such as to render it responsible for the totality of the cost overrun on the project.

6.2 I accept that Dock Street's pleaded case on causation in relation to the allegations of breach in the individual phases is pleaded, in §99-101, in wide terms. In particular I accept that the allegations at §99(3) (to the effect that Clark's breaches caused the whole of the cost overrun), §100(4)-(5) (to the effect that Clark's breaches caused the need to settle Parkinson's claim on the terms it did and hence make the payments it did to Parkinson), and §101 (to the effect that Clark's breaches caused Dock Street to be in a worse position in defending or settling Parkinson's claim) are not limited to individual phases. However it also seems to me that the heart of Dock Street's case in relation to breach, causation and loss can conveniently be addressed in the context of the construction phase services. That is because the essential allegations of breach as pleaded and advanced and as found by me are the allegations of failure to address the cost implications of design development and changes to the project at every stage, from failing to advise of the costs implications associated with design development and change before the works began, through failing to advise of the costs implications at the time when the design was being developed and changes made and the work undertaken, through failing to address the costs implications of the design development and change when valuing or reporting on Parkinson's interim valuations, and failing to undertake any proper detailed analysis of, or give any proper advice as to, Parkinson's draft and final final account submission with particular reference to the costs implications of the design development and changes.

6.3 I should however also note that Dock Street's pleaded case as to causation is concerned exclusively with its claim to recover the cost overrun over and above the contract price which it has been exposed to vis-à-vis Parkinson. There is no pleaded case to the effect that Clark's breaches also caused Dock Street to be unable to recover some or all of that cost overrun from the PCT. That is something which I ruled during the course of the trial would have needed to be pleaded, with specific allegations of breach, causation and loss, supported by evidence (factual and/or expert, as necessary), and insofar as an attempt was made to seek to raise such allegations I ruled that it would be unjust to Clark to allow them to be made for the first time only at trial.

6.4 Although not formally conceded, it is quite clear from what I have already said that Clark's performance of its quantity surveying obligations in this phase was seriously deficient in a number of important respects. In particular, I am satisfied on the evidence that:

(1) There were no monthly reports as to the actual and projected final cost of the development, whether in writing (as they clearly should have been) or even orally, contrary to §2.1 (and §1.6).

(2) There were no monthly reports accompanying valuations, analysing the costs incurred and the cost of authorised or pending variations, or applications for additional remuneration, contrary to §2.4.

(3) Other than in certain instances, mainly where the question of the cost of changes was specifically raised by Parkinson, no costs estimates for proposed variations were provided and nor was there any assessment or monitoring of their effect on cost and programme, contrary to §2.5.

6.5 As regards costs, I am also satisfied as I have said at §3.23 above that Clark failed to give appropriate advice as to the costs implications of the detailed design process and the change process at the pre-start stage. Moreover, as I find in sections 2 and 9, Clark failed properly to analyse or to report on or to value Parkinson's final account, whether the original draft or the final version.

6.6 I am also satisfied that Clark's performance of its project management obligations was seriously deficient so far as the performance of its review obligations in §2.4 and 2.5 in relation to quantity surveying matters was concerned.

6.7 However, although allegations of breach of the review and co-ordination obligation in §2.5 in relation to other consultants are also pleaded, as are breaches of a similar obligation in §2.6 specifically in relation to the fitting-out works, those allegations are not particularised either in the Schedule to the Amended Defence and Counterclaim or in the report of Mr Baldwin or elsewhere in Dock Street's evidence, and were put to Mr Crewdson in cross-examination only at a high level of generality by reference to extracts from the minutes. In the circumstances I do not consider that it would be proper on the evidence to make any finding of widespread breach of duty in such respects. Nor, given the absence of express reference to specific instances of breach, is it proper for me to find that, for example, Clark failed to instruct, co-ordinate or review the performance of Ms Bird, the interior designer, in relation to some part of the fitting-out works, so as to provide the evidential platform for a specific finding that such an individual failure caused some part of the fit-out works to be insufficiently designed, in time or at all, or over-specified, resulting in some specific element of the overall overspend.

6.8 That is an important point in my opinion, because Mr Mort's cross-examination of Mr Crewdson by reference to the minutes of the project meetings, design team meetings and site meetings proceeded on the implicit basis that the court could infer that if Clark had got a grip on things there would have been no overspend. However, as Mr Crewdson pointed out [D2/61] he could not control the PCT, and still less could he control the prospective subtenants, nor for that matter could he compel the other members of the design team, Parkinson or the sub-contractors to do everything required of them as and when necessary. Clark was obliged to take reasonable steps as project manager to ensure that the other members of the project did what they should when they should, but it could not be expected to, nor did it, give a warranty to Dock Street that this would happen.

6.9 To give an example, in cross-examination Mr Whittle referred to the increased cost of the partitions. He explained that the BQ had specified standard partitions, but the architect subsequently produced drawings which showed an increased specification for the partitions in order to achieve certain sound reduction requirements, which resulted in a significant price increase. It is readily apparent that in order to make Clark liable for this extra cost Dock Street could and should have investigated the circumstances and, having done so, pleaded and proved the respects in which Clark was at fault and why that caused the loss. If, for example, it was said that Mr Brindle was at fault in not including this non-standard specification in the BQ from the outset, on the basis that this was always part of the PCT's requirements, that would have needed to be pleaded and established and a case made as to how the extra cost represented a genuine loss, as opposed for example to a cost which would always have been incurred. Alternatively, if it was said that the enhanced specification was not in fact required to comply with the PCT's requirements so that Clark should have rejected it, that would have needed to be pleaded and established. The same is true if it is said that adequate cost reporting would have identified this in advance as a significant cost which could then have been controlled in some way. As Mr Baldwin said in cross-examination [D5/137], such decisions would normally need to be taken by involving all the necessary members of the design team, so that to take this example one would need to adduce evidence that had Clark raised the issue some alternative, less expensive, solution could have been achieved (in which case of course only the difference in cost between the two could be recoverable as damages against Clark). Alternatively, if it was said that it was a PCT variation, which Clark should have taken steps to identify and cost at the time, so that it could have been recovered as a discrete cost from the PCT, that would have needed to be pleaded and established. I accept, as Mr Mort submitted, that in order to chase down this allegation in this way it might have been necessary to obtain expert evidence from an architect to demonstrate that, for example, there was no need for the design change or that some alternative less expensive solution was

available. I accept that this may well have introduced further complexity and cost into the case. However I do not consider that this provides an excuse, especially when that was never a matter which was raised with the court at the earlier stages. It might be that if this point had been pleaded and the matter considered at the first case and cost management conference the court would have been willing to order, for example, that such evidence be given by written report of a single joint expert.

6.10 This individual examination of an individual element of the overall cost overrun demonstrates that Dock Street has failed to establish how Clark could be held responsible for the increased cost of the partitions. The same is true in relation to the unnecessary variations claims where, having considered the complaints against Clark, I have rejected them in the majority of the cases. I am quite satisfied having heard the evidence overall that an individual examination of all of the individual substantial cost increases not specifically investigated at trial would have resulted in a similar conclusion in a good many of them. Apart from anything else, that is because establishing causation in construction related professional negligence claims against design professionals such as quantity surveyors and project managers is notoriously difficult precisely because of the difficulty in showing how things would have turned out differently even if the professional had not acted negligently. In her closing written submissions Ms Colter drew my attention [§99] to a number of further areas of change as between the BQ and the final account where considerable extra costs were claimed in circumstances where no specific allegation had been made (or could obviously be made) that they were matters for which Clark had any responsibility.

6.11 Another important issue in this context is the causal consequence of the failure to undertake proper cost reporting. As I have said, it is clear that Clark's cost reporting in the construction phase was virtually non-existent. Mr Baldwin had referred to the RICS guidance note on cost reporting which states that regular and frequent cost reporting "will afford the client and the project team the ability to control the outturn construction cost". Mr Martin agreed in cross-examination [D5/25] that inadequate contemporaneous cost reporting will in principle contribute to cost overrun, because the employer is deprived of the opportunity to mitigate costs. However it is obvious that the opportunity will only mature into an actual saving in certain circumstances, where it can be seen that the competent report would have identified the cost of the change at a time when it was possible and practicable to adopt an alternative, less costly, solution to the change item or, possibly, where it would have influenced the employer's subsequent approach to the scope of works overall or to further change items and it can be shown that there was the scope to save costs in one or more of these respects. It follows in my opinion that it is not enough simply to identify this as a breach which is likely to cause some cost overrun. At the very least, some concrete examples would be required, to enable the court to see how this breach did cause significant cost overrun in this case. One assumes that the unnecessary variations are the only respects in which Dock Street and its expert have been able to identify areas where savings could have been made. Of course given that the contract had already been subject to two rounds of value engineering reductions it is not surprising that Dock Street would find difficulty in suggesting that there were further significant savings which could have been made to the existing contract works.

6.12 In their second joint report the experts had agreed that "any kind of detailed exercise to compare the original contract sum with the final outturn cost and explain the difference (i.e. increase) has not been carried out. Such an exercise was not within either of the expert's instructions and both agree that it would be a time consuming and costly exercise to carry out". They did not say that it would have been an impossible exercise to carry out, and there is no other evidence to that effect or basis for making such a submission. Dock Street have not provided material which indicates just how long it would have taken Mr Baldwin to undertake such a review, or how much it would have cost for him to do so.

6.13 Some suggestion was made during the course of the trial that it was not Dock Street's fault that this detailed exercise had not been done, because its instructions to Mr Baldwin were sufficiently wide to

justify him undertaking that process. However in my view this argument, if pursued, is a thoroughly bad one, for the following reasons:

(1) It does not avail a party to blame its own expert for an alleged failure to undertake a sufficiently detailed investigation;

(2) If a client wants its expert to undertake a task of that scale, then it should give specific instructions to the expert. I cannot assume that Mr Baldwin could or should have known from the extremely wide instructions given to him that he was being asked to undertake this task. He clearly did not think that it was at the time he produced his report or agreed the second joint statement.

(3) In the absence of full disclosure of all relevant instructions to and discussions with the expert, I cannot safely make a positive finding in Dock Street's favour that there had been no discussion as to the scale (or time and cost) of the investigation which Mr Baldwin was being asked to undertake. Mr Baldwin was instructed as long ago as summer 2014 [§1.5-7 of his report]. He was instructed by competent solicitors who have instructed specialist counsel. It seems intrinsically unlikely that what is now suggested to be a significant lacuna in his report was not picked up and addressed many months ago, when there might have been time to address it.

(4) One of Dock Street's difficulties in this case is that the Defence and Counterclaim was pleaded without the benefit of expert evidence and on the basis – as it probably had to be in such circumstances – of a global claim on causation. It would have been open to Dock Street to instruct Mr Baldwin to undertake a full investigation of breach, cause and effect either before service of its defence, or if time did not permit immediately afterwards, and then to plead its detailed case, whether originally or by way of amendment to the Defence and Counterclaim. Indeed this was done, albeit to a limited extent, in relation to the unnecessary variations claim.

6.14 Dock Street has always had available to it Parkinson's final account claim, from which the change claims could be taken and individually considered. I am quite satisfied that it would have been able, using the documentary trail, combined with the knowledge of Mr Abbott, Mr Whittle and Mr Hargreaves, and the expertise of Mr Baldwin, to investigate all of the significant cost increase claims and to plead and seek to establish by evidence all of those where it considered Clark was at fault and that the fault caused a genuine loss.

6.15 Mr Martin agreed in cross-examination [D4/15] that undertaking the detailed exercise referred to in the joint statement would have been "pointless", given that the final settlement with Parkinson was a lump sum figure, would have resulted in discovering only part of the story, and would have been "potentially wholly misleading". However I do not consider that Dock Street can place substantial weight on this. It is Dock Street's task to demonstrate why, on the balance of probabilities, it was Clark's responsibility that the final outturn cost was £7.7M as opposed to £6.966M. To do so, Dock Street must demonstrate on the balance of probabilities that the project, if properly run by Clark, would have resulted in a lower outturn, and what that would have been. The obvious starting point is to consider Parkinson's final account of £8.109M, identify the principal reasons for the principal cost increases, and demonstrate why Clark bears responsibility for some or all of them. I appreciate that such an exercise must also take into account that Parkinson was prepared to accept a deduction of £409K from its final account. That however is not at all unusual when a court has to address circumstances where: (a) a claimant is seeking to hold a defendant liable for a payment which the claimant has made to a third party under a contract between the claimant and the third party; (b) the claimant is seeking to contend that it would not have had to make some or all of that payment but for the defendant's breach of duty owed to him; (c) the payment is made under a negotiated lump sum settlement, as opposed to – for example – under a fully reasoned court judgment.

The fact of the lump settlement does not absolve the claimant of the need to prove cause and effect to the satisfaction of the court. In this case, it does not even begin to justify Dock Street in undertaking no detailed analysis at all.

6.16 Mr Martin also agreed in cross-examination [D5/16] that the task of undertaking a detailed analysis would have been a lot easier had Dock Street complied with its contractual obligations as regards monthly cost reporting during the construction phase. There is indeed some force in this criticism. However, again I do not consider that Dock Street can place any real weight on this. This is not a case, such as those referred to by Mr Mort in his closing submissions [§113-120], where the court would be justified in drawing wide ranging adverse inferences against Clark on such a basis. If Dock Street had attempted to undertake the detailed analysis which was required, whether via Mr Baldwin or otherwise, and along the way had formed the view that it was genuinely unable to reach a clear conclusion on a specific point due to the lack of sufficient contemporaneous evidence, where it could show that such evidence ought to have been available had Clark properly complied with its cost reporting obligations, then Mr Mort would have been able to invite the court to draw appropriate inferences against Dock Street in those particular respects. Mr Baldwin said in cross-examination [D5/123] that whilst it would have been useful to have more information, he could have conducted the detailed analysis on the information which he did have. Whilst he did go on later to say that the absence of information would affect the standard to which the analysis could be carried out, his evidence about that both in further cross-examination and in re-examination was at a high level of generality. In my view is not appropriate for me to take the approach which Dock Street invites me to take here, which is to draw the much wider conclusion that Clark's failings justifies Dock Street in making no effort at all to undertake any detailed analysis, on the basis that I can safely infer that it would have produced nothing of any value.

6.17 In short, Dock Street having chosen, whether for reasons of time or cost or otherwise, not to conduct the detailed analysis which is required in a case such as the present, it cannot complain if the court takes that into account in deciding whether or not it has proved its case to the requisite standard. A defendant to a professional fees claim in the position of Dock Street is not under any compulsion to defend a claim by pleading allegations of professional negligence leading to financial loss by way of set off and counterclaim. If it chooses to do so then it cannot complain if that case is subject to close scrutiny both by the claimant or by the court. This is not a straightforward case where the court can simply infer causation from evidence of breach, evidence of loss, and evidence that the loss is of a kind likely to have resulted from that breach.

6.18 I accept that there is no rule that the failure to plead or advance a properly detailed case on breach, causation or quantum, when such a case could have been pleaded and advanced, is of itself fatal to a global claim. The law in relation to global claims has recently been reviewed in detail by Akenhead J. in Walter Lilly v Mackay [2012] EWHC 1773 (TCC), in the context of a contractor's claim under a JCT contract, and counsel were agreed that it accurately states the law. Akenhead J reviewed the relevant authorities at §474-483.

6.19 In §484 he observed the need to be careful in using the expression "global" claims without being clear what was being referred to. He said that it commonly referred to "a contractor's claim which identifies numerous potential or actual causes of delay and/or disruption, a total cost on the job, a net payment from the employer and a claim for the balance between costs and payment which is attributed without more and by inference to the causes of delay and disruption relied on".

6.20 In my view the claim as presented by Dock Street, albeit a claim for damages for professional negligence, has the essential characteristics of a global claim, in that it is a claim which identifies numerous breaches by Clark which are said to be potential or actual causes of cost overrun, a total cost payable under the

building contract substantially exceeding the original contract sum, and a claim for the difference between the two (the cost overrun) which is attributed to Clark's breaches without any detailed particularisation of the causal connection between the individual breaches and the whole or some part of the cost overrun.

6.21 In §486 Akenhead J summarised the position as follows (omitting matters not relevant to this case):

"(a) Ultimately, claims by contractors for delay or disruption related loss and expense must be proved as a matter of fact. Thus, the Contractor has to demonstrate on a balance of probabilities that, first, events occurred which entitle it to loss and expense, secondly, that those events caused delay and/or disruption and thirdly that such delay or disruption caused it to incur loss and/or expense (or loss and damage as the case may be). I do not accept that, as a matter of principle, it has to be shown by a claimant contractor that it is impossible to plead and prove cause and effect in the normal way or that such impossibility is not the fault of the party seeking to advance the global claim. One needs to see of course what the contractual clause relied upon says to see if there are contractual restrictions on global cost or loss claims. Absent and subject to such restrictions, the claimant contractor simply has to prove its case on a balance of probabilities.

(b) ...

(c) It is open to contractors to prove these three elements with whatever evidence will satisfy the tribunal and the requisite standard of proof. There is no set way for contractors to prove these three elements. For instance, such a claim may be supported or even established by admission evidence or by detailed factual evidence which precisely links reimbursable events with individual days or weeks of delay or with individual instances of disruption and which then demonstrates with precision to the nearest penny what that delay or disruption actually cost.

(d) There is nothing in principle "wrong" with a "total" or "global" cost claim. However, there are added evidential difficulties (in many but not necessarily all cases) which a claimant contractor has to overcome. It will generally have to establish (on a balance of probabilities) that the loss which it has incurred (namely the difference between what it has cost the contractor and what it has been paid) would not have been incurred in any event. Thus, it will need to demonstrate that its accepted tender was sufficiently well priced that it would have made some net return. It will need to demonstrate in effect that there are no other matters which actually occurred (other than those relied upon in its pleaded case and which it has proved are likely to have caused the loss). It is wrong, as Counsel suggested, that the burden of proof in some way transfers to the defending party. It is of course open to that defending party to raise issues or adduce evidence that suggest or even show that the accepted tender was so low that the loss would have always occurred irrespective of the events relied upon by the claimant contractor or that other events (which are not relied upon by the claimant as causing or contributing to the loss or which are the "fault" or "risk" of the claimant contractor) occurred may have caused or did cause all or part of the loss.

(e) The fact that one or a series of events or factors (unpleaded or which are the risk or fault of the claimant contractor) caused or contributed (or cannot be proved not to have caused or contributed) to the total or global loss does not necessarily mean that the claimant contractor can recover nothing. It depends on what the impact of those events or factors is. An example would be where, say, a contractor's global loss is £1 million and it can prove that but for one overlooked and unpriced £50,000 item in its accepted tender it would probably have made a net return; the global loss claim does not fail simply because the tender was underpriced by £50,000; the consequence would simply be that the global loss is reduced by £50,000 because the claimant contractor has not

been able to prove that £50,000 of the global loss would not have been incurred in any event. Similarly, taking the same example but there being events during the course of the contract which are the fault or risk of the claimant contractor which caused or cannot be demonstrated not to cause some loss, the overall claim will not be rejected save to the extent that those events caused some loss. An example might be (as in this case) time spent by WLC's management in dealing with some of the lift problems (in particular the over-cladding); assuming that this time can be quantified either precisely or at least by way of assessment, that amount would be deducted from the global loss. This is not inconsistent with the judge's reasoning in the **Merton** case that "a rolled up award can only be made in the case where the loss or expense attributable to each head of claim cannot in reality be separated", because, where the tribunal can take out of the "rolled up award" or "total" or "global" loss elements for which the contractor cannot recover loss in the proceedings, it will generally be left with the loss attributable to the events which the contractor is entitled to recover loss.

(f) Obviously, there is no need for the Court to go down the global or total cost route if the actual cost attributable to individual loss causing events can be readily or practicably determined. I do not consider that Vinelott J was saying in the **Merton** case (at page 102 last paragraph) that a contractor should be debarred from pursuing what he called a "rolled up award" if it could otherwise seek to prove its loss in another way. It may be that the tribunal will be more sceptical about the global cost claim if the direct linkage approach is readily available but is not deployed. That does not mean that the global cost claim should be rejected out of hand.

(g) DMW's Counsel's argument that a global award should not be allowed where the contractor has himself created the impossibility of disentanglement (relying on **Merton** per Vinelott J at 102, penultimate paragraph and **John Holland** per Byrne J at page 85) is not on analysis supported by those authorities and is wrong. Vinelott J was referring to unreasonable delay by the contractor in making its loss and/or expense claim; that delay would have led to their being non-compliance with the condition precedent but all that he was saying otherwise was that, if such delay created difficulty, the claim may not be allowed. He certainly was not saying that a global cost claim would be barred necessarily or at all if there was such delay. Byrne J relied on Vinelott J's observations and he was not saying that a global cost claim would be barred but simply that such a claim "has been held to be permissible in the case where it is impractical to disentangle that part of the loss which is attributable to each head of claim, and this situation has not been brought about by delay or other conduct of the claimant". In principle, unless the contract dictates that a global cost claim is not permissible if certain hurdles are not overcome, such a claim may be permissible on the facts and subject to proof."

(At §565-5 Akenhead J also helpfully summarised the applicable principles as regards the recovery of sums paid in settlement of third party claims, to which I have had regard when considering the claim made by Dock Street in this case.)

6.22 Dock Street's fundamental difficulty is that it has failed to prove on the balance of probabilities that no or no substantial part of the cost overrun would have been incurred in any event. Thus it is obvious that there would have been some cost overrun in any event due to the detailed design development and due to the changes introduced by the PCT and proposed subtenants. Dock Street has failed to satisfy me that all potential cost overrun caused by these matters could and should have been prevented by Clark properly performing its obligations as quantity surveyor and/or project manager. Dock Street has not pleaded or established that it is Clark's fault that all of the costs introduced by the PCT and proposed subtenants were not recovered from the PCT. On an individual examination of one significant element of the cost overrun, namely the partitions, Dock Street has not demonstrated that it is Clark's responsibility. Dock

Street has also failed in the majority of the unnecessary variations claims. It follows, it seems to me, that Dock Street has failed to surmount the evidential difficulties referred to by Akenhead J in §486(d). Moreover, this is not a case where the court can adopt the approach identified in §486(e), by simply deducting the non-proved items from the overall claim. That is because: (a) it is not possible to identify what the amount of the cost overrun resulting from design development and PCT changes actually is, never mind what proportion of that is not Clark's responsibility; (b) it is not possible for me safely to conclude that all of the other causes of the cost overrun are matters for which Clark is responsible.

6.23 The fundamental weakness in Dock Street's case is that it is not self-evident that a substantial cost overrun on a project such as this can only have been caused by failings attributable to the quantity surveying and project management operations. Here, one has any number of other equally plausible explanations, including matters such as: (a) the lack of a fully detailed design in January 2011, which cannot be shown to be Clark's responsibility or fault: (b) the previous deductions to the negotiated tender sum (which as appears from §2.21(5) above did come back in to the final account to some extent); (c) the involvement of the PCT and proposed tenants, in requesting changes, in requesting them to some extent in a piecemeal and disorganised fashion, and in being resistant to accepting that it should have to pay for all such changes; (d) decisions made by or failings of other members of the design team, including the architect and the interior designer; (e) decisions made by or failings of Parkinson or its sub-contractors or suppliers, coupled with a fairly typical bullish contractor approach to contract claims; (f) decisions made by or failings of Dock Street itself, for example the agreement with Mr Hargreaves not to quibble about changes which did not have significant cost impact, and the tendency of Mr Abbott to make decisions based on his perception of his wider business immediate interests rather than on professional advice. Furthermore, since Parkinson's final account included a substantial element of delay related claim, which cannot be shown to have been completely unsustainable, Dock Street's failure to plead and prove a case to the effect that Clark was responsible for all or the substantial part of the delay means that there is another substantial cause of the cost overrun which cannot be laid at Clark's door. Although Mr Mort has striven valiantly in cross-examination and in submissions to satisfy me that all of these other actual or potential causes of cost overrun could and should have been overcome by Clark exercising proper control over the project, he has been unable to do so given the lack of a sound evidential platform to found that case.

6.24 The relevance of the fact that Parkinson's final account claim was settled without detailed scrutiny or third party determination (whether by the adjudicator or subsequently by a court) should also not be overlooked. Ms Colter has not sought to establish that the settlement was unreasonable (to the contrary, her client's case is that a settlement on slightly more advantageous terms could and should have been implemented in July 2012). Indeed it is apparent that Parkinson was willing to accept a very substantial deduction from its final account claim as asserted. In the absence of even a high level analysis of its final account claim, it is difficult for a court to conclude that what Parkinson was willing to concede were claims which were obviously hopeless or wildly exaggerated, leaving remaining a hard core of genuine claims which could obviously be linked to Clark's substandard performance of its retainer. I do not accept that Dock Street can invite me to find that all of the matters for which Clark may not have been responsible were somehow swept up within the amount which Parkinson was prepared to write off in the final settlement, leaving only matters for which Clark was responsible as having caused the cost overrun, entirely or at the very least substantially.

6.25 For all of those reasons I am unable to accept that Dock Street has made out its case on causation so far as the total cost overrun is concerned. That does not, however, prevent me from considering whether it has succeeded in relation to individual elements of cost overrun, which is where the unnecessary variations claim comes into play.

6.26 Before so doing, and for completeness, I should address the various explanations put forward by Clark for the cost overrun. As Akenhead J observed at §486(d) in Walter Lilly, there is no burden of proof on Clark to prove that there were other causes of loss for which it is not responsible. Mr Mort submitted that the fact that Clark was unable to advance any coherent explanation for the cost overrun supported his client's case as regards breach and causation, in that it demonstrated that the only reason was what he castigated as Clark's chaotic approach to the project. I consider that submission to be unfair and also wrong. Whilst I have been critical of Clark in a number of respects, I do not accept that Dock Street has made out a case that Clark's performance overall was anything like as bad as is said. Moreover, I do not consider that Clark's failure to satisfy me that all of its explanations are right is of any particular relevance, forensically or otherwise, to my evaluation of Dock Street's case on causation. This is not the simple kind of case on causation to which Toulson LJ referred in Drake v Harbour [2008] EWCA Civ 25 at [28], on which Mr Mort relied.

6.27 In his witness statement [§137, WS1] Mr Crewdson identified the causes of the cost overrun as follows:

Artificial deduction from contract sum to replay Barclays	c. £363,860
Delay and disruption from original contract with Mr Abbott	c. £260,160
Work to Colourbanners' building	c. £117,000
Pharmacy extension instructed by Mr Abbott (Parkinson proposed final account figure)	c. £75,000
Changes and details requested by the PCT	c. £63,000

6.28 So far as the "artificial deduction" is concerned, I have already addressed this at §2.20-22 above and concluded that it was nothing of the kind. I am prepared to accept, however that reducing the contract sum by 2 hefty rounds of value engineering brought with it an inevitable risk that some of the items reduced would come back in. As I have said Ms Colter was able to demonstrate that as regards some £61,000 of this second round it did come back in. However that is as far as it goes.

6.29 The delay and disruption from the original contract with Mr Abbott is a reference to Parkinson's claim for costs associated with the 2010 start and stop. However, as I have already found, I am satisfied that this claim was finally settled for £150,000 outside the final account process and, hence, has no relevance to the cost overrun case.

6.30 The work to Colourbanners' building appears to be a reference to the fact that the works undertaken by Parkinson included certain enabling works involving the provision of support to the existing Colourbanners building immediately adjacent to the development site. However in cross-examination Mr Crewdson was taken to the documents, from which it was apparent that these works were always included and priced as part of the contract enabling works. It follows that even if, as Clark appears to contend, they were not strictly speaking works necessary for the construction of the centre, as opposed to works for the benefit of Colourbanners, that is of no relevance to this case in that it does not provide any explanation for the overspend on the project, since it was there from the start and remained there, without any increase in its amount.

6.31 As regards the pharmacy extension, it is I think common ground that this would not form part of any

claim against Clark, but it is an item which could properly be removed from the claim and, hence would not have any wider significance.

6.32 I have already addressed the issue of the PCT changes, and need say no more about it at this point.

Conclusion

6.33 The claim for damages for breach of construction phase services as a global claim fails.

7. BREACH, CAUSATION AND LOSS IN RELATION TO CONSTRUCTION PHASE SERVICES: THE UNNECESSARY VARIATIONS CLAIM

7.1 This claim was only introduced by way of amendment made without opposition from Clark at the pre-trial review held on 22 April 2015, although the draft amended Defence and Counterclaim had been provided on 18 March 2015. The pleaded case is that Clark permitted or instructed 7 specific changes, with a combined value of £214,557, when they had no corresponding benefit to Dock Street and were not otherwise necessary. The 7 items are pleaded in Schedule 2 to the amended pleadings as follows:

> "2. The changes to the scope and/or quality of the works referred to, and the consequent cost of each variation to the Defendant, are as follows:
> (1) works to the courtyard area, at a cost of £15,495.00;
> (2) enhanced finishes to the interior of the lift car supplied by Otis, at a cost of £1,555.00;
> (3) changes to the internal door veneer, at a cost of £49,724.00;
> (4) non-standard colour to IPS, at a cost of £5,980.00;
> (5) floor tiling by Granite Tops UK, at an additional cost of £27,406.00;
> (6) enhanced floor coverings, at an additional cost of £91,603.00;
> (7) instruction to form "clean lines" for the gypliner and columns, at an additional cost of £22,794.00;
> Total cost to the Defendant: £214,557.00."

7.2 The order made at the pre-trial review gave Clark permission to serve an amended Reply and Defence to Counterclaim, which it did, and in which it was contended, in summary, that the changes were due to the ongoing design development process undertaken in conjunction with the input of the PCT and the proposed tenants, and it was denied that the works were unnecessary.

7.3 The experts had not formally considered these items in their first joint meeting, held before the pre-trial review, although Mr Martin is recorded as stating that the claim was "extremely speculative" and the items "subjective". Mr Baldwin was only instructed to consider them in his report under the section relating to quantum [§2.12(c)], and did so [§3.83] in very summary terms, referring to them as "variations which are essentially of an aesthetic nature". He identified them in Appendix 9 to his report by reference to the relevant sections of Parkinson's final account submission, but did not include any narrative of his own so as to explain why in his opinion they were non-structural and non-functional items, or seek to investigate or to explain the circumstances in which they had come to be undertaken. In cross-examination he said that he had been through Parkinson's final account and picked them out himself.

7.4 In his report [§5] Mr Martin addressed them primarily from the standpoint that Clark could not be responsible for them because they had not been formally instructed by Clark as contract administrator. He also recorded that according to Clark they were required by the PCT and allowed to proceed by Dock Street. He did however agree that they "may be considered to be of an aesthetic nature and not necessary for the functionality of the building".

7.5 In their second joint statement the experts agreed the figures as figures, but did not discuss substantive matters.

7.6 In his witness evidence [§47 WS1] Mr Abbott referred to these items but did not offer any detailed evidence as regards the substance of the complaint. In cross-examination he accepted [D4/87] that he had not looked in detail at the factual background to the items. Mr Whittle addressed the substance of item 3 in his witness statement [§51 WS1] but offered no detailed evidence as regards the remainder. Mr Hargreaves stated in his witness statement [§25-28] that the variations were not instructed by the PCT nor was the cost notified to it, and also addressed the substance of item 3, but not otherwise.

7.7 In his witness evidence [§119-126, WS1] Mr Crewdson referred to these items at a general level, whereas in his witness evidence [§27-43, WS2] Mr Brindle addressed these items in some detail. Whilst Dock Street did not have permission to adduce evidence in response to Mr Brindle's supplemental witness statement, nonetheless it did not seek to serve any evidence in rebuttal, whether factual or from Mr Baldwin, and then seek permission at the start of the trial to rely upon it.

7.8 During the course of the trial Mr Crewdson and Mr Brindle were not cross-examined in detailed terms on each of the unnecessary variations, although both were cross-examined generally as to their alleged failure to control changes and costs, and the cross-examination touched on some of the items. Mr Martin was not cross-examined in any detail on this aspect of the case. I do not criticise Mr Mort for this, in circumstances where time was tight, and Mr Martin had not been instructed to consider the substance of the allegations, but the end result was that by the end of the factual evidence and completion of Mr Martin's evidence no detailed case in rebuttal of Mr Brindle's evidence had emerged or been put to Clark's witnesses.

7.9 It was only during Ms Colter's cross-examination of Mr Baldwin that these issues were first addressed in detail. It emerged that Mr Baldwin had undertaken some further consideration of the relevant circumstances, but had not provided any summary of his evidence in this regard in advance. Nor had he or Dock Street's solicitors assembled clips of the relevant documents on which he relied. It was not surprising that in these circumstances it was very difficult for Ms Colter to cross-examine Mr Baldwin on the views which he was now expressing, given that they had not emerged previously.

7.10 In the circumstances the view I expressed at the time, and the view to which I adhere, is that where there is an issue of fact or opinion as regards the individual circumstances of each item, which only fully emerged for the first time in cross-examination of Mr Baldwin, it would not be right for me to reach a view adverse to Clark unless I was satisfied either that Clark had been able to contest the point and had chosen not to do so, or that nothing further Clark could have said would have any reasonable prospect of altering my view of the matter. I thus decide the individual items on that basis.

(1) <u>Courtyard area</u>

7.11 It appears that what has been provided in the courtyard area is a boulder and decorative stone design, at a cost of some £15,495. Dock Street's essential complaint is that this was unnecessary expenditure, incurred at a time when it should have been apparent to Clark that the contract cost overrun needed to be

very tightly controlled.

7.12 Mr Abbott in cross-examination [D4/106-110] accepted that it looked very nice, but said that it should have been done for a lot less money, suggesting that a gravel courtyard would have sufficed, and that everyone had got carried away. Mr Whittle in cross-examination said that he particularly remembered asking Clark why they were asking for this to be done at the end of the job when there was no more money. That evidence I accept as being consistent with his frustrated email of 5 April 2012 [9/1912]. Mr Hargreaves' evidence in his witness statement and in cross-examination was to the effect that he had never insisted on any change to the standard specification or been informed that the different design options suggested had had any cost implication so far as the PCT was concerned.

7.13 In his witness statement Mr Brindle had said that this area had not been designed from the outset, and that the provisional sum allowance had been reduced from £10,000 to £5,000 and then down to nil. He made the reasonable point that the PCT would undoubtedly have wanted something there, and said that what was provided had been agreed between Mr Crewdson, the architect and Mr Hargreaves in around November 2011. It was not suggested that Mr Abbott had been asked, or had agreed, to accept that the extra cost should be absorbed by Dock Street.

7.14 It was put to Mr Martin in cross-examination [D5/111] that the courtyard should have been specified and costed at the outset on the basis of the simplest most cost effective solution, and he agreed.

7.15 Mr Baldwin said that originally the design drawing had shown the courtyard as a paved area, and that the BQ had included some allowance for paved areas, although he was unable to say in terms that the area priced against in the BQ did include the courtyard. His evidence was to the effect that a paved area would have been perfectly acceptable, and he believed that the whole cost was an extra item.

7.16 This is an allegation where I can be satisfied on the evidence overall that Clark did fail to exercise sufficient cost control and project management. Whether the decision was taken in November 2011 or in early 2012, it is apparent that Mr Brindle was already well aware that Parkinson was concerned about variations and Dock Street's ability to pay for them. In my view there could be no justification whatsoever for allowing this expensive design to proceed without either securing a commitment from the PCT to pay for the extra over from hard paving or Mr Abbott's agreement to fund the extra cost through Dock Street. Clark does not suggest in its evidence that it did either.

7.17 I am satisfied that a real saving could and should have been achieved. However I am not satisfied on the balance of probabilities that Mr Baldwin has established that the full claim is an extra item, given Mr Brindle's evidence, and in circumstances where Parkinson did not expressly give credit for the paving in the final account submission. I am satisfied on the evidence that the extra over cost is approximately £10,000, being the amount of the costing for the subsequent drawing and quotation identified by Parkinson, and award that sum.

(2) <u>Lift interior</u>

7.18 This is a relatively modest claim for £1,555, which appears to be Mr Baldwin's assessment of the unnecessary design detail of the lift car. It is not clear from his evidence whether his complaint is as to the white granite floor or the stainless steel finish or both; the figures do not match either way. In his witness statement Mr Brindle explained why the design choices had been made, and there is no obvious reason to reject that explanation. It is also apparent that this design was agreed relatively early on, in May 2011. Indeed in cross-examination Mr Whittle did not feel able to support this as a complaint, on the basis that it was introduced early on in the project.

7.19 In my view this allegation has not been made out on the material before me.

(3) Internal door veneers

7.20 This is a substantial head of claim, £49,724. The complaint is that the horizontal walnut veneer finish to the internal doors, whilst undoubtedly aesthetically pleasing, is neither necessary nor justified as a substantial extra cost.

7.21 The email chain between Mr Crewdson and Mr Whittle of 4 October 2011 [3/764-5] and the other evidence demonstrates that the particular veneer was proposed as an option by the interior design consultant, Ms Bird, without anyone having obtained a cost estimate for it in advance. It was chosen by the PCT and included in the revised specification for the internal doors (which needed to be altered anyway due to the internal layout redesign) in ignorance of the costs implications of selecting that particular veneer. It appears that once the door supplier provided its quotation it became clear that the total cost of £96,250 was far greater than the cost included in the BQ of £46,615. There was then an attempt to obtain an alternative quotation which did not result in a significant saving, because the same veneer was specified, but at which point it emerged that the principal reason for the substantial cost increase was the choice of veneer. It appears that Mr Crewdson had been aware of this problem for some weeks, and was expressing his frustration both that the cost had not been addressed at the time the option was provided to the PCT, and also that no detailed breakdown of costs had been provided to show the extra cost of the veneer.

7.22 It is also clear that as at 4 October 2011 Mr Whittle's view was that he needed a quick decision as to whether or not to proceed with this veneer, because "there is already a major problem with the delivery of these doors, which should have been on order months ago". It appears from the oral evidence that the urgency was not so much related to the doors as to the door frames, which were needed for construction purposes, although as Mr Baldwin observed in cross-examination it appears that this problem had already been overcome in September 2011 by fitting temporary door frames, which Parkinson included as part of its claim [2/744]. It is also clear that Mr Whittle was pushing Mr Crewdson to go ahead with the existing veneer, on the basis that it would take a lot of time and effort to ascertain how much of the additional cost related to other changes in quantity and specification and how much related to the choice of veneer.

7.23 There is no indication as to what, if anything, Mr Crewdson did at this point to see what could be done. The only further email exchange to which reference is made is an email from Mr Crewdson to Mr Whittle dated 24 October 2011 which simply confirms the veneer to be used. In his witness statement Mr Brindle provides only a very brief explanation. He does not provide any explanation as to what, if any, further steps were taken after 4 October 2011. He says that it was to avoid further delay due to door frame installation that the decision was made to proceed with that veneer. That statement, however, does not appear to explain why there was no further enquiry in the context of the emails of 4 October 2011.

7.24 I am invited by Dock Street to conclude that Clark is at fault as project manager, either in ensuring that the proposal was not put forward before being costed, or for not taking steps in October 2011 to change the design once it became apparent what the extra cost was going to be.

7.25 So far as the first complaint is concerned, Dock Street has not attempted to work through the available documentation in order to put before me, by reference to the contemporaneous documents, witness statements, expert opinion or a combination of all three, evidence which would clearly show that Clark was or should have been aware that the proposal was being put to the PCT when it had not been costed, and where there was an obvious risk that the cost would be significantly greater than the BQ allowance

because of the type of veneer being proposed. I am therefore unable to accept this criticism.

7.26 However the position is different in October 2011. The email correspondence demonstrates very clearly that Mr Crewdson was aware of the problem by September 2011, when he did indeed ask for a detailed breakdown, but then appears to have taken no further action either before 4 October 2011 or between 4 and 24 October 2011. This was clearly a significant extra cost. It was also a cost which Dock Street would have to bear unless it could be put to the PCT as a variation for which it was responsible. However, it is apparent from Mr Hargreaves' evidence that had it been put to him on that basis he would have refused to accept it. He confirmed in his evidence that he knew nothing about the cost implications of the choice at the time.

7.27 The case as advanced by Dock Street is that Mr Crewdson ought to have realised as at 4 October 2011 if not before that there was a real problem here with a design choice on purely aesthetic grounds having been made without proper cost investigation, and a significant risk that unless prompt and effective steps were taken it would be a cost which Dock Street would have to bear. As Dock Street contends, it is really inexplicable as to why Mr Crewdson did not at that point ensure that matters were fully investigated and resolved. There appears to have been plenty of opportunity to have done so, thus: (a) the minutes of site meeting no 10 held on 21 September 2011 show at item 3.3 that the veneer of the internal doors was still to be resolved; (b) there is a handwritten note of a meeting between Mr Brindle and Mr Whittle on 5 October 2011 at which a reference is made to "veneer choice", with no elucidation; (c) there was a project meeting on 6 October 2011 at which no reference appears to have been made to this item; (d) the minutes of site meeting no 11 held on 19 October 2011 again show at item 3.3 that the veneer of the internal doors was still to be resolved, although item 10.23 is a new item which also states "doors and order to resolve". It is only the minutes of site meeting no 12 held on 16 November 2011 which show this item as having been resolved.

7.28 In my judgment the opportunity was there, but was not taken, for Clark to ascertain in short order that: (a) other satisfactory and far less expensive veneers were available; (b) Mr Hargreaves would not have insisted on the chosen sample being retained unless it was agreed as a no-cost option so far as the PCT was concerned; (c) an alternative order could have been placed in time to avoid critical delay to the programme. As Mr Abbott said on a number of occasions, without contradiction, the interior designer Ms Bird was based in the same office suite as Clark, and was introduced by them, so that there was no reason for any communication difficulty so far as she was concerned. I am also satisfied, as Mr Abbott also made clear, that if he had been made aware that if this choice went ahead Dock Street would have to take a £40-50K "hit" with no opportunity for reimbursement from anyone, he would have become personally involved and ensured that both Mr Hargreaves and Mr Whittle gave the matter their urgent attention. In the circumstances I am satisfied that Dock Street has made out its case in relation to this item. It was a purely aesthetic variation which was unnecessary and, with proper care and attention by Clark, could have been avoided and cost saved. On the evidence before me, including Parkinson's final account submission, it cannot be said that a short delay whilst this was investigated and resolved would have caused time critical delay to the project overall in circumstances where the evidence indicates that any serious delay problem had already been largely resolved by temporary door frames being ordered and provided in September 2011.

7.29 Finally, a further issue arises, which is how the extra cost of the expensive veneers is to be separated out from the costs of the layout changes, where there were changes to the number, size and specification of some of the internal doors. In cross-examination of Mr Whittle, when the point first emerged, he said that "the cost came in the veneer rather than the number of doors". Moreover Mr Martin had in the second joint statement agreed the cost of the changes to the internal door veneer as £49,724, in circumstances where the agreement of the value of these items was, as he said in re-examination [D5/113], the very

purpose of the second meeting. In the circumstances it would not have been fair in my judgment to allow Clark to take the point that since this did not give credit for the cost of other necessary changes to the doors Dock Street was unable to prove its case on quantum and hence to recover anything. However, by reference to the schedule at [2/744], it is clear that only the first cost of £42,023.46 is obviously related to the veneer, so that to achieve a fair result I consider that this is all that I should allow.

(4) IPS colour

7.30 It appears that Parkinson claimed £4,000 extra to reflect the fact that the colour selected by the PCT was a non-standard colour at an enhanced cost. Mr Brindle said in his witness statement that the BQ had simply carried over the specification from St Annes, but that the colour used was subsequently chosen by the PCT or its tenants from a mood board provided by the interior designer. The witnesses of fact did not address this in their evidence in any detail. Although Mr Baldwin said that having recently seen the PCT specification he was satisfied that this was a change from the PCT basic specification, he had not made that point in his previous evidence, so that it was something which Clark could say, with some justification, it had not had the opportunity to contest. In such circumstances I do not consider that I can allow this item of claim.

(5) Floor tiling

7.31 It appears from the Parkinson final account that the floor tiling allowance in the BQ was under £10,000, whereas the quotation as procured by Mr Crewdson in September 2011 and updated in December 2011 amounted to almost £33,000. Mr Brindle's evidence about this was the same terms as his evidence about the IPS colour.

7.32 The difficulty I have here is that whilst it is disconcerting that the cost appears to have increased so dramatically without anyone seeming to have picked it up there was no attempt by Dock Street, whether through witness evidence or expert evidence or cross-examination of Mr Crewdson or Mr Brindle to work through the documents such as they are and to identify and put to Clark in clear terms precisely what was done or not done which amounted to a breach of duty and how doing things properly would have made a difference. I cannot exclude the possibility that the specification as carried over from St Annes was always going to be insufficient for what was required, and indeed I note that Mr Whittle in his witness statement [§52.5] appears to suggest that the BQ did not cover this area.

7.33 It may well be that Dock Street could have established a case in this respect, but I do not consider that I can properly infer breach and causation of loss in the absence of a properly particularised case. Thus this claim must also fail.

(6) Enhanced floor coverings

7.34 The position here is similar to the previous item. Both Mr Abbott and Mr Baldwin were particularly critical of the decision to specify Karndean tiles at a cost of some £16,000. However again the difficulty is that I cannot on the extremely limited evidence before me and the case as advanced safely conclude either that Clark was in breach of a specific duty and, if so, how that caused a particular element of the extra cost. There is no email chain or other evidence from which I can safely draw a conclusion that there was a point in time when Clark was aware of the problem, and that there was an opportunity to change the specification to save Dock Street substantial costs, yet failed to take that opportunity. Furthermore, it is apparent from the Parkinson claim that the additional amounts are not limited to aesthetic matters alone.

7.35 Again therefore I do not consider that I can allow this item.

(7) Clean lines

7.36 It is apparent from the emails to which reference has been made that this issue arose in early October 2011. The email from the architects dated 3 October 2011 [3/761-2] made it plain that it was a requirement, conveyed by Mr Hargreaves at the outset, that the internal face of the external walls should have smooth internal lines rather than boxing out around structural columns. This, it is clear, was not an aesthetic issue, but an infection control requirement. The email explained how the design drawings had sought to accommodate that requirement, but that during the course of construction it had become apparent that there was a problem on site in complying with the design which needed to be resolved. The alternatives were either to insist on clean lines throughout, to abandon the requirement, or to adopt a compromise of allowing limited boxing out in non-publicly accessible areas. That email provoked a response from Mr Crewdson the same day, saying that he needed to know the cost implications before taking the matter up with Mr Hargreaves. That then led to an email from Mr Whittle, expressing his concern that this was now on the critical path and causing critical delay, that there were cost implications of adopting both positive solutions, and that unless the problem was resolved without further undue delay there would be delay cost implications as well.

7.37 In his witness statement Mr Brindle explained that after some debate a compromise position was agreed between Mr Crewdson and Mr Hargreaves. In cross-examination [D3/30-31, 33-34] he insisted that this was an issue which could not have been anticipated by Clark as a problem at the time it was designed by the architects at the outset, which only emerged as a problem in autumn 2011, and which had to be resolved as a matter of urgency and in a pragmatic way, having regard to the cost of delay as well as the cost of any variation to the contract works. The correspondence chain was also put to Mr Whittle in cross-examination, and he did not dissent from what he had written at the time. In cross-examination Mr Hargreaves confirmed that the requirement for clean lines had been made known from the outset, but made it plain that he did not know whose fault it was that they were not provided from the outset. I accept that if he did know he would have said so. I also accept that as he said he would have been prepared to accept a pragmatic approach, and would not have insisted on an absolute approach to compliance, but he would have insisted on some appropriate solution being adopted.

7.38 In my view Dock Street has not made out its case in relation to this item. The clean lines were clearly not simply a matter of aesthetics, because they were required in order to satisfy infection control requirements. There is no pleaded case or proper evidential basis to support Clark's case that this was purely aesthetic, and there is no pleaded or other evidential basis for holding Clark liable for this cost, in that no clear case has been made out in relation to breach, clearly explaining what Clark should have done and when and with what effect, or in relation to causation, clearly explaining how the financial outturn would have been different has they acted in the way which Dock Street would like to suggest that they should have done.

Conclusion

7.39 The unnecessary variations claim succeeds, but only as regards item 1 in the sum of £10,000 and item 3 in the sum of £42,023.46, total £52,023.46.

8. IS DOCK STREET ENTITLED TO A DEDUCTION (BY ABATEMENT OR OTHERWISE) IN RELATION TO ANY NON-PERFORMED OR DEFECTIVELY PERFORMED CONSTRUCTION PHASE SERVICES?

8.1 I refer back to section 5 as regards the principles to be applied.

8.2 I have already held that Clark did breach its obligation to provide cost reports on a monthly basis stating the actual and projected final cost of the development. This was a wholesale and serious failure of a basic obligation which one would have expected any professional quantity surveyor to provide, in that Clark simply did not provide anything which could be fairly be described as a cost report within the whole of the construction period. It was also a discrete obligation undertaken by Clark, separate to the obligation to provide interim valuations under the contract. Clark performed the latter, but not the former.

8.3 The experts have agreed that the saved time is 200 hours, and the value of that saved time pro rata to the contract price is £25,000.

8.4 Given that the "global" claim for construction phase breach has failed, and given that the damages awarded as regards the unnecessary variations have no connection with the failure to provide cost reports, there would be no duplication in making a deduction from Clark's fees claim to reflect this failure, and accordingly I deduct £25,000 from the fee entitlement.

8.5 I do not accept Ms Colter's fallback argument that I should not make any reduction because of the work which she submits Clark undertook over and above what it was contractually obliged to do. First, there is no hard evidence of this, in terms of times actually spent and on what, particularly in relation to the construction phase element. Second, since Clark was on any view well remunerated, it is not particularly relevant that Clark did spend time and effort outside the scope of the deed of appointment. Third, since Mr Crewdson was prepared to accept a role as an executive director, in the hope and expectation of obtaining an interest in the business, it cannot be assumed that all of this extra time and effort should in some way be treated as work done by Clark. Fourth and finally, it does not seem to me to excuse anyway a failure by Clark to perform this important element of the services it did actually contract to provide.

9. BREACH, CAUSATION AND LOSS IN RELATION TO POST-CONSTRUCTION PHASE SERVICES.

9.1 As is apparent from my findings in section 2 above under the sub-heading "Parkinson's final account", I am satisfied that Clark did fail to comply with its obligation as quantity surveyor under paragraph 3.1 of the schedule of services to prepare and negotiate the settlement of the final account under the building contract or prepare a full reconciliation of final construction costs. I am satisfied that Clark did not undertake a detailed and professional examination of the draft final account or of the formal final account once produced by Parkinson. Thus, whilst I accept that Clark did provide some advice as to the likely final account settlement figure in around May – July 2012, the quality of that advice was undermined by the failure to have undertaken or communicated a detailed analysis of the final account claim.

9.2 However there is no evidence from Dock Street that the result of such an analysis, properly undertaken, would have produced a figure which was substantially less than the proposed settlement figure of £7,662,500 in July 2012, let alone the actual settlement figure of £7.7M in January 2013. Although Mr Mort suggested at various stages that Dock Street could rely on the various estimates put on the final account claim by Clark in the correspondence, the fundamental difficulty with that argument is that these are the very estimates which Dock Street has, rightly in my judgment, castigated as having been made without the benefit of any proper or detailed analysis. Again, Dock Street is in difficulties as a result of its own failure to instruct Mr Baldwin to undertake a detailed critical analysis of Parkinson's final account with a view to establishing that a proper or detailed analysis at that stage would have shown that the true final account value was significantly less than the claim but also the settlement.

9.3 Moreover, as Mr Brindle observed with some justification, it is unlikely that Mr Abbott would have been interested in any detailed analysis, since all he wanted to know was the bottom line figure.

9.4 It follows, in my view, that there is no obvious basis for linking the failure to perform these obligations with any loss represented by the difference between the original contract sum and the final settlement sum. This is not a case where Dock Street has been able to establish that it was led into agreeing far too high a settlement figure because it did not have access to a proper evaluation of the final account which would have shown that the justifiable final account figure was something substantially less than £7.7M. As I have already said, Mr Baldwin has not undertaken a retrospective analysis of the final account claim from which he has been able to conclude that its true value was only, for example, £7.5M.

9.5 I have also considered however whether or not Clark can be held responsible for the difference between the £7.7m figure and the lower figure of £7,662,500 agreed with Mr Abbott in July 2012. I have considered whether or not it could be said that the loss flows from the fact that there was no justification for seeking to deduct from the £7,662,500 any substantial element of the "statement of deductions" put together by Mr Crewdson and communicated to Parkinson on 18 July 2012. They were, frankly, spurious, and Mr Crewdson must have known that they were spurious. It could be said, therefore, that if Mr Crewdson had not put these spurious deductions together Mr Abbott would probably have settled for £7,662,500 in July 2012 rather than £7.7M in January 2013.

9.6 However I am satisfied that a claim cannot succeed on this basis, for the simple reason that I am satisfied that Mr Abbott was fully involved in the decision not to carry through the agreement reached by him on 28 June 2012, knowing that the alleged deductions were spurious and a device to try to achieve a better settlement. It seems to me that at this point Mr Crewdson and Mr Abbott were acting together as directors of Clark, promoting what they perceived to be its commercial interests. I do not consider that in assembling the statement of deductions Mr Crewdson was providing quantity surveying advice to Dock Street in his capacity as director of Clark. It would have been perfectly open to Mr Abbott, once it became apparent that the negotiating ploy had failed, to go back to Parkinson and seek to agree a payment schedule he could live with on the basis of a £7,662,500 settlement figure. He chose not to do so, doubtless for good business reasons, but cannot in my judgment visit the consequences of that decision upon Clark.

9.7 I have also considered whether I can properly conclude that with the benefit of having seen and evaluated a detailed analysis by Clark of its final account submission Parkinson would have been willing to settle the claim in January 2013 for no more than the sum it was willing to settle in July 2012, namely £7,662,500.

9.8 If Clark had undertaken a proper analysis of Parkinson's draft final account at that time I am quite satisfied that it would have been no more than £7,662,500 and probably substantially less. In other words, I am quite satisfied that Parkinson was not undervaluing its final account claim when it agreed it in that sum at that time. That is a conclusion which I can safely draw even without the benefit of a detailed analysis from Mr Baldwin.

9.9 Whilst Parkinson might have taken the view that Dock Street had, through its own stupidity or greed, repudiated that settlement 6 months previously, since when interest had accrued, it is apparent that in fact Parkinson was prepared to take a reasonable approach to the claim, perhaps because of its knowledge of the precarious finances of Dock Street and Mr Abbott, and I am satisfied that it would not have wanted to fight the adjudication to the end had it known that Dock Street would have been able to put a detailed analysis by Clark before the adjudicator which might, if accepted, have the result of Parkinson recovering a lesser sum than the amount which it was prepared to accept in July 2012. When asked in cross-

examination whether it would have made a difference if Dock Street had been able to produce a more detailed document, Mr Whittle frankly said "we'll never know", but on the balance of probabilities I am satisfied that Parkinson would have been prepared to revert to the original figure had that been available to Dock Street as a weapon to deploy in the discussions.

9.9 Furthermore, in this limited respect I consider that I can draw a commonsense conclusion in relation to breach, loss and causation. There was a clear breach in failing to provide any detailed analysis of the final account claim. There was a clear loss in that in January 2013 Dock Street had to accept a settlement for more than could have been achieved in July 2012. In negotiating the settlement Mr Abbott had nothing to put before Parkinson to support an argument that there was a real risk that it might recover less than it had been willing to accept in July 2012. In the circumstances it is a commonsense conclusion that the failure to provide the analysis was a substantial and effective cause of the failure to achieve the same settlement in January 2013. Although I have no detailed evidence as to the course of the meeting, my assessment of Mr Abbott leads me to conclude, unhesitatingly, that he would have tried to negotiate on the final account sum and would have sought to persuade Parkinson to accept the amount it was prepared to accept in July 2012, but was unable to make bricks without straw.

9.10 It follows, in my view, that I can confidently conclude that Dock Street has suffered a real loss in the sum of £37,500, being the difference between £7.7M and £7,662,500, as a result of Clark's breach in relation to post-construction phase services. Although it appears from the terms of settlement reached with Parkinson that the full amount of the settlement sum has not yet been paid by Dock Street to Parkinson, nonetheless it seems to me to be a genuine loss, albeit as matters currently stand one which has not yet crystallised so far as actual payment is concerned.

<u>The proper quantification of the loss – issue raised by Dock Street post draft judgment</u>

9.11 After circulation of the draft judgment Mr Mort QC provided further written submissions in which, having referred to various parts of my draft judgment and to various documents, he invited me to correct what he described as an error in the calculation of damages under this head, and to substitute an award of £185,500 for the award of £37,500 identified above. This is the matter referred to in §1.8 above. Ms Colter provided written submissions in response, vigorously contesting that this was appropriate. Mr Mort produced written submissions in reply, and the parties invited me to deal with this in writing prior to the date fixed for judgment to be handed down, which I now do.

9.12 In short, Mr Mort submitted that there was a crucial difference between the January 2013 settlement and the July 2012 agreement in principle, which is that the former expressly excluded any claim or allowance for pre-contract suspension costs, whereas the latter did not. Accordingly, he submits, the true comparison should be between the January 2013 settlement <u>plus</u> the £150,000 which, as I have already found, was paid by Dock Street to Parkinson and accepted by Parkinson in full and final settlement of the pre-contract suspension costs claim, and the July 2012 agreement in principle, resulting in an increase in the claim value by the same amount to £185,500.

9.13 Ms Colter objected to this on a number of grounds, namely:

(a) It was inconsistent with Dock Street's pleaded case, which advanced its claims on the basis that the settlement sum was £7.7M, not £7.85M.

(b) This was not a simple case of correcting a mathematical error in the draft judgment, since it was apparent from the draft judgment that I was fully aware that the settlement sum did not take the pre-contract suspension costs claim into account, but had nonetheless gone on to make a finding, open to me, that but for Clark's breach a lesser settlement of £7,662,500 could have been achieved.

(c) In order to accede to Dock Street's invitation I would have to make further positive findings as to what Dock Street could and would have done had it been armed with a detailed analysis from Clark of Parkinson's final account submission. In particular, it would involve findings that: (i) this discrepancy would, in these necessarily hypothetical circumstances, have been picked up in February 2013 by Mr Abbott or by any of Dock Street's advisers at the time; (ii) Parkinson would have been asked in February 2013, and would have agreed, to have accepted in full and final settlement a further net payment of £150,000 less than that which it actually agreed to accept.

9.14 Mr Mort submitted in reply that:

(a) Even if not expressly pleaded, the question as to whether or not the settlement figure did or did not include an allowance for pre-contract suspension costs was raised by Clark in its evidence, responded to by Dock Street, and explored at trial and, hence, there can be no objection to damages being assessed and awarded on that basis.

(b) The error to be corrected was not that the settlement sum did not take the pre-contract suspension costs claim into account, but that the July 2012 agreement in principle was inclusive of the pre-contract suspension costs claim.

(c) There is no need to make further positive findings in order to correct the error identified.

9.15 There is no need for me to lengthen this part of the judgment by referring to the relevant principles to be applied when a judge is invited by one party to correct errors in a draft judgment in circumstances where the other party contends that this is an impermissible attempt to re-argue points already found against the first party and/or to raise new points not previously argued; the authorities and the principles are to be found in the notes to Part 40.2 in Civil Procedure 2015.

9.16 In short, I am satisfied that each of the points made by Ms Colter are both good and sufficient reasons as to why I should not accede to Mr Mort's invitation.

9.17 First, I am satisfied that it would have been necessary for Dock Street to plead this in terms at some point in the course of the trial, had it wanted me to assess damages on the basis of a total payment of £7.85M, as opposed to £7.7M. Whilst Mr Mort is right to say that the issue as to whether the final settlement did or did not include the pre-contract suspension costs claim was an issue raised by Clark in its witness evidence, its purpose was to seek to persuade the court that its alleged breaches were not the cause of the claim for the difference between the contract sum and the final settlement. Had Clark wanted to advance a case to the effect that its true loss was the difference between the original contract sum and the gross amount actually paid, inclusive of the £150,000 allocated to the pre-contract suspension costs claim, then it would have needed to seek permission to amend to plead such a claim. It has not done so, and I am satisfied that I would not have been prepared to accede to such an application at close of the evidence, let alone at this post draft judgment stage. Clark would have been entitled to submit with great force that it would be unfairly prejudiced by any such amendment, not least because if it had known that this was part of Dock Street's positive case it would have wanted to consider and to investigate this matter in much more detail, both pre-trial and at trial, and particularly in cross-examination of Dock Street's witnesses.

9.18 Second, I am satisfied that it does go beyond correcting a simple error of mathematics, because it does involve a detailed consideration of what was in play as at July 2012 and as at February 2013, and the inter-relationship between the two. Whilst that is not in itself necessarily fatal to the exercise of the jurisdiction, the plain fact is that it was always open to Dock Street to advance this as a positive element

of its case from the outset, but chose not to do so, seeking instead to persuade me primarily of the strength of its global claim. There is no compelling reason why I should now allow Dock Street an opportunity to seek to rescue itself from a difficulty of its own making at this point in the proceedings.

9.19 Third, I am satisfied that it is not a finding which it would be proper to make as consistent with the findings that I have already made, nor one which would have been justified on the evidence before me. The basis on which I found that Clark's breach caused Dock Street to over-settle with Parkinson was its failure to produce a detailed final account analysis. However, as Ms Colter observes, that was explicitly not through a finding that if Clark had done so then Mr Abbott and/or Dock Street's advisers would have pored over it and advanced it as a detailed rebuttal of the detailed breakdown of Parkinson's final account claim – see §9.2 - 9.4 above. Instead, it was on the basis that it would have given Mr Abbott the ammunition in a general negotiating context to persuade Parkinson to go back to the gross figure agreed in principle in July 2012 – see §9.7 – 9.9 above. There is no proper factual basis for a conclusion that at that point either Mr Abbott or Dock Street's advisers would have appreciated that there was a discrepancy between what was included in July 2012 and what was included in January 2013, and sought – let alone obtained – a discount above and beyond what Parkinson was prepared to agree on a commercial basis to reflect that discrepancy. Indeed, since at the time Mr Whittle was unaware that the pre-contract suspension costs claim had already been settled, since Parkinson were a hard nosed commercial outfit, and since there was no documentary proof of that settlement, I have no doubt that Parkinson would have refused to agree a further discount on this basis and that Mr Abbott would have had no option but to accept what it was proposing. This settlement, it must be remembered, was a commercial settlement entered into by Mr Abbott without the benefit of any full or proper advice from Clark or from Forbes or anyone else for that matter.

Errors in the final account claim

9.20 Mr Baldwin had also noted in his report [§3.74] a number of errors in the final account claim, totalling £65,590 [2/719], which he considered should have been identified by Clark. Mr Martin did not disagree that there were these errors, or with the amounts involved, save in relation to two specific matters, where the experts set out their respective positions in their first joint statement. Although the experts were not cross-examined on these matters, I consider that Mr Baldwin was generally the more impressive witness in relation to matters of "pure" quantity surveying, and generally I prefer his opinions on these issues. He was cross-examined by Ms Colter on the basis that, in the same way as with the error in the initial BQ, given the relatively modest value of these items, and given the substantial difference between the final account claim and the settlement it could not seriously be suggested by him that this had any specific causative impact in this case. He had to accept that he could not say whether or not Parkinson had already internally discounted their claim by these items, and Mr Whittle did not evidence to that effect.

9.21 The problem however is that this is not a case where I can safely conclude that, even if these items ought to have been picked up by Clark as part of a detailed analysis of Parkinson's final account, that would have led to any different outcome in terms of the settlement negotiations and outcome. I do not think that I can safely conclude that because Parkinson's final account claim as advanced represented the starting point for negotiations, when it should have been £66,590 less, that has resulted in an equivalent over-settlement. It is apparent that the agreement in July 2012 and the agreement in January 2013 were both reached on the basis of commercial bargaining, as opposed to quantity surveyor debate. In the circumstances I do not consider that a claim can succeed on this basis.

9.22 Finally, Dock Street claims the cost of the adjudication as damages as against Clark. The costs as agreed by the experts are: (a) £10,000 in respect of the adjudicator's fees; (b) £20,000 in respect of Dock Street's contribution towards Parkinson's legal costs; (c) £4,642 in respect of Dock Street's legal costs.

9.23 I am not satisfied however that Clark could be said to be responsible for the claim going to adjudication and, hence, the costs of the adjudication which Dock Street has become liable for. I am satisfied that it was Mr Abbott's decision to seek to delay the final reckoning for as long as he could, and that even if Clark had prepared a detailed response to the final account claim when it should have done the matter would still have proceeded to adjudication, with the same result. I do not think that there is any material upon which I can safely conclude that Parkinson would have been willing to write off the costs it had incurred in being forced to take the matter to adjudication in those circumstances.

9.24 Moreover, I am not satisfied as to Dock Street's legal costs. This was said by the experts to be subject to proof of payment. Mr Abbott does not address that cost in his witness statement and although he said in cross-examination in general terms that he had paid Forbes' fees, he was not asked to and did not deal specifically with this item. I have not been referred to any invoice from Forbes relating to this item, nor to proof of payment, in circumstances where the contemporaneous e-mail from Forbes dated 21 January 2013 referred to above is not obviously consistent with Dock Street incurring a fee liability of that size. Thus I am unable to be satisfied that it was incurred or paid.

Conclusion

9.25 It follows that the total loss which I conclude that Dock Street has lost as a result of Clark's failure properly to perform its post construction phase services is £37,500.

10. IS DOCK STREET ENTITLED TO A DEDUCTION (BY ABATEMENT OR OTHERWISE) IN RELATION TO ANY NON-PERFORMED OR DEFECTIVELY PERFORMED POST-CONSTRUCTION PHASE SERVICES?

10.1 The experts have agreed that the time saved in not agreeing and settling the final account is 40 hours, and that the value of that saved time pro rata to the contract sum is £5,000.

10.2 However, in circumstances where I am satisfied that Clark did provide Dock Street with some informal advice as to the settlement of the final account, which was relied upon at least to some extent by Mr Abbott in reaching the provisional settlement figure in July 2012, I do not consider that I can properly find that no part of this service was provided or that what was provided was wholly useless. It was clearly of little value on an objective basis because of the lack of detailed analysis; but I consider that it was of some, albeit very modest, value. Moreover, in circumstances where I have already decided that Dock Street is entitled to substantial damages for this breach, it would not in my view be proper to made any further deduction from the contract price.

11. CONCLUSIONS

11.1 Clark appears to be entitled to £162,500 inclusive of VAT (see paragraph 1.2 above) less £30,000 (£25,000 plus 20% VAT under section 8 above), net £132,500.

11.2 Dock Street is entitled to damages of £52,023.46 under section 7 above and £37,500 under section 9 above, total £89,523.46. It would appear that these sums are VAT exclusive, but that Dock Street as – I presume – a VAT registered trading company would have been able to deduct the input VAT on these amounts against its output VAT so that it appears that they are properly to be awarded as net sums.

11.3 Since it would appear that Dock Street is entitled to rely on a set-off, then the end result, subject to any issues as to precise quantification and VAT, and before any questions of interest fall to be determined, is

that Clark is entitled to recover the principal sum of £42,976.54.