Case No: HT-2015-000157

Neutral Citation Number: [2015] EWHC 3244 (TCC)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16 November 2015

Before:

THE HON MR JUSTICE COULSON

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Between:

	(1) Mr Philip Seeney **(2) Mrs Rosemary Seeney**	**Claimants/Applicants**
	- and -	
	(1) Gleeson Developments Limited **(2) M. J. Gleeson Group PLC**	**Defendants/Respondents**

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Mr Seb Oram (instructed by **Hewitsons**) for the **Claimants/Applicants**
Mr Tom Owen (instructed by **Systech Solicitors**) for the **Defendants/Respondents**

Hearing date: 6 November 2015

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Judgment**The Hon. Mr Justice Coulson:**

1. INTRODUCTION

1. By an application dated 8 September 2015, the claimants (whom I shall call "the Seeneys") seek summary judgment pursuant to CPR Part 24 in respect of a part of their claim. That part is set out at paragraph 22 of the Particulars of Claim, and comprises a declaration that they and the first defendant "compromised all claims for compensation or additional payment" that the first defendant might have as at 1 September 2011 "arising from additions or variations to the works" at 19, The Crescent, Cambridge ("the property"). The compromise agreement, in the sum of £30,000, is said to be contained in an email dated 1 September 2011. The application for summary judgment is denied by the defendants (whom I shall call "Gleesons"), because they maintain that any agreement

was conditional on the conclusion of a formal contract.

2.The background to the dispute is factually quite complex, although the issues on the summary judgment application are ultimately straightforward. Although I have grave concerns as to how the parties have ended up in the current position, no criticism can be attached to counsel, who argued their respective positions with clarity and courtesy. I should particularly commend Mr Owen for his equanimity in the face of a certain amount of judicial heckling.

2. BACKGROUND

3.In 2001, the Seeneys brought a property (known as 1, Fuller Way, Cambridge), from a company within the Gleeson Group. Since – at least for present purposes - nothing turns on the various entities within that Group who have had an involvement in this saga, I shall simply refer hereafter to all such companies as "Gleesons".

4.1, Fuller Way was significantly defective. The Seeneys indicated substantial claims against Gleesons. Eventually, by an agreement (called "the Property Agreement") in writing dated 21 April 2009, those claims were compromised on the basis that:

(a) Gleesons would demolish and rebuild an adjoining property which they owned, known as 19, The Crescent, Cambridge (the property);

(b) On completion of the property (sometimes called Darwin House in the papers), the freehold would be transferred by Gleesons to the Seeneys;

(c) At the same time, the freehold of 1, Fuller Way would be transferred by the Seeneys to Gleesons.

It was effectively a property swap: Gleesons would build a new house for the Seeneys and take the existing, defective house in exchange.

5.The Property Agreement contained the following provisions:

> "3. Gleeson and the Owners shall agree an initial planning stage specification (up to RIBA Outline Plan of Work 2007 Work Stage D -design development) for the rebuilding of Plot 1 by no later than 28 days from the date of this Agreement and before the planning application is made. A more detailed specification shall be agreed before submission of plans to Building Control. In both cases, the Owners are to

sign off the specification indicating their satisfaction with it (such approval not to be unreasonably withheld or delayed).

4. Within a reasonable period of the grant of planning permission and of any other consents necessary for such work to proceed, Gleeson shall proceed with the demolition of Plot 1 [the property] and the construction of a new house on that Plot in accordance with the agreed specification. Gleeson will have complete freedom as to the method of procurement and sequence of works and all the other construction-related provisions. However, Gleeson agrees to appoint only NHBC registered contractors and the site will be registered with the considerate contractor scheme.

5. Gleeson may amend the specification with the consent of the Owners, such consent not to be unreasonably withheld or delayed. Consent shall be deemed to be given when any change is minor (in the reasonable opinion of Gleeson) and is reasonably required by Gleeson because of unavailability of materials or any other item specified provided that any substituted materials are of equivalent or superior standard and are no less suitable for their purpose.

   The Owners may amend the specification with Gleeson's consent, such consent not to be unreasonably withheld or delayed, subject to any such amendments being added to Schedule 1 to this agreement so that Gleeson will subsequently be compensated for any consequential increase in cost of such amendments in accordance with clause 15.

…

14. The enfranchisement costs incurred in acquiring the freehold of Plot 1 and Plot 2 will, in the first instance, be paid by Gleeson.

15. Following the transfer of Plot 1 to the Owners and Plot 2 to Gleeson, Gleeson will then pay to the Owners the sum of £25,000 less:

    (a) the enfranchisement costs incurred in acquiring Plot 1 [the property]; and

    (b) the cost of the additions and alterations to the specification set out in Schedule 1 to this agreement together with the cost of

any amendments to the specification which the Owners may require in accordance with clause 5.

For the avoidance of doubt, if this is a negative figure then the Owners will make a payment of this sum to Gleeson."

6. There were therefore three matters identified in the Property Agreement on which subsequent agreement would be required. Those were:

(a) The more detailed specification referred to in clause 3;

(b) The enfranchisement costs incurred by Gleesons in acquiring the property (referred to as Plot 1) in clause 15(a);

(c) The costs of the additions and alterations to the specification required by the Seeneys in accordance with clause 5, as referred to in clause 15(b).

The agreement of the detailed specification at (a), and the costs at (c), were potentially linked.

7. By July 2011, Gleesons were ready to put the building works at the property out to tender. The emails between July and early September 2011 reveal two principal matters that were being debated back and forth: the value of the additions/alterations required by the Seeneys (referred to by both parties as 'the extras bill'), and the agreement of the detailed specification. Since those are the critical emails for the purposes of this application for summary judgment, I set them out in detail in **Section 6** below. As I have already said, the issue is whether the eventual agreement (that the extras bill was £30,000 as at 1 September 2011) was binding on Gleesons, or whether it was subject to a formal contract that was never concluded.

8. Following further exchanges after 1 September 2011, a number of things are clear. First, although the possibility of a supplemental agreement was raised on both sides, no such document was ever provided by Gleesons to the Seeneys. A draft agreement was found on the files of Gleesons' former solicitors, but there was no evidence on either side that it had ever been sent out. Still further, the supplemental agreement was so general, with all of the relevant details to be filled in, that it was of no practical value.

9. Secondly, notwithstanding the absence of an agreed specification, Gleesons went on to build the property. That is an important matter, for reasons which I shall explain. I am told that, except for finishing details, the property has been completed for some time. Sadly, because of the ongoing dispute between the parties, it is sitting there, empty, whilst the

Seeneys continue to occupy the defective house at 1, Fuller Way.

10. That dispute came to the fore in September 2012 when Gleesons sent the Seeneys a demand for £89,575.61 said to be due for extras that the Seeneys had instructed, pursuant to clause 5 of the Property Agreement. The list made no reference to the £30,000 and, in subsequent correspondence, it became apparent that Gleesons refused to acknowledge any agreement in that figure. Their stance was not made any clearer by their failure to identify when they said that the extras had been ordered, so there was nothing with which to compare the £30,000. The Seeneys, for their part, refused to pay the £89,575.61, and commenced a claim for specific performance.

11. In response, Gleesons maintain that the Seeneys' failure to pay the sum due under clause 15 of the Property Agreement amounts to a repudiation of and/or allows them to rescind the Property Agreement. Moreover, they say that their counterclaim is worth not £89,575.61 but, depending on which way it is calculated, £163,902 or £440,937. Neither of these sums was demanded prior to the commencement of proceedings. Moreover, neither figure is arrived at by a method of calculation which gives any indication of the extras allegedly ordered by the Seeneys. Instead the figures are calculated using global comparisons.

12. Thus, it appears to be Gleesons' case now that, although they have provided the Seeneys with a defective house at 1 Fuller Way for 14 years, they can either put to one side the subsequent settlement agreement into which they entered by way of compensation for those defects (the repudiation/rescission arguments), or constitute a mechanism by which they, Gleesons, receive almost half a million pounds by way of counterclaim. It may be that the commercial, reputational and practical realities of such a stance have not been fully thought through.

13. The same may also be said for the single issue at stake in this application. The Seeneys agree that they are bound by the £30,000 that they agreed for the extras instructed up to 1 September 2011. Gleesons are not happy to be so bound. So I asked Mr Owen why not: what was the value of the extras that Gleesons said had been ordered up to that date? Gleesons seemed surprised by this simple question and did not have a ready answer to it. In the end, the best they could do was to point to a document dating from 2011 which suggested that the starting point for the eventual agreement was a figure of £57,000 odd (paragraph 31 below). On that basis, Gleesons appear content to spend £16,576 (their costs of the hearing before me) in order to argue about a point which was worth just £27,000 (£57,000 less £30,000). The lack of commercial reality seemed to me to be stark.

3 THE RELEVANT PRINCIPLES

14. The principles applicable to summary judgment applications of this sort are neatly summarised in the judgment of Popplewell J in ***Barclays Bank PLC v Landgraf*** [2014] EWHC 503 (Comm); [2015] 1 All ER (Comm) 720. I therefore set out paragraph 26 of his judgment in full:

> "**The Law**
>
> 26. The principles to be applied on applications for summary judgment are well established. In respect of defendants' applications, they were summarised by Lewison J, as he then was, in ***Easyair Ltd v Opal Telecom Limited*** [2009] EWHC 339 (Ch), in a formulation approved in a number of subsequent cases at appellate level, including ***AC Ward & Sons v Catlin (Five) Limited*** [2009] EWCA Civ 1098 and ***Mellor v Partridge*** [2013] EWCA Civ 477. In ***FG Wilson Engineering Limited v Holt*** [2012] EWHC 2477 (Comm), I adapted them for claimants' applications. The principles are:
>
> (1) The court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success: ***Swain v Hillman*** [2001] 2 All ER 91;
>
> (2) A "realistic" defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: ***ED & F Man Liquid Products v Patel*** [2003] EWCA Civ 472 at [8];
>
> (3) In reaching its conclusion the court must not conduct a "mini-trial": ***Swain v Hillman***;
>
> (4) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ***ED & F Man Liquid Products v Patel*** at [10];
>
> (5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: ***Royal Brompton Hospital NHS Trust v Hammond (No 5)*** [2001] EWCA Civ 550;
>
> (6) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is

possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: ***Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd*** [2007] FSR 63;

(7) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ***ICI Chemicals & Polymers Ltd v TTE Training Ltd*** [2007] EWCA Civ 725."

15. The last authority cited by Popplewell J, namely ***ICI Chemicals & Polymers Ltd v TTE Training Ltd***, is a useful case in this context, because it addresses in a pragmatic way the relatively robust approach to be adopted on construction issues that may arise on a summary judgment application. The relevant parts of the judgment of Moore-Bick LJ are as follows:

"11. The first of these arguments raises a short point of construction which on the face of it the court could conveniently decide on an application of this kind. Indeed the judge invited the parties to agree that he should decide it as a preliminary issue, but they were unwilling for him to take that course. Counsel for TTE apparently was unable to

obtain instructions to enable him to agree to it and counsel for C&P was reluctant to do so because of the potential relevance, so it was said, of extrinsic evidence not then before the court. The judge therefore proceeded on the footing that it was necessary for him to decide only whether C&P had a real prospect of succeeding in its claim notwithstanding the terms of the agreement of 10 June 2002.

12. In my view the judge should have followed his original instinct. It is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better.

13. In cases where the issue is one of construction the respondent often seeks to persuade the court that the case should go to trial by arguing that in due course evidence may be called that will shed a different light on the document in question. In my view, however, any such submission should be approached with a degree of caution. It is the responsibility of the respondent to an application of this kind to place before the court, in the form of a witness statement, whatever evidence he thinks necessary to support his case. Where it is said that the circumstances in which a document came to be written are relevant to its construction, particularly if they are said to point to a construction which is not that which the document would naturally bear, the respondent must provide sufficient evidence of those circumstances to enable the court to see that if the relevant facts are established at trial they may have a bearing on the outcome.

14. Sometimes it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial. In such a case it would be wrong to give summary judgment because there would be a

> real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction."

4. THE ISSUE

16. On 1 September 2011, Mr Richard Cavadino, a quantity surveyor and mediator (who was engaged by Gleesons) wrote to Ms Faye Whiteoak of Gleesons, (with a copy to the Seeneys) in the following terms:

> "Subject: agreement with Mr and Mrs Seeney.
>
> Hi Faye
>
> Following our earlier discussions I can confirm that we have agreed with Mr and Mrs Seeney that their net contribution to the extras on the building contract.
>
> This has been calculated as follows:
>
> Your previous offer £40,000
>
> Less allowance for kitchen lighting -£3,000
>
> Less contribution for wardrobes -£5,000
>
> Reduction in quote from By Design -£2,000
>
> Total £30,000."

17. Mr Oram confirmed in answers to questions from the court that it was the Seeneys' case this email evidenced a binding agreement that the value of the extras ordered by the Seeneys as at 1 September 2011 was £30,000, and that that was the agreed figure for the purposes of clause 15(b) of the Property Agreement. I think that that is consistent with paragraph 22 of the Particulars of Claim.

18. Gleesons maintain that there was no binding agreement. They say that, by reference to earlier emails, this email should be read as if it had been stated expressly to be "Subject to Contract" and that the agreement in respect of the £30,000 was conditional upon the conclusion of a binding contract between the parties. In the absence of any such further contract, Gleesons say that they are not bound by the agreed £30,000.

5. THE LAW

19. In deciding whether the parties have reached agreement, the court must have regard to the whole of the negotiations. Once the parties have, to all outward appearances, agreed in the same terms on the same subject matter, usually by a process of offer and acceptance, a contract will have been formed. It is perfectly possible for the parties to conclude a binding contract, even though it is understood between them that a formal document recording or even adding to the terms that they have agreed will also need to be executed. Whether they intend to be bound in such circumstances, or whether they intend to be bound only when the formal document is executed, depends on an objective appraisal of their words and conduct.

20. Those principles were summarised by Lord Clarke in ***RTS Flexible Systems Ltd v Molkerei Alois Müller GmbH & Co Kg*** [2010] BLR 337. They themselves are derived from the well known summary of the principles by Lloyd LJ (as he then was) in ***Pagnan SpA v Feed Products Ltd*** [1987] 2 Lloyd's Rep 601:

> "(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole (see ***Hussey v Horne-Payne*** (1879) 4 App. Cas.311);
>
> (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary "subject to contract" case.
>
> (3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed; see ***Love and Stewart v Instone*** (1917) 33T.L.R 475 where the parties failed to agree the intended strike clause, and ***Hussey v Horne-Payne***, where Lord Selbourne said at p. 323:
>
> > …The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, *and without the settlement of which the parties had no idea of concluding any agreement.* [My emphasis].

(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled (see ***Love and Stewart v Instone*** per Lord Loreburn at p. 476)."

21. As Males J noted in ***Air Studios (Lyndhurst) Ltd v Lombard North Central PLC*** [2012] EWHC 3162 (QB): [2013] 1 Lloyd's Rep 63, this fourth principle was established in ***Von Hatzfeldt-Wildenburg v Alexander*** [1912] 1 CH 288. Parker J said at page 228:

> "It appears to be well settled by the authorities that if the documents or letters relied on as constituting a contract contemplate the execution of a further contract between the parties, it is a question of construction whether the execution of the further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will in fact go through. In the former case there is no enforceable contract either because the condition is unfulfilled or because the law does not recognize a contract to enter into a contract. In the latter case there is a binding contract and the reference to the more formal document may be ignored."

22. Two more recent cases show the critical difference between, on the one hand, conduct consistent with the parties only being bound on the conclusion of a formal contract and, on the other hand, an agreement that a subsequent written document was simply to record that which had been previously agreed. Thus:

(a) In ***Whitehead Mann Ltd v Cheverny Consulting Ltd*** [2006] EWCA Civ. 1303, the Court of Appeal was dealing with complex negotiations relating to incorporation/acquisition of two companies. Although it is clear that they found that there was no agreement on the facts, the Chancellor set out some useful principles, noting at paragraph 42 that the commonest way of being able to review all the written terms before becoming committed to any of them was to stipulate that the negotiations were 'subject to contract', although such words were not essential. He said that each case depended on its own facts, but where solicitors were involved and a formal written agreement was to be produced and arrangements made for its execution, then the normal inference was that the parties were not bound unless and until the agreement was signed.

(b) In ***Newbury v Sun Microsystems*** [2013] EWHC 2180 (QB), Lewis J was dealing with the settlement of litigation in which the offer, which was accepted, noted that the terms of settlement were "to be recorded in a suitably worded agreement". He found that the fact that there was a subsequent dispute over the terms of the written agreement did not prevent there from being a binding

contract, because the subsequent document was merely to record what had already been agreed. He made plain at paragraph 22 that his view might have been different if the offer letter had been marked 'subject to contract'.

23. I must therefore apply these principles when considering the negotiations as a whole.

24. Finally, although I must have regard to the fact that this is a summary judgment application, not a trial, I consider that the evidence on the issue before me will not improve or increase between now and the trial. First, these sorts of issues are almost always decided on the contemporaneous documents, and I am satisfied that there will be no more such documentation here. There is nothing to suggest that this is not a full record of all such documents; in particular, there are no references to other documents that we do not have. Secondly, Gleesons have known since March this year about the Seeneys' reliance on the compromise agreement (because it is pleaded in the Particulars of Claim), and their pleaded denial of a binding agreement relies on the contemporaneous documents and nothing else. There is nothing to suggest that, even on their own case, any of their former employees could add anything of substance to the contemporaneous material. Thirdly, in view of the low value of the issue, the overriding objective further militates against waiting for the remote possibility that something else will turn up at trial.

6. THE RELEVANT EXCHANGES

25. By July 2011, the Seeneys had been working with Gleesons for some time on the proposals for the property, which was to be demolished and rebuilt. The contract for the building works was about to go out to tender.

26. On 13 July 2011, the Seeneys emailed Ms Whiteoak in respect of the proposed specification, saying "it would be useful to know the deadline for the spec to be sent to tender so Rosemary and Sam [Gleesons' designer] can try to meet this…" It appears that Ms Whiteoak responded on the phone because subsequently on the same day the Seeneys emailed again to say:

> "We will try to get agreed spec to you as soon as we can…we then need to have a discussion with Richard [Cavadino] and put our case to him for reviewing costs so that you and he can sit down and agree an offer to make as you suggested.
>
> I feel in this way, as you have indeed set it up, you can speak candidly to Richard and so can we and then we can [hopefully] get to an agreement as he will be able to see/state both cases without anyone getting emotional – we have come too far together to stall at the final fence."

27. Ms Whiteoak's email of 15 July indicated that the tender documents were going out that day, despite the fact that (at least in their final version) they had not been seen by or agreed by the Seeneys. She said that the proposed works at the property were programmed for 2011-2012.

28. On 16 July 2011, the Seeneys sent Mr Cavadino an email setting out "our position and views" in respect of the new house. In that email, the Seeneys asked to review the specification and plans. They also agreed that it was probably best that they now negotiated "the current position" and reach an agreement as soon as possible. The stated plan was for the Seeneys to make an offer "and hopefully move things forward quickly".

29. On 18 July 2011, the Seeneys replied to Ms Whiteoak's announcement that the tender documents had gone out, saying that they assumed that the specification which had gone out to tender was provisional "as we have not seen it since February and we have not signed it off yet". In the letter they stressed the importance of seeing some of the drawings and signing off the plans. It does not appear that any of that in fact happened because, on 19 July 2011, Ms Whiteoak replied to say that there was nothing in the Property Agreement that imposed an obligation on Gleesons to agree the tender documentation with the Seeneys.

30. Her lengthy email of 19 July then turned to the question of the extras. Having dealt with the detail of what had been ordered as extras, Ms Whiteoak said this:

> "I met with our solicitor today to discuss formalising the settlement payment which is referred to in the Property Agreement. Now that we have received your final bathroom and kitchen specification, the next steps will be to confirm the 'Extras List' and reach an agreed settlement figure with yourselves. The final payment figure and corresponding specification will then be appended to a new (simple) Contract, as well as a copy of the signed-off Building Regulations and Planning application packages. To clarify, the Property Agreement sets out the principles of the settlement payment and the new Contract will prescribe the details, such as how much, when and what for."

31. On 22 July 2011 Mr Cavadino recalculated the maximum value of the extras in an email he sent to both parties. He said that he had met with Ms Whiteoak and they had gone through the details. A summary of the extras showing the relevant figures was attached. The summary was in the total amount of £57,852.39.

32. On the same day, Ms Whiteoak emailed the Seeneys. Although she referred to a figure in respect of enfranchisement costs (clause 15(a) of the Property Agreement), the declaration sought by the Seeneys on this application does not relate to this item, which

is therefore immaterial for present purposes. Having then referred to the final extras bill of £57,852.39 (paragraph 31 above), Ms Whiteoak then offered to reduce that to £40,000. She expressed the hope that that offer was acceptable and that, once it was agreed, "I will instruct our solicitors to prepare a settlement contract".

33. On 25 July 2011, the Seeneys responded to Ms Whiteoak's offer. The response showed a relatively narrow area of disagreement, which presumably prompted Mr Cavadino's remark to the Seeneys, on the same day, that "we're nearly there". The Seeneys responded to Gleesons (copied to Mr Cavadino) in greater detail on 31 July 2011, in which they made a counter offer of £20,000 in respect of "the final extras bill".

34. On 3 August 2011, Ms Whiteoak replied, noting that there had been other upgrades which meant that the final extras bill should have been in the region of £80,000. She said this figure had been halved (presumably leading to the original offer of £40,000). Although no other figure was referred to in her email, Ms Whiteoak went on to say: "Hopefully you will find that this offer is acceptable to you both and we can proceed past the tender stage. If not, we will have to postpone the start onsite date and review the specification again." Not unreasonably, the Seeneys emailed Mr Cavadino on the same day to say that they were not quite sure what Ms Whiteoak was offering, because her reply appeared to be no more than a restatement of the £40,000.

35. On 9 August 2011, Mr Cavadino confirmed that Gleesons' offer of £40,000 had been reduced by £8,000. He told the Seeneys "your contribution therefore reduces to £32,000." There was then some further discussion/negotiation and, on 1 September 2011, Mr Cavadino sent the £30,000 email to which I have referred at paragraph 16 above.

36. There was some debate between the parties as to whether I should have regard to subsequent correspondence. Gleesons wanted to refer to it because they say that the desirability of drawing up a subsequent agreement was plain in that later correspondence (which it was). The later correspondence cannot of course be relevant to any question of construction. However, in order to paint the complete picture, it is appropriate to refer briefly to the following:

(a) The letter from Gleesons' then solicitor of 6 September 2011, which referred to paragraph 15(b) of the Property Agreement, and expressed the understanding that there was "a list of additions and alterations to the specification" which had been agreed "and the cost";

(b) The numerous further exchanges about Gleesons not making the contract specification available to the Seeneys and therefore the inclusion of design details that the Seeneys said they did not know about.

(c) The correspondence in which the Seeneys, on the face of it, ordered further changes/extras;

(d) Ms Whiteoak's email of 28 September 2011 which said "basically we need to tidy up the Property Agreement and formalise the due payment to Gleeson upon completion of Darwin House";

(e) The email of 11 October 2011 from the Seeneys' solicitor saying:

> "I understand the 'full details and specification' of the new house have not yet been formally agreed by my clients and this will be an important part of the new agreement.
>
> My clients and I are hoping to meet shortly in order to sort out those areas which the agreement needs to address in order to tie everything up nicely"

(f) Gleesons' then solicitor's response of 11 October 2011 which said:

> "This comes as a surprise as my instructions are that the detailed specification has been agreed as have extras. The agreed spec has been tendered and the build contract let. As you say the new agreement is a sensible item to record what is already agreed."

(g) Gleesons' then solicitor's later letter of 28 October 2011 which accepted that there had not been a formal agreement of the new specification and said that that was one of the purposes of the proposed supplemental agreement.

37. A draft supplemental agreement was apparently prepared by Gleeson's solicitors. A copy has been recently found on file. As noted in paragraph 8 above, I find that it was not sent out, because there was no record of it being sent out, no record of it being received, and no reference to it in any later letter or exchange between the parties.

7. ANALYSIS

38. I am in no doubt that, when applying the principles set out in **Section 5** above to the negotiations to which I have referred in **Section 6** above, the parties reached a binding agreement that the value of the extras ordered by the Seeneys as at 1 September 2011 was £30,000. There are a number of reasons for that conclusion.

39. First, that is what the email of 1 September 2011 says (paragraph 16 above). There is

nothing there which qualifies that agreement or makes it conditional in any way.

40. Secondly, the previous emails of Ms Whiteoak do not suggest for a moment that any agreement of "the final extras bill" was 'subject to contract'. At no point does she use that expression, despite the involvement of solicitors on both sides. And I find that that was not her intention. What she was saying was that, once agreement was reached on the value of the final extras bill, that agreement would have to be recorded in a supplemental agreement. In view of the history (after all, this further negotiation flowed from the Property Agreement, which was itself a settlement of the underlying dispute), this was very sensible. Moreover, a supplemental agreement was going to be necessary in any event to deal, amongst other things, with the enfranchisement costs (clause 15(a)), and the specification. The agreement of the final extras bill was not conditional on the formalisation of any such supplemental agreement.

41. Thirdly, that Ms Whiteoak's emails were referring to the recording of an agreement that had already been reached was the view of others too. Thus Gleesons' then solicitor accurately described the position on 11 October 2011 when they said that the new agreement was "sensible" because "it would record what is already agreed". He also said expressly that the extras had been agreed. Although he subsequently accepted (paragraph 36 (g) above) that the specification had not been agreed, he never suggested that he was wrong to say that the extras had been agreed.

42. Fourthly, it is important to note the sequence that Ms Whiteoak set out in her email of 19 July 2011 (paragraph 30 above). She said that the parties needed first to reach an agreed figure for the extras. Once that had happened, the agreed figure, and corresponding specification, "will then be appended to a new (simple) Contract". In other words, the settlement figure had to be agreed first (as the Seeneys called it, that was 'the final fence', as noted in paragraph 26 above), and it would thereafter be included within a new "simple" contract. The contract would be 'simple' because it was recording that which had already been agreed.

43. Fifthly, Ms Whiteoak's email of 3 August 2011 (paragraph 34 above) demonstrated the importance to Gleesons of agreeing the value of the extras at that critical stage. She made plain that agreement of the extras was necessary before Gleesons could proceed with the works. She expressly warned that, if there was no binding agreement in relation to the extras, the construction works would have to be postponed. In fact, following 1 September 2011, the construction works then proceeded, which is the best possible evidence that Gleesons themselves recognised that there was a binding agreement as to the extras, which allowed them to carry on with the works.

44. Sixthly, it is clear that both parties recognised the importance of reaching an agreement that was binding in respect of what the Seeneys called the "current position" (paragraph 28 above). This recognised that there may be later developments and possibly

amendments and extras ordered after that date. But I find that the parties wanted to reach a binding agreement on that current position so as to have a baseline from which to work. Moreover, they expressly wanted to achieve that by the usual process of offer, counter-offer and agreement: see paragraphs 26 and 32 above.

45. Finally, it is I think important to stress Mr Cavadino's position. The emails which I have set out make it clear that he was mediating between Gleesons and the Seeneys: the email from the Seeneys set out at paragraph 26 above admits of no other interpretation. Thus, I find that the agreement of 1 September 2011, set out in Mr Cavadino's email, was an agreement which he himself had brokered in his role of mediator. The courts should be very reluctant to undo agreements reached with or through the offices of a mediator, and should take a realistic, if not mildly sceptical, view of parties who seek to avoid the consequences of such an agreement months, if not years, down the line.

For all those reasons, I consider that there was a binding agreement between the parties that the value of the extras ordered by the Seeneys as at 1 September 2011 was £30,000.

8 OTHER COMPELLING REASON FOR TRIAL

46. At paragraphs 27-30 of his full skeleton argument, Mr Owen identified four matters which he said comprised other compelling reasons for ordering a trial. I reject each. As to the first, I have already said that I am confident that, if Gleesons have not been able to find it in the last 8 months, they will not find any other relevant evidence on this issue. Second, concerns about the Seeneys' credibility on other matters can be pursued at trial. They do not affect the proper construction of the exchanges. Third, the issue of extras after 1 September does not arise and is no part of the declaration which I am asked to make. Fourth, the issue of enfranchisement costs similarly does not arise and is no part of the declaration which I am asked to make.

47. On the contrary, in the light of the material set out above, the low monetary value of the issue, and the likely need for Gleesons to revamp their pleadings, there are compelling reasons for the court to decide this issue at this stage.

9 CONCLUSIONS

48. For all those reasons, I declare that the parties reached a binding agreement that the extras ordered by the Seeneys as at 1 September 2011 were to be valued at £30,000, and that, at least at that date, that was the relevant figure for clause 15(b) of the Property Agreement.

49. I will deal separately with all issues of costs. There may also be arguments about the

need for Gleesons to re-plead their defence and counterclaim in order to make clear what extras they say were ordered after 1 September 2011 and the value ascribed to them.