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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (KB)

Manchester Civil Justice Centre
Date handed down: 11 September 2023

Before His Honour Judge Stephen Davies sitting as a High Court Judge
Between:

Lidl Great Britain Limited	**Part 8 Claimant / Part 7 Defendant**
- and -	
Closed Circuit Cooling Limited t/a 3CL	**Part 8 Defendant / Part 7 Claimant**

Jonathan Acton Davis KC and Christopher Reid (instructed by **Clarke Willmott LLP, Manchester**) for **Lidl**
Charlie Thompson (instructed by **Hill Dickinson LLP, Manchester**) for **3CL**

Hearing date: 23 August 2023
Date draft judgment circulated: 4 September 2023

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APPROVED JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10am on 11 September 2023 by circulation to the parties or their representatives by email and by release to The National Archives.

I direct that pursuant to CPR PD 39A paragraph 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

A. Introduction and summary of decision

1. This is my judgment following the hearing on 23 August 2023 of:

   1.1. The Part 8 claim issued on 14 June 2023 by Lidl (as the Part 8 claimant and Part 7 defendant) seeking the determination of issues arising out of an adjudicator's decision dated 1 June 2023 by way of the declaratory relief claimed in paragraphs 6 and 7 of its details of claim.

   1.2. The application seeking summary judgment of the adjudicator's decision in the Part 7 claim issued on 30 June 2023 by 3CL (as the Part 7 claimant and Part 8 defendant).

2. The declaratory relief sought in the draft order accompanying the Part 8 claim gives a clear idea of the nature and breadth of the determinations sought and their intended purpose. It is, therefore, worth setting out in full at the outset:

> "1. In order to comply with the requirements of clause 7.4.3 of the Framework Agreement, Applications for Payment must include the matters specified in sub-paragraphs 7.4.3(a)(i) – (vi) of that contract.
>
> 2. In particular, a valid Application for Payment:
>
> 2.1. must adequately identify the particular Milestones for which payment is sought in each individual Application for Payment;
>
> 2.2. must include photographic evidence that the particular Milestones for which payment is sought have been achieved;
>
> 2.3. must include evidence of renewals of the relevant insurances (or evidence that insurance is otherwise being maintained).
>
> 3. Further, in order for an Application for Payment to be 'received' by the Claimant – such that the Due Date can be calculated – an Application for Payment must be submitted to the Claimant in accordance with clause 1.3 of the Framework Agreement.
>
> 4. Accordingly:
>
> 4.1. AFP19 was not a valid Application for Payment and was of no effect under the Framework Agreement or the Order; and/or

4.2. AFP19 was not validly 'received' by the Claimant such that neither the Due Date nor the Final Date for Payment have occurred.

5. PAY-7 was a valid Payment Notice under the Framework Agreement and the Order. Accordingly, no sum is payable to the Defendant by the Final Date for Payment for AFP19.

6. The Parties' agreement for the 'Final Date for Payment' complies with the requirements of section 110(1)(b) of the Housing Grants, Construction, and Regeneration Act 1996 (as amended).

7. In the absence of a VAT Invoice complying with the terms of the Payment Schedule, the Final Date for Payment for AFP19 has not yet occurred and no sum is therefore payable to the Defendant.

8. The Adjudicator was therefore wrong to decide that any sums were payable to the Defendant further to AFP19.

9. The Adjudicator determined that PAY-7 was invalid on the basis of a conclusion of law for which neither of the Parties had contended.

10. The Decision is therefore unenforceable by reason of a material breach of the rules of natural justice."

3. It will be seen that:

3.1 Paragraphs 1 to 8 are seeking declaratory relief with a view to obtaining determinations from the court that 3CL's contentions before the adjudicator, on which they largely succeeded, in relation to: (a) the validity of 3CL's application for payment; (b) the validity of the service of that application; (c) the invalidity of Lidl's payment notice; (d) the validity of 3CL's invoice; and (e) the non-compliance of the terms for the final date for payment with the requirements of section 110(1)(b) of the Housing Grants, Construction, and Regeneration Act 1996 (as amended) ("the Act") are wrong with the result that the adjudicator's decision should not be enforced.

3.2 Paragraphs 9 and 10 are seeking declaratory relief that the decision is also and separately unenforceable by reason of the adjudicator's alleged failure to comply with the rules of natural justice.

4. Acting sensibly in accordance with the relevant provisions of the TCC Guide 2022 the parties had agreed that the summary judgment application and the Part 8 claim should be heard together on the first convenient available date after the parties had completed the exchanges of evidence with a time estimate of one day. That hearing proceeded on 23 August 2023. I was able to pre-read the very helpful and detailed written submissions of counsel beforehand and to consider the key relevant documents. The hearing still took the full day, due to the number and complexity of the issues argued and I reserved judgment.

5. The essential background is conveniently summarised by Lidl's counsel in their written submissions which I paraphrase as follows.

6. Lidl is a well-known national retailer. 3CL carries on business as an industrial refrigeration and air-conditioning contractor. Lidl and 3CL entered into a framework agreement which enabled the parties to enter into individual works orders, each of which was to constitute a separate contract incorporating both the terms of the framework agreement and the order. The first order issued under the framework agreement is the subject of this case.

7. The framework agreement and the order contain provisions entitling 3CL to make applications for interim payment ("a payment application") following the achievement of defined milestones. The relevant payment application in this case is the 19th such application ("AFP19"), in which 3CL sought payment of £781,986.22.

8. The first major dispute between the parties concerns the effect of AFP19. Lidl's position is that it was an invalid payment application because of its failure to comply with one or more of the requirements of the contract in

terms of: (a) the identification of the milestones achieved and amounts claimed against each; (b) the provision of the required supporting photographs and insurance evidence; and (c) its method of service, so that it did not engage the subsequent steps (being service of a payment notice and pay less notice) in the payment provisions. 3CL maintains that none of these requirements were conditions precedent to AFP19 being a valid payment application and that in any event either it did comply with the contractual requirements, properly understood or, even if it did not, Lidl is estopped by convention from contending that it failed to do so.

9. The second major dispute concerns the effect of Lidl's response to AFP19, which was to issue a document entitled '2011-PAY-7' and valuing the works at nil ("PAY-7"). Lidl maintains that it was a valid payment notice, while 3CL contends that it was not and that it was in reality an invalid pay less notice served without a prior payment notice.

10. The third major dispute concerns the compliance of the payment terms of the contract with the Act. 3CL contends that the terms of the contract as regards the final date for payment do not comply with the requirements of the Act. Lidl disagrees. 3CL argues this point as an answer to the defence raised by Lidl to the effect that the contract made the final date for payment conditional upon 3CL delivering a compliant VAT invoice which, Lidl says, 3CL did not do. This dispute raises a question of more general importance as to whether the court should follow the approach of Cockerill J in Rochford Construction Limited v Kilhan Construction Limited [2020] EWHC 941 (TCC), as 3CL submits that it should, or whether it should follow what Lidl submits is the different and preferable approach of other judges in earlier decisions.

11. On 26 April 2023, 3CL referred the dispute over its entitlement to payment under AFP19 to adjudication. In a detailed reasoned decision the adjudicator (Mr. Robert J. Davis) rejected all of Lidl's submissions as to the invalidity of AFP19 and as to the validity of PAY-7 and, thus, rejected Lidl's defences that no sum was payable because the final date for payment had not arrived and/or because no sum was payable under PAY-7 as a valid payment notice. He ordered Lidl to pay the sum applied for in AFP19 together with interest.

12. Lidl did not pay and instead issued its Part 8 claim. In response 3CL issued its Part 7 claim and summary judgment application. The evidence filed in the Part 7 and Part 8 claims comprises witness statements from the solicitors to the respective parties, being a witness statement from Mr Christie on behalf of Lidl in support of the Part 8 claim and two witness statements from Mr Keating on behalf of 3CL in support of the Part 7 claim and in opposition to the Part 8 claim. I have been greatly assisted by the excellent written and oral submissions from leading and junior counsel for Lidl and from junior counsel for 3CL.

13. In summary, my decision is that the Part 7 claim succeeds and that Lidl is not entitled to the Part 8 declarations sought, so that there should be summary judgment for 3CL on the claim.

14. I provide my reasons under the headings below. I include at Appendix 1 the most relevant provisions of the contract which feature in this case.

B. The correct procedure to follow in a case such as the present

15. The correct procedure to adopt in cases such as the present involving a Part 7 summary judgment application to enforce an adjudicator's decision and a competing Part 8 application seeking a determination from the court that the decision was wrong and should not be enforced has been the subject of guidance in the cases leading up to the publication of the TCC 2022 Guide, where the effect of that guidance is summarised at paragraph 9.4.5, and subsequently by the Court of Appeal in A & V Building Solutions Limited v J & B Hopkins Limited [2023] EWCA Civ 54, 206 Con LR 184 at [38] and considered more recently by Mr Alexander Nissen KC sitting as a High Court Judge in Sleaford Building Services Ltd v Isoplus Piping Systems Ltd [2023] EWHC 969 (TCC) at [43]-[44].

16. There is no need to over-lengthen this judgment by referring to the detail of this guidance, especially since in the end there was no real dispute as to the approach I should take or, indeed, as to the appropriateness of my proceeding to deal with the Part 8 claim at the same time as the Part 7 summary judgment application, subject

to certain important but fact-specific qualifications which I shall address. The guidance establishes that the correct approach is to consider and determine the following issues in the following order:

(1) Where there are any genuine substantive defences to the summary enforcement of the decision, falling within well-established and limited categories, such as lack of jurisdiction or breach of the rules of natural justice, and whether identified in the defence to the Part 7 summary judgment claim or in the Part 8 claim, these defences should be determined first. Where there are no such genuine substantive defences raised or made out, the starting point is that the adjudicator's decision should be summarily enforced.

(2) Where other issues are raised in the Part 8 claim, with a view to asking the court to decide that the adjudicator's decision on those substantive issues can be demonstrated to be wrong within the confines of a summary expedited hearing of a Part 8 claim, the court should first decide whether or not it can fairly undertake that exercise on that basis and whether or not the consequence, if answered in favour of the Part 8 claimant, would be that it would be unfair for the court to enforce the adjudicator's decision.

(a) It is, based on my experience in this and other cases, worth making the point that it is not always easy to decide at the outset of the hearing whether or not the Part 8 claim issues can fairly be determined at the hearing. In such circumstances, it may be – and was in this case – both practicable and fairer to both parties to hear the arguments on a provisional basis whilst reserving judgment on the question as to whether or not the court should ultimately proceed to determine them.

(b) This, however, can lead to its own difficulties. Where, as in this case, the court can accommodate a 1 day hearing to determine all issues without delaying the hearing of the Part 7 summary judgment application the court will wish to assist the parties. It may, however, as it has in this case, become apparent that whilst the issues are proper issues to be determined as Part 8 issues, the number and relative complexity of the arguments means that it is necessary for the full day to be used for submissions and for at least one if not more than one full day to be used to produce a judgment which does justice to all of them. A judge will be naturally disinclined to decline at the end of the hearing to produce a judgment on the grounds of how much further judicial time will be needed. However, the need to produce a judgment within a timetable which does not prejudice the Part 7 claimant's reasonable expectation of speedy justice in adjudication enforcement cases may have an adverse impact on judicial availability for other work. Although there is no one simple solution, it may be necessary in such cases for the parties to provide a realistic timetable for pre-reading and oral submissions[1] and for the court, based on such material and its own estimate of how much time will be needed to produce a judgment, to decline to entertain the Part 8 proceedings as a priority if it becomes apparent that to do so would unfairly impact on either the Part 7 claimant or on other court users.

(c) There may be other cases where the court could accommodate a 2 hour summary judgment application within, say, 6-8 weeks but could only accommodate a full one day hearing with sufficient pre-hearing reading and post-hearing judgment time in, say, 4-6 months' time. In such cases the only fair solution would be for the court to list the summary judgment application on the first available date on the basis that if at the hearing the court rejects any genuine substantive defences to enforcement raised it will then proceed to consider at the same hearing whether or not to direct an expedited hearing of the Part 8 claim and, if so, on what terms as to payment of the sums ordered to be paid by the adjudicator.)

(3) If and to the extent that the court concludes that it is appropriate to embark on the exercise of a summary determination of the issues raised in the Part 8 claim, then the court should do so and determine the consequences so far as summary enforcement of the adjudicator's decision is concerned.

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1 I am not suggesting that this did not happen in this case.

C. Is there any genuine defence to summary enforcement of the decision?

17. It follows from the above that the first issue is to consider whether or not there are any genuine substantive defences to summary enforcement.

18. Here, as I have said, the only genuine defence raised is the alleged breach of natural justice as identified in the details of Part 8 claim at paragraphs 9 and 10 of the draft order.

19. As stated, the adjudicator accepted 3CL's case that PAY-7 was not a valid payment notice. This issue was addressed by the adjudicator as Issue 4 where he concluded that "Lidl did not issue a valid Payment Notice in respect of AFP19". His reasoning appeared at paragraphs 8.74 to 8.96 of his decision. It is clear that his decision on this issue was based in part on his analysis of clause 7.4.2 of the contract, which he addressed at paragraphs 8.85 to 8.87. Lidl's natural justice defence is directed at his including this as a reason for his decision, in circumstances where it says that this was not the subject of submission to him and nor did he give the parties the opportunity of making submissions on the point.

20. For convenience I have included the relevant provisions of the agreement, including Clause 7.4.2, at Appendix 1 to this judgment. Before referring to clause 7.4.2 the adjudicator summarised the rival contentions. In short, 3CL relied upon the fact that PAY-7 described itself as being a pay less notice. Lidl relied upon the fact that PAY-7 set out its position on the sum it considered due in respect of AFP19 and, thus, complied with the key requirements of the contract and the Act as regards the content of a payment notice. The adjudicator noted, correctly, that the contractual definition of the term payment notice was to be found in clause 7.4.2 and, having referred to clause 7 as a whole so as to see clause 7.4 in its contractual context, and having recorded what clause 7.4.2 said, continued as follows:

> "8.85 But for two significant issues I can see some force in Lidl's argument that the Notice of 6 October 2022 could be considered as a Payment Notice.
>
> 8.86 The first issue is that the Notice goes further than that described in clause 7.4.2 insofar as it levies Liquidated Damages. When establishing what payment is due under the Contract as noted above it is not appropriate to make a deduction for Liquidated Damages. Subject to compliance with clauses 4.7 and 4.8 of the Conditions, Lidl can withhold or deduct Liquidated Damages at the rate stated in the Project Particulars from monies due to 3CL.
>
> 8.87 That withholding and/or deduction would form part of the Pay Less Notice as such a deduction does not sit within how a Party establishes the amount due as provided for in clause 7.4".

21. He then continued as follows:

> "8.88 Secondly as articulated by 3CL it is clear that by reviewing the document that it was intended to be a Pay Less Notice"

He proceeded in the following paragraphs to give his reasons for so finding. He recorded 3CL's submission (as to which there is no dispute) that case-law established that such notices have to be construed objectively by reference to how they would have been understood by a reasonable recipient and concluded:

> "8.96 Taking all the foregoing into account I agree with 3CL in its assertion that no reasonable recipient would have understood the 6 October 2022 Notice as anything other than a Pay Less Notice. It follows in my view that Lidl therefore failed to serve a Payment Notice by the contractual date of 11 October 2022 or at all".

22. In short, therefore, his decision was made on the basis that the reasonable recipient would have understood PAY-7 to be a pay less notice because: (a) this is what it said it was; and (b) it included a deduction for liquidated damages when under the terms of the contract, including and specifically clause 7.4.2, that deduction ought to be the subject of a payless notice and not a payment notice.

23. As to the legal principles to be applied in relation to a challenge based on breach of the rules of natural justice, both parties referred me to the well-known observations of Akenhead J in Cantillon Limited v Urvasco Limited [2008] BLR 250 and, in particular, his summary at paragraph 57 to the following effect:

"57. From this and other cases, I conclude as follows in relation to breaches of natural justice in adjudication cases:

(a) It must first be established that the adjudicator failed to apply the rules of natural justice;

(b) Any breach of the rules must be more than peripheral; they must be material breaches;

(c) Breaches of the rules will be material in cases where the adjudicator has failed to bring to the attention of the parties a point or issue which they ought to be given the opportunity to comment upon if it is one which is either decisive or of considerable potential importance to the outcome of the resolution of the dispute and is not peripheral or irrelevant.

(d) Whether the issue is decisive or of considerable potential importance or is peripheral or irrelevant obviously involves a question of degree which must be assessed by any judge in a case such as this.

(e) It is only if the adjudicator goes off on a frolic of his own, that is wishing to decide a case upon a factual or legal basis which has not been argued or put forward by either side, without giving the parties an opportunity to comment or, where relevant put in further evidence, that the type of breach of the rules of natural justice with which the case of Balfour Beatty Construction Company Ltd v The Camden Borough of Lambeth was concerned comes into play. It follows that, if either party has argued a particular point and the other party does not come back on the point, there is no breach of the rules of natural justice in relation thereto.

24. Although I was referred to a number of other authorities I do not need to refer to them expressly. There is a detailed commentary on this aspect of natural justice in Coulson on Construction Adjudication 4th edition at paragraphs 13.30 to 13.37 and 13.62 to 13.75, including copious reference to the cases. I need only refer to two further authorities, one which summarises the essential question which the court has to ask in a case such as this, and the other which considers how the judge should address the question of materiality.

25. The first is the decision of Edwards-Stuart J in Roe Brickwork v Wates Construction [2013] EWHC 3417 (TCC) where he summarised the position at paragraphs 23 and 24 as follows:

"23. If an adjudicator has it in mind to determine a point wholly or partly on the basis of material that has not been put before him by the parties, he must give them an opportunity to make submissions on it. For example, he should not arrive at a rate for particular work using a pricing guide to which no reference had been made during the course of the referral without giving the parties an opportunity to comment on it.

24. By contrast, there is no rule that a judge, arbitrator or adjudicator must decide a case only by accepting the submissions of one party or the other. An adjudicator can reach a decision on a point of importance on the material before him on a basis for which neither party has contended, provided that the parties were aware of the relevant material and that the issues to which it gave rise had been fairly canvassed before the adjudicator. It is not unknown for a party to avoid raising an argument on one aspect of its case if that would involve making an assertion or a concession that could be very damaging to another aspect of its case."

26. The second is the decision of Adam Constable QC (sitting as a deputy High Court Judge) in Corebuild v Cleaver [2019] EWHC 2170 (TCC) where, at paragraph 26, he addressed the proper approach to materiality as follows:

"26. Mr Cleaver relied on ABB Ltd v BAM Nuttall Ltd [2013] EWHC 1983 (TCC); [2013] BLR 529; 149 Con LR 172, another decision of Akenhead J, in which the court emphasised that the court should be slow to speculate upon what an adjudicator would, should, or could have done or decided if he had not gone on the particular frolic of which complaint is made. In that case, the adjudicator determined important parts of the dispute by reference to a particular clause which had not featured in submissions or in exchanges between the parties and the adjudicator. At the summary judgment application, the party seeking to enforce the decision argued that, on the merits of the relevant point, the adjudicator's decision was substantively correct as a matter of construction. Akenhead J considered that "it is not really for the court to rule on this as it should have been for the adjudicator, having raised it (which he did not before his decision) and heard argument on it to decide this type of point. I am satisfied that there is at least a respectable and probably convincing argument that [the clause does not apply]." There may be circumstances in which it is possible to demonstrate on summary judgment that the answer the adjudicator arrived at was so obviously correct, that the failure to have allowed the point to be properly

ventilated is not material: permitting a party to make submissions could not have changed the outcome. However, generally, it is sufficient for a party to show that the substance of the point with which they were deprived of the opportunity to engage with was properly arguable i.e. it had reasonable prospects of success. Beyond that, the court should not determine the merits of the point itself on the summary judgment application."

27. In the course of the hearing I asked the parties to identify where in the submissions to the adjudicator reference was made to the subject of issue 4. Having read the submissions I note the following:

(a) Lidl is correct to observe that no express reference was made to clause 7.4.2 in the submissions. There was of course a plethora of reference to clause 7.4 but no express reference to this particular sub-clause.

(b) However, in the referral 3CL submitted at paragraphs 5.28 – 5.33 that one reason why the notice should be read as a payment notice was because it stated that its net value of the works took into account liquidated damages and that this (and other) purported deduction and withholding demonstrated that it was in content a pay less notice.

(c) Lidl did not engage with this particular point about the notice including deductions for liquidated damages in its response. Although there was submission as to whether the notice was in substance as well as in form a payment notice or a pay less notice there was no focus on that point in the specific context of the inclusion of the deduction for liquidated damages. It is fair to say that in their submissions the parties primarily indulged in detailed, repetitive and tendentious submission on the relevance of the fact that the notice was repeatedly described by Lidl's representative as a pay less notice. The adjudicator cannot have been assisted by the tenor of these submissions which has, unfortunately, become so endemic in adjudications.

28. It seems most surprising to me that the very experienced solicitors acting then, as now, for the parties in the adjudication did not specifically refer the adjudicator to clause 7.4.2, since it was the only clause which identified what amounts should be included within an interim payment. However, given that 3CL had, in its referral, specifically raised the point about the notice wrongly deducting and withholding an amount for liquidated damages, that was clearly an issue raised in the adjudication which the adjudicator was entitled to consider. In my judgment there can be no objection to an adjudicator – as Mr Davis did in this case - looking at the contract as a whole, focussing on clause 7.4 as a whole and, having done so, deciding that clause 7.4.2 was relevant to the question as to whether or not the notice was in content and substance a pay less as opposed to a payment notice because it included a deduction and withholding for liquidated damages. To say that he could not even refer to clause 7.4.2 in making this decision simply because it had not been the subject of express reference by either party seems to me to be taking the requirements of natural justice way too far in the context of the adjudication procedure. In short, this seems to me to fall on the right side of the dividing line as identified in the Roe Brickwork case above.

29. In case I am wrong about the above, it is also sensible to address the question of materiality. Here, I accept that the issue of the validity of the notice relied upon by Lidl as a valid payment notice was of course one of the decisive points, or at least an important point, in the case. However, I should also consider whether the adjudicator's failure (on Lidl's case) to afford both parties the opportunity to make submissions on clause 7.2.4 was material. In this respect it is relevant to note that in his witness statement for Lidl Mr Christie contended that if Lidl had been provided with the chance to comment it would have "made it clear that our view is that Clause 7.4.2 of the Contract does not mean that Payment Notices cannot properly include deductions for Liquidated Damages, and we would have referred the Adjudicator to other clauses within the Contract to say that when the Contract is read as a whole and in context, that is not the effect of the clause". He does not, however, identify these clauses and nor did Lidl's counsel in their submissions. Although it was suggested that Lidl also lost the opportunity to adduce evidence to explain why these liquidated damages had been deducted in the relevant notice in a way which did not contravene the interim payment provisions of the contract, no explanation was given and no evidence was adduced. In short , in my view it is apparent that Lidl has belatedly appreciated that clause 7.4.2 is a key clause in the context of this particular dispute to which it appears to have no answer, whether as to its proper construction or as to its impact on the true meaning and effect of PAY-7.

30. It follows, in my judgment, that had I held that there had been a breach of natural justice it would have been wrong for me to refuse to determine the point myself. Indeed, Lidl's declaration 5 invites the court to determine

the substantive point. It would be unjust for the court to refuse summary enforcement of the decision on the basis that it should not determine the point beyond determining whether or not Lidl's case was reasonably arguable when Lidl's invitation to determine declaration 5 can only be advanced on the basis that it is a pure point of construction of PAY-7 which does not require any contested evidence to resolve. If the court was to find against Lidl on declaration 5 then it cannot be right that the court should still refuse to summarily enforce the decision. I note that in a case relied upon by Lidl in relation to the final date for payment issue Edwards-Stuart J took the same approach: see Manor Asset Ltd v Demolition Services Ltd [2016] EWHC 222 (TCC) at paragraph 39.

31. It is common ground before me, as it was before the adjudicator, that the construction of PAY-7 is to be undertaken objectively and the issue is how a reasonable recipient would have understood the notice: Jawaby Property Investment Ltd v The Interiors Group Ltd [2016] EWHC 557 (TCC) (Carr J, DBE).

32. In short, there is nothing to which I have been referred and nothing which I have seen in the contract which militates against the clear and – in my view – obvious conclusion reached by the adjudicator that any deduction for liquidated damages is to be made in a pay less notice not in a payment notice, whether by reference to the particular terms of this contract or by reference to the well-known provisions of the Act. It appears to me from my reading of PAY-7 that it is in substance a combined payment notice and pay less notice, in that it specifies 20 reasons for "withholding payment", the majority of which are said to be instances where either the individual milestone had not been fully completed or where it had been completed but was non-compliant through defect or damage or other cause, and of the remainder by far the most significant in monetary terms is the deduction of liquidated damages in the sum of £765,000.

33. At the hearing I enquired whether there was any authority on the point as to whether or not a notice which describes itself as a pay less notice but which is, in content and substance, a hybrid payment and pay less notice, could be treated as a valid payment notice. My attention has not been drawn to any such authority. An explanation for that may be the point noted in Coulson's Construction Adjudication 4th edition paragraph 3-28 at sub-paragraph (5), commenting on the change between the original and the amended payment provisions of the Act, that: "The original provisions, which entitled a payer to serve a notice, operating as both a payment notice and a withholding notice, have been deleted in their entirety. Thus the payer must serve both the payer's notice and a payless notice in accordance with the new s111 in the periods identified".

34. In my judgment Lidl's submission on declaration 5 is thus wrong and, moreover, it has failed to show that the substance of the point which it was deprived of the opportunity to engage was even properly arguable. The adjudicator was plainly and incontrovertibly right to say that the deduction of liquidated damages in PAY-7 was contrary to the express terms of the contract and confirmed that the notice was in content and substance, as well as in its express description, a pay less notice and not a payment notice. It follows that any failure to follow natural justice could not have been material.

35. In the circumstances, there is no substantive defence to enforcement and it follows that subject to the remaining Part 8 issues raised the decision ought to be enforced and declarations 5, 9 and 10 refused.

D. Is it appropriate to determine any other claims for declaratory relief at this hearing?

36. I can deal with this relatively shortly. 3CL's primary contention had been that it was not appropriate to determine the other Part 8 claims because one of its defences rests on estoppel by convention which cannot fairly be determined in the context of this expedited Part 8 hearing.

37. However, Lidl has submitted that:

(a) The estoppel argument must fail because it is precluded by the non-waiver provisions of the framework agreement, which is a point of pure law.

(b) There is no rule that estoppel arguments cannot be determined in the context of a summary Part 8 hearing such as the present, so long as the issue does not require resolution of conflicting evidence or otherwise cannot fairly be determined at a summary hearing.

(c) The estoppel argument is not and cannot be relied upon in relation to declarations 6 and 7 above

38. I can dispose of the non-waiver point briefly. I have set out clauses 12.6 and 12.7, which appear to be those relied upon, in the Appendix.

39. As Mr Thompson submitted, it is difficult to see how a non-waiver provision can apply to an argument based on estoppel by convention since the two are different legal principles. Further, there is no need for me to expand on this simple point, since in the A&V v JBH case the Court of Appeal had to consider (albeit obiter) a similar clause which provided (see paragraph 9(b)):

"23.1. No waiver by J & B Hopkins of any breach of the Sub-Contract by the Sub-Contractor shall be a waiver of any subsequent breach of the same or of any other provision of the Sub-Contract. No failure by J & B Hopkins to exercise any right or remedy arising under the Sub-Contract or at law shall be a waiver of its right to exercise such rights arising subsequently."

Whilst Coulson LJ relied upon this as amounting to "a clear agreement that an alleged earlier waiver by JBH could not amount to a subsequent waiver of the same provision" (paragraph 66), he also accepted that this did not prevent A&V from arguing that JBH's treatment of application 14 amounted to an estoppel (paragraph 68). On the basis that I should follow this clear statement from the Court of Appeal, albeit that it was strictly obiter, that disposes of this point against Lidl, which was unable to make any submissions to the contrary.

40. I accept (as did Mr Thompson in his respective written and oral submissions) that there is no principle that the mere raising of an estoppel by convention argument makes a case unsuitable for Part 8 determination. The question is whether there needs to be a resolution of contested factual evidence. Here, counsel for Lidl made it plain that they did not suggest that this was the case. They positively contended that the estoppel argument can fairly be determined on the basis of the limited and uncontested contemporaneous documents as, they rightly submit, the Court of Appeal was willing to do in the A&V v JBH case.

41. Finally, Mr Thompson also accepted that the estoppel argument cannot be relied on in response to the argument based on the non-compliant invoice, since there is no evidence that previous payment claims were accompanied by invoices without the supporting document stated to be required under the payment schedule.

42. It follows, I accept, that there is no reason why I should not determine the remaining Part 8 declarations on the basis that insofar as it applies I can fairly determine 3CL's estoppel by convention defence as well. 3CL contends that the parties established a convention as to the format and content of payment applications that was followed from AFP1 onwards

43. Lidl's case that 3CL's estoppel case cannot succeed is set out in paragraphs 60 - 62 of its skeleton, referring back to its detailed analysis of what AFP19 contained in relation to the identification of the milestones in paragraph 56 and to its further analysis of the position in Appendix 1 to its skeleton (it is common ground that it contained nothing in relation to photographic evidence and insurance). In short, Lidl's case is that any convention established in AFP1 was not followed because in AFP1 the amount applied for corresponded with the milestones said to have been completed in the period to which the payment application related but in subsequent payment applications this was not always the case

44. 3CL has set out its argument in paragraph 9 of its responsive skeleton and again at paragraphs 11 - 14. In short, its case is that (apart from one correction of an arithmetical error) the only reason for the difference between the amounts applied for and the milestones said to have been completed within the period to which the payment application related, as would have been apparent to all at the time, is that the applications differed simply because the later applications included the amounts which Lidl had not paid against earlier applications, but where all such applications only included claims made for milestones which 3CL contended had been completed.

45. It is convenient to deal with this estoppel argument by reference to the relevant declaration issues to which it applies.

E. Declarations 1, 2 and 4.1: The alleged failures to comply with the Milestones identification requirement, the photographic requirement and the insurance requirement

46. A number of issues arises in relation to these declarations.

47. The first, which is a common question of construction of clause 7.4.3(a) and which applies to all of these requirements, is whether or not a failure to comply with these requirements renders a payment application under that clause invalid and ineffective with the important consequence that the trigger period for setting the due date for payment under clause 7.4.3(c) does not begin to run. A similar question arises in relation to declarations 3 and 4.2 and declaration 7, although they are more conveniently addressed separately below.

48. In short, compliance with these requirements is either a condition precedent to the validity of the payment application (Mr Action-Davis preferred to categorise it as a mandatory requirement, but in my view the difference is one of terminology rather than of substance) or simply a contractual obligation, the breach of which may sound in damages, but which does not prevent the payment application being a valid application which has to be dealt with in accordance with the requirements of clause 7.4.

49. I have been referred to chapter 16 of Lewison's The Interpretation of Contracts (7th edition), headed "conditions and conditional obligations", which contains an invaluable analysis of the relevant principles. Here, the question is whether or not this is a condition precedent in the sense that it is a contractual obligation which must be performed by 3CL before Lidl's obligations under clause 7.4.3(b) (inspection) and following on from the triggering of the due date for payment under clause 7.4.3(c) arise. At paragraph 16.12 authorities are referred to which indicate that the use of the word "if" or the phrase "provided always that" are likely to be strong indicators of a condition precedent.

50. At paragraph 16.13 it is said that the question is one of construction of the contract and of the relevant provision in its contractual context, according to the normal principles. Reference is made to the observation of Flaux J in Astrazeneca UK Ltd v Albemarle International Corp [2011] EWHC 1574 (Comm) to this effect: "Whilst it is clear that, for performance of a provision in a contract to be a condition precedent to the performance of another provision, it is not necessary for the relevant provision to use the express words 'condition precedent' or something similar, nonetheless the court has to consider whether on the proper construction of the contract that is the effect of the provisions."

51. At paragraph 16.14 it is said that: "Because the classification of a term as a condition precedent may have the effect of depriving a party to a contract of a right because of a trivial breach which has little or no prejudicial effect on the other and causes that other little or no loss, the court will usually require clear words to be used before coming to that conclusion", referring to Heritage Oil and Gas Ltd v Tullow Uganda Ltd [2014] EWCA Civ 1048.

52. This analysis also accords with the approach of O'Farrell J in Kersfield Developments (Bridge Road) Limited v Bray and Slaughter Limited [2017] EWHC 15 (TCC) at [31] – [38] relied upon by Mr Thompson, where the contract stipulated that payment applications should be accompanied by the supporting information required in the Employer's Requirements but did not expressly specify that such applications whould not be valid in the absence of such supporting information. As she said at [36]:

"It is a matter of fact and degree as to whether the information and supporting documentation supplied in respect of any claim within an application is sufficient to comply with the substantiation requirement in section 462. However, although deficiency in substantiation of a claim might justify rejection of such claim, in part or in full, it would not of itself render the application invalid."

53. Applying these principles, in my view the strongest point made by Lidl is the use of the word "must" in sub-paragraph 7.4.3(a). That is a powerful indication that compliance with these requirements is mandatory. However, as against that in my view are a number of other factors, all emphasised by 3CL:

(a) The absence of words which make clear that in the absence of compliance with each and every one of these requirements the payment application will not be an effective payment application and the remaining requirements of the clause will not apply. There is no equivalent of the phrase "provided always that".

(b) The imprecision of at least some of the requirements and the unacceptable uncertainty which would arise if there was a dispute as to whether or not they had been complied with, particularly in the context of the due date being set only 7 days after the date of the payment application. For example, a dispute as to whether any photographic evidence of a milestone being achieved was sufficient, or a dispute about what was required by "any other supporting information as may be stated in the Updated Specification for Works and/or any Order and/or the Payment Schedule". And finally, as I observed in argument, what about "any other information as may be reasonably required by the Employer"? Does that have to be required before the date of the payment application and, if so, how far in advance and, if not, can it seriously have been intended that the validity of the payment application could depend on a requirement post-dating the date of the payment application especially when there was no independent arbiter as to who should decide whether the requirement is reasonable?

(c) The absence of any compelling reason for requiring compliance to be a condition precedent. Not only was Lidl required to inspect the works within 7 days, so that Lidl could see for itself whether the milestone had been achieved, but Lidl was only required to issue a payment notice specifying the sum it considered to be due. It would obviously be entitled to have regard to any non-compliance with the requirements in arriving at its valuation. If, for example, Lidl issued a payment notice stating that nothing was due on the basis that 3CL had failed to identify in its payment application which milestones had been achieved or the amount claimed for each milestone, Lidl would have been perfectly entitled to rely on 3CL's breach of clause 7.4.3(a) in support of such decision without needing to show that the payment application was invalid and that it was not even required to issue a payment notice.

54. I have considered whether or not objection (b) could be met by a finding that, for example, requirement (i) was a condition precedent whereas the remainder were not. Whilst I accept that there is a stronger case for (i) than for the others, in my view objections (a) and (c) remain and it would be most unsatisfactory if a contracting party had to form its own assessment as to which, if any, of 5 separate obligations were conditions precedent in circumstances where Lidl had failed to make it clear that all were intended to have this effect.

55. I have also considered whether any assistance is to be gained from the format of the standard form of payment application attached at Appendix A. This however simply states that it is a request for £X and a statement that:

"in support of our application we attach the following:

1 [copies of insurance certificates for: 1.1 [..]

2 photographs of [..] as evidence of the completion of the Milestone; and

3 [detail any other supporting information as may be stated in the Employer's Requirements and/or any Order and/or the Payment Schedule, or any other information as may be reasonably required by the Employer]."

In the circumstances, since this does not even require identification of the individual milestones or amounts pertaining to each, or include a space for insertion of an "appropriate invoice code", it cannot be said to reinforce any message otherwise conveyed by clause 7.4.3(a) itself that all of these requirements are strict condition precedent requirements non-compliance with which would lead to non-consideration of the payment application.

56. In conclusion, I am satisfied that Lidl fails at the first hurdle in relation to these declarations, since if compliance with these provisions is not a condition precedent to Lidl's payment obligations under clause 7.4 the alleged breaches have no relevance in the context of this case.

57. It follows that I can deal with the remaining issues relatively briefly.

<u>Issue 2 – did AFP19 comply with the contractual requirements for payment applications in relation to milestones and/or is Lidl estopped by convention from alleging a breach?</u>

58. In its evidence and in its submissions Lidl appeared to argue that clause 7.4.3(a) required, on its true construction, a payment application to identify only such milestones as had been achieved since the last payment application and the relevant amount pertaining to each, and that 3CL had not complied with this requirement, submitting instead an application: (a) showing the total of all payment applications claimed against all achieved milestones since the start of the order; (b) the total of all payments made against such applications; and (c) the total outstanding balance of £781,986.22. In short, its case was that 3CL had submitted a cumulative total payment application which was not permitted by the contract and which invalidated AFP19.

59. In its response 3CL submitted that a payment application could include any application for a completed milestone, including claims for milestones completed before and included within previous payment applications which Lidl had not fully accepted or fully paid. It submitted that this is precisely what it had done and that AFP19 identified each and every separate milestone claimed for, showing which were milestones achieved since the last payment application and which were repeats of claim for milestones achieved and claimed for in previous applications, so that Lidl was perfectly able to see which was which from its own interrogation of AFP19.

60. As to the question of contract construction I am in no doubt that 3CL is correct. The payment schedule permits applications to be made in respect of "each completed Milestone or Milestones at the time of such application". That does not mean only milestones completed since the time of the last payment application. Clause 7.4.2 does not seek to restrict the amounts due as interim payments in the way claimed by Lidl. Clause 7.4.3 does not provide that a valid payment application must include confirmation that the milestone was achieved since the time of the last payment application. It follows that cumulative payment applications such as were submitted by 3CL are perfectly valid under the contract.

61. Once this point is understood, Lidl's complaints about the detail of AFP19 fall away. I was taken through AFP19 at the hearing and it can clearly be seen how the detail separates out the claims made in respect of milestones achieved during the current period (where the relevant row in the table is highlighted green across the whole row) from the claims already made in respect of milestones previously achieved but not paid, and how the summary shows how the total claimed in AFP19 is separated into the first and the second categories.

62. Finally 3CL relies on its estoppel by convention case insofar as a complaint is taken to the format of AFP19. 3CL accepts that if Lidl was right on its case that the contract did not permit any payment applications to be made for milestones achieved before the last payment application then it could not argue an estoppel in that respect in relation to its claim to the cumulative element of that claim. As to the principle to be applied, it relies upon the summary by O'Farrell J in Kersfield Developments (above) at [45]-[46]:

> "45. Where parties to a transaction proceed on the basis of an underlying assumption on which they have conducted their dealings between them, neither will be allowed to go back on that assumption when it would be unfair or unjust to do so: Amalgamated Property Company v Texas Bank [1982] 1 QB 84 (CA) per Lord Denning pp.121-122; Brandon LJ pp.131.
>
> 46. The essential requirements of estoppel by convention were set out in the cases of Mears Ltd v Shoreline Housing Partnership Ltd [2015] EWHC 1396 per Akenhead J at Para.51; and HM Revenue & Customs v Benchdollar Ltd [2009] EWHC 1310 per Briggs J at Para.52. There must be a shared assumption communicated between the parties in question. The party claiming the benefit of the convention must have relied on the assumption. It must be unconscionable or unjust to permit the other party to assert the true position. The estoppel by convention can come to an end and will not apply to future dealings once the common assumption is revealed to be erroneous."

63. In this case, as it submits, the evidence of Mr Keating in his Part 8 witness statement shows that its previous 18 payment applications were all in substantially the same form as AFP19 and none of the previous applications were rejected or challenged on the basis that by including applications for milestones previously completed they were invalid or otherwise not in accordance with the contract requirements. In its skeleton Lidl submitted by reference to the summary of payment applications in its appendix that AFP1 through to AFP13 were not in the same form, because they did not include claims for milestones completed in previous periods, so that there could have been no such common assumption. As 3CL submitted in response, what the appendix showed was that up to AFP14 Lidl had been paying 3CL its claims in full, so that there was no difference between the current and

the cumulative totals, whereas from AFP14 onwards Lidl began to pay less than claimed, with the result that the discrepancy built up to the substantial amount seen in AFP19. There is no suggestion or basis for a suggestion from Lidl that it was not fully aware of all this at the time. It follows in my judgment that 3CL would have made out its estoppel by convention case had it needed to rely on it.

Issue 3 - did AFP19 comply with the contractual requirements for payment applications in relation to photographs and insurance and/or is Lidl estopped by convention from alleging a breach?

64. These points can be dealt with speedily.

65. As regards the photographs, first it is common ground that no photographs were submitted but second it is not contended by Lidl that any of the previous applications were rejected on the basis of a lack of photographs. In such circumstances it is plain that any challenge to the validity of AFP19 based on the absence of photographs would fail by application of estoppel by convention.

66. As regards the insurance evidence, first, as I observed in the course of submissions, clause 7.4.3(a) requires: (a) evidence of maintenance of all insurances with the first payment application; and (b) evidence of renewals of such insurances with relevant subsequent applications. What is required by (b) can only be evidence of renewal where the insurance policy in question has expired before the relevant subsequent application. In the circumstances, to rely on this as invalidating AFP19 Lidl would have had to have stated which policies had expired between AFP18 and AFP19 so as to be able to rely on 3CL's admitted non-provision of any insurance documentation with AFP19. It has not done so. Second, even if there was a breach, it is not contended by Lidl that any of the previous applications were rejected on the basis of a lack of insurance evidence – not even AFP1 where one would have thought it would have been regarded as most important if for any. Again it is plain in such circumstances that any challenge to the validity of AFP19 based on the absence of insurance evidence would fail by application of estoppel by convention.

67. In conclusion, therefore, the answer to declarations 1 and 2 is that compliance with the matters specified in sub-paragraphs 7.4.3(a)(i) – (vi) of the Framework Agreement is not a condition precedent to the validity of applications for payment under clause 7.4.3 and Lidl is not entitled to declaration 4.1.

F Declarations 3 and 4:2: The alleged failure to serve AFP19 in accordance with the requirements of clause 1.3

68. There are four issues for determination:

(1) Was service of AFP19 other than by email required?

(2) If so, was service by hand / mail / courier to the specified address a condition precedent to the validity of AFP19?

(3) If so, is Lidl estopped by convention from relying on the absence of service by hand or mail or courier?

(4) If not, is clause 7.4.3(c) unenforceable as failing to provide an adequate mechanism for determining the due date for payment under s.110(1)(a) of the Act?

Issue 1 - was service of AFP19 other than by email required and Issue 2 - was service by hand / mail / courier to the specified address a condition precedent to the validity of AFP19?

69. I am dealing with these issues together because they raise different but ultimately connected questions of construction. If strict compliance with clause 1.3.1 is a condition precedent to the validity of a payment application then that might be relevant to the question as to whether it should be regarded as falling within that sub-clause, given the serious consequences of non-compliance whereas, if it is not, it may be regarded as a matter of relative indifference whether or not it has to meet these service requirements.

70. The first issue raises what ought to be a straightforward question of construction of clause 1.3.1 (see the Appendix) – is an application for payment under clause 7.4.3 a "notice" or a "request" under clause 1.3.1 so as to require it to be "(b) delivered by hand (against receipt) or sent by mail or courier; and (c) with a copy transmitted by email; and (d) delivered, sent or transmitted to the addresses for the recipient's communications as stated in the Project Particulars relating to the Project"? If not, and if it falls within the category of "other communications between the parties", it is common ground that email service alone suffices.

71. There is no contractual definition of a notice or of a request, although it can be seen from the definition section and from a general perusal of the framework agreement that: (a) a number of communications are expressly described as notices, both in the definitions section and elsewhere (for example notices of non-completion); (b) a number of communications are also expressly described as requests – for example an employer's request that the contractor enter into a tender competition and a contractor's request to remove various persons from the site). It follows that it cannot be said that these words are deprived of meaning if they do not include communications such as "applications".

72. An "application for payment" is a defined term – namely "an application for payment by the Contractor in accordance with clause 7.4 [Interim Payments] such application being in the form attached at Appendix 5 with such form being updated from time to time by the Employer and notified in writing to the Contractor". (It is not argued by Lidl, sensibly in my judgment, that what is to be notified in writing by the employer to the contractor is the application for payment itself, as opposed to any update to the payment form.)

73. Clause 7.4.3 requires the contractor to "submit" its application for payment in the form attached at Appendix 5. The timing of the employer's inspection obligation and the due date are triggered on "receipt" of the payment application. It is a curious feature of this contract that neither in clause 1.3 nor elsewhere (at least so far as I have been made aware) is there any provision making clear when communications are to be treated as received.

74. The standard form of payment application is drafted in the form of a letter, to be addressed to Lidl's senior construction consultant at a specified Lidl address, which implies – but does not mandate – that it would be sent in paper form.

75. In my view a payment application cannot sensibly be described as a "notice". It could, I can see, be described as a "request", in the sense that there is little difference in substance between an application for payment and a request for payment. The question must be whether an application for payment should be treated as falling within the category of a request on the basis that they are in substance the same thing or whether the consequences of such an extended construction would be to impose on the contractor a risk that it could not fairly be regarded as having objectively agreed to accept, i.e. that its payment application for a month's work might be justifiably refused without consideration for failure to serve by hand / mail / courier to the specified address.

76. I consider that the condition precedent question can be dealt with relatively speedily. It is worth noting that clause 1.3.1 applies to a range of communications which may be produced by the employer or by the contractor, so that if non-compliance is a condition precedent to their validity that could prejudice the employer or the contractor depending on who was seeking to rely on the communication. The principles are the same as discussed above. The best argument for it being a condition precedent is the mandatory words "shall be". The arguments against are, however, in my view more compelling. First, the range of communications to which this requirement applies is extremely wide, especially on the employer's case. Especially in modern times, the idea that every such communication, no matter how relatively routine, should have to be delivered in writing as well as email to be valid – especially in the context of a framework agreement envisaging a number of separate contracts formed by separate orders, seems inherently implausible. It is not entirely clear whether the requirement in clause 1.3.2 to send copies means that, for example, every email sent by the contractor to the employer's agent would have to be paper delivered to the employer as well or only notices. If this was to include applications even though they are not expressly included that would not meet the requirement that it ought to be clear what is required and with what consequences.

77. For these reasons I am satisfied that compliance with clause 1.3.1 is not a condition precedent to the validity of any communication required to be served thereunder. On that basis I would have been prepared to accept that an application can fairly be regarded as falling within the category of a request. Equally, however, I do not think it is judicially inconsistent for me to indicate that if I was wrong on that point I would not have been prepared to find that an application for payment fell within the category of a request. That would be for the logically consistent view that if it had objectively been intended by the parties that an application for payment should only be valid if it complied with the clause 1.3.1 requirements it would have been explicitly included in the list of such communications falling within clause 1.3.1.

Issue 3 – estoppel by convention

78. This can be briefly addressed. Had I found against 3CL on the above two points Lidl would have needed to engage with the further fundamental point that it had not previously raised the lack of service other than by email as a reason for treating any of the previous payment applications as valid. It has been unable to advance any basis for doing so and, hence, applying the relevant principles as discussed above it is plain that its case would have failed by application of estoppel by convention.

Issue 4 - Is clause 7.4.3(c) unenforceable as failing to provide an adequate mechanism for determining the due date for payment under s.110(1)(a) of the Act?

79. An alternative case raised by 3CL is that none of this avails Lidl anyway because it argues that clause 7.4.3(c) fails to provide an adequate mechanism for determining when payments become due under the contract, contrary to s.110(1)(a) of the Act because it introduces unacceptable uncertainty in permitting the due date to be brought forward to the date of inspection of the works by the employer following receipt of the payment application even though there is no express obligation for the employer to notify the contractor of the date of such inspection. It says that in such circumstances clause 7.4.3(c) must fall away and the relevant provisions of the Scheme for Construction Contracts apply, with the result that the due date does not run from the date of "receipt" of the payment application and thus the debate about the method of service becomes redundant.

80. Given my previous findings I hope I shall be excused if I deal with this point relatively briefly.

81. Clause 7.4.3(c) states that: "the Due Date for payment of an amount due shall be the date seven (7) days after receipt of the Application for Payment or, if earlier, the date of the inspection of the Works by the Employer".

82. I refer below to the relevant provisions of the Act and also to paragraphs 17, 18 and 20 of the decision of Cockerill J in Rochford to the effect that: (a) the payment provisions of the Scheme may be incorporated piecemeal into the contract to the extent necessary for the contract to comply with the Act; (b) it is important to give effect to the express terms of the parties' contract; (c) in Manor Asset Limited v Demolition Services Limited [2016] EWHC 222 Edwards-Stuart J had been "at pains" to achieve this object by construing the contract with the aim of ensuring that it did not contravene the Act.

83. In short, if the only real basis of objection to the express term is that the mechanism is inadequate because it does not require Lidl to notify 3CL of the date of inspection, then the least intrusive course in my view would simply be to construe the relevant words so that they read "or, if earlier, after receipt of notification of the date of the inspection of the Works by the Employer". This would be on the basis that the parties are to be taken as taking the date of receipt of any relevant communication as the relevant trigger date and not intending to introduce unacceptable uncertainty as to the due date, so that they must have intended the employer to notify the contractor of the date of any inspection, with the result that both limbs of clause 7.4.3(c) are to be construed as including a requirement for receipt of the relevant communication.

84. It follows in my judgment that if 3CL had needed to rely on this argument to succeed then it would have failed in its attempt. However, the end result is that Lidl is not entitled to declarations 3 or 4.2.

G. Declarations 6 and 7: Lidl's case that the final date for payment provisions of the contract comply with s.110(1)(b) HGCRA 1996 and that the failure to submit a VAT Invoice complying with the terms of the payment schedule means that no final date for AFP19 has occurred and thus that no sum can be payable thereunder

85. There are two issues which require determination. In the order raised in the declarations, the first is whether the final date for payment provisions of the contract comply with s.110(1)(b) and the second is whether it was a condition precedent to the validity of AFP19 that a VAT invoice compliant with the terms of the payment schedule was submitted.

86. The first issue raises the question as to whether a contract term which provides for a final date for payment other than by reference to a specified period between the due date and the final date for payment is compliant with s.110(1)(b). The consequence of non-compliance is provided for by s.110(3), namely "If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) , the relevant provisions of the Scheme for Construction Contracts apply". It follows that in such a case the final date for payment is as provided for by the Scheme, namely 17 days from the due date. The important consequence so far as this case is concerned is that Lidl is unable to rely on the absence of a compliant VAT invoice.

87. Assuming that Lidl succeeds on the first issue, it is also necessary to consider whether it was a condition precedent to the validity of AFP19 that a VAT invoice compliant with the terms of the payment schedule was submitted. In this case 3CL did actually submit a VAT invoice. However, what it did not do was, as required by the payment schedule, to submit with the VAT invoice a copy of AFP19. It is Lidl's case that this failure meant that the mandatory requirements of the payment schedule were not met so that the final date for payment never arose. It is 3CL's case that this was not a condition precedent so that the final date for payment was triggered by service of the VAT invoice.

Issue 1 – do the final date for payment provisions of the contract comply with s.110(1)(b)?

88. As already indicated, 3CL submits that I should follow the decision of Cockerill J in Rochford and hold that the final date for payment provisions are not compliant, whereas Lidl contend that I should follow earlier authority to contrary effect. It is therefore necessary to examine the decision in Rochford and the earlier decisions to see what each case decided and, to the extent that there is conflict, how that should be resolved.

89. Before I do so I should set out the key relevant provisions of the Act.

"s.109.— Entitlement to stage payments

(1) A party to a construction contract is entitled to payment by instalments …

(2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.

(3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.

s.110.— Dates for payment.

(1) Every construction contract shall—

(a) provide an adequate mechanism for determining what payments become due under the contract, and when, and

(b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(1A) The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on—

(a) the performance of obligations under another contract, or

(b) a decision by any person as to whether obligations under another contract have been performed.

..

(1D) The requirement in subsection (1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction contract provides for the date on which a payment becomes due to be determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract.

(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) [...] 2 , the relevant provisions of the Scheme for Construction Contracts apply."

90. Rochford was a Part 8 claim in which the claimant, Rochford, was seeking a final determination with the effect of overturning the adjudicator's earlier decision that it was liable to the defendant, Kilhan, in respect of a payment application on the basis that Rochford was unable to rely on its payment notice because, so decided the adjudicator, the contractual payment provisions were not compliant with the Act and were replaced in their entirety with the payment provisions of the Scheme.

91. One of the arguments advanced by Rochford was that under the terms of the subcontract the final date for payment was 30 days from the date of service by Kilhan of an invoice and, on the basis that this was a valid and effective provision, its pay less notice was served in time to be effective.

92. The subcontract provided, as relevant, as follows: "application date end of month … valuations monthly as per attached payment schedule end of month. Payment terms 30 days from invoice as per attached payment schedule. S/C payment cert must be issued with invoice". It was common ground that notwithstanding the repeated reference to an attached payment schedule in fact no such schedule existed.

93. Cockerill J observed at [12] that had there been a payment schedule it was far less likely that this dispute would have arisen. Lidl submits that this is a point of distinction between that case and this. As will appear, I do not consider that to be a relevant distinction in terms of the particular legal point decided by Cockerill J which is relevant to this case.

94. At [17] Cockerill J accepted Rochford's submission that the payment provisions of the Scheme may be incorporated piecemeal into the contract to the extent necessary for the contract to comply with the Act. At [18] she accepted the submission that it was important to give effect to the express terms of the parties' contract. At [20] she noted that in Manor Asset Limited v Demolition Services Limited [2016] EWHC 222, on which Lidl rely, Edwards-Stuart J had been "at pains" to achieve this object.

95. She dealt first with an argument about when Kilhan was required to make its payment application. That was an issue which was relevant to the identification of the due date for payment and, thus, has no relevance to the instant case. She decided that the due date was supplied by the provisions of the Scheme.

96. She then turned at [49] to the second issue, being that of the final date for payment. As she noted at [49], Rochford's case was that the subcontract term stating "payment terms 30 days from invoice as per attached payment schedule" had the effect of fixing the final date for payment as 30 days from the date of submission of the invoice. She accepted at [50] that this appeared to have been intended as a final due date provision and, therefore, that "to the extent that it can fit with the Scheme provisions, that date should be followed".

97. At [51] she noted that the question was how that could be effective in the absence of the payment schedule and the requirement that the payment certificate should be issued with the invoice. She recorded that Rochford advanced a factual and a legal argument to answer this question. Dealing with the factual argument first, she concluded in the same paragraph that the provision could not survive given both the linkage to the (non-existent) payment schedule and the uncertainty over the payment certificate, proceeding to give her reasons for that conclusion in the following paragraphs of her judgment from [52] to [56]. Essentially, her reasoning was that

the lack of any certainty as to when the due date fell or when the payment certificate should be issued meant that the regime agreed was so deficient that wholesale replacement with the Scheme provisions was the only option.

98. That was sufficient to determine this aspect of the case, but she went on to address the legal argument which had also been advanced by Kilhan, which is the self-same legal argument with which I am dealing, and she said this.

> "57. If I did have to decide the point on the law, I would with some diffidence have accepted [counsel for Kilhan's] submissions, at least in part. She submitted that properly construed, section 110 required a final date for payment provision to fix a time period, albeit that that might itself depend on an event to fix the due date. I was directed to the section, and in particular to the distinction between subparagraph (1A), which allows an adequate mechanism for the determining of the due date, and subparagraph (1B), which refers to "how long a period is to be between the date on which a sum becomes due and a final date for payment".
>
> (I note that the references to (1A) and (1B) must have been references to (1)(a) and (1)(b), the error being explained by the fact that the judgment is a transcript of an oral judgment.)
>
> 58. That, she submitted and I accept, suggests that while a due date can be fixed by reference to, say, an invoice or a notice, the final date has to be pegged to the due date, and be a set period of time, and not an event or a mechanism. That also makes a degree of sense given that it will be important for the payer to be exactly certain how much time he or she has in which to serve a payless notice, the final date for payment being the date which is critical to that step."

99. She then referred to a number of points which in her view supported her in that conclusion.

100. The first, which she noted at paragraph 59, was the difference in drafting between s.110(1)(b) and s.109(2). The former only allows the parties freedom to agree "how long the period is to be between the date on which a sum becomes due and the final date for payment", whereas the latter allows the parties freedom to agree the "amounts of the payments and the intervals at which, or circumstances in which, they become due". That, as she observed, pointed to a conclusion that the freedom to agree in s110(1)(b) is limited to the time period and not to agree that the final date for payment should be set by reference to some further event occurring between the due date and the final date for payment.

101. The second, which she noted at paragraph 60, was the effect of the additions to the section introduced by the amendments to the Act. As she observed at [61], since the restrictions imposed by s.110(1A) and (1D) only apply to s.110(1)(a) (i.e. the due date for payment), that must logically have been on the assumption that there was no need to introduce similar restrictions in relation to s.110(1)(b) because it was not possible to link the final date for payment with the happening of some further event.

102. At [62] she referred to and addressed the earlier decision of HHJ Humphrey Lloyd QC sitting as a High Court Judge in Alstom Signalling Limited v Jarvis Facilities Limited [2004] EWHC 1285 (TCC) upon which counsel for Rochford placed reliance, as does counsel for Lidl in this case. She said: "I do not consider, even aside from the fact that it predates the amendments to the Act, that that case drives a different conclusion. Alstom was a case where the due date was ascertained by reference to a certificate, and the final date for payment was then seven days after that. It was not therefore at all at odds with what I have noted above". She referred at [63] to the comments of Coulson LJ in Bennett Construction Ltd v CMC MBS Limited [2019] EWCA Civ 1515 in relation to the Alstom case as supporting her view.

103. With respect, she was plainly right in my view to say that Alstom was not, on proper analysis, an authority which militated against the decision which she had reached.

104. I accept, as did Mr Thompson, that the part of her decision in which she determined the case on the law was strictly obiter, because she had already determined the case against Rochford on the final date for payment point on her analysis of the facts. However, she gave a careful and a reasoned decision on the law, which was a

separate and an independent basis for finding as she did. Accordingly it cannot simply be disregarded on the basis either that it is obiter or that it was given extempore.

105. Nor can it be distinguished, as counsel for Lidl has suggested, on the basis that the decision on the law was dependent on factual findings which have no equivalent in this case. Whilst it may very well be that her conclusion would have been different had there been a payment schedule in the contract in that case this point does not detract from the point that she was required to and did make a decision on the legal consequences which followed from that factual state of affairs. In this case the factual state of affairs is for the purposes of this argument the same as it was in Rochford, in that in this case under the Payment Schedule the final date for payment is either 21 days following the due date or receipt of the Contractor's valid VAT invoice, whichever is the later. Thus, under the contract the final date for payment may be entirely dependent on the date of 3CL's invoice, which is not therefore set solely by reference to the due date.

106. Accordingly, unless counsel for Lidl can persuade me that the decision was inconsistent with previous authority to contrary effect and wrong I consider that I ought to follow it.

107. The earliest authority in time on which Lidl relies is the decision of HHJ Hicks QC sitting as a High Court Judge in VHE Construction plc v RBSTB Trust Co Limited [2000] BLR 187. In that case, the contractual final date for payment provided as follows:

"30.3.6 The final date for payment of an amount due in an Interim Payment shall be 14 days from the receipt by [RBSTB] of [VHE's] Application for Interim Payment or within 28 days from the date of receipt by [RBSTB] from [VHE] of a copy of each Application for Interim Payment together with an appropriate VAT invoice… whichever is the later."

108. The first adjudicator had proceeded on the basis that the requirement for a VAT invoice before time for the final date for payment could start running was compliant with the Act. The claimant [VHE] could not have challenged that conclusion before HHJ Hicks and nor did it need to do so in order to succeed on its claim. Equally the defendant [RBSTB] did not need to challenge that conclusion before HHJ Hicks and nor did it need to do so to succeed in its defence. It was in those circumstances that HHJ Hicks said at paragraph [31]:

"Section 110(1)(b) provides that every construction contract shall provide for a final date for payment in relation to any sum which becomes due, and that the parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment. It is not, as I understand it, in dispute that here clause 30.3.6 (paragraph 3 above) complied with that requirement, and I so find" (emphasis added).

109. I agree with Lidl that HHJ Hicks did therefore make a finding that clause 30.3.6 of the contract in that case, which provided for a final date for payment potentially to be determined by reference to the date of receipt of a VAT invoice, which was not directly or indirectly linked in time to the due date. However, since this finding was made without the benefit of argument on the point from either party, and without his giving any reasons for reaching this conclusion, in my respectful view it carries very little weight as an authority against the detailed reasons given by Cockerill J for determining this point the other way in Rochford.

110. The next authority in time is the Alstom case. I have already referred to Cockerill J's analysis of the Alstom case and stated that in my respectful view Cockerill J was plainly right to say that it was not an authority which ran contrary to her analysis of the legal position and need say no more about it.

111. The third authority in time is that of Manor Asset Ltd v Demolition Services Ltd [2016] EWHC 222 (TCC), which as I noted above was referred to by Cockerill J in paragraph 17 of her judgment in Rochford. In this case Edwards-Stuart J had to consider a contract where the original payment terms, which were in accordance with the standard provisions of the JCT Minor Works Building Contract, had been amended to provide for payment of a percentage of the contract value on the achievement of certain milestones, with "payment to be made within 72 hours of receipt of invoice, issued when the milestone is achieved." The judge considered and dealt with detailed submissions about the compliance of the payment mechanism in that contract with the Act and concluded (at paragraph 55) that "neither side's construction of the agreement produces a result that complies

with both the express terms of the amendment and with the Act". He thus had to undertake the analysis for himself.

112. At paragraph 58 he stated that: "The words 'Payment to be made within 72 hours of receipt of invoice' are, to my mind, clear and unequivocal: they cannot reasonably be construed to mean payment at some later (unspecified) date. It seems to me that, unless there is a compelling reason to give them any other meaning, then they must be understood as referring to 'the final date for payment' within the meaning of the Act".

113. In paragraphs 59 and 60 he concluded that applying the principle stated in paragraph 56 (that the contract should be construed on the basis that the amendment would be lawful so that in case of ambiguity the amendment should be construed in a way which did not infringe the Act or undermine the purpose of the contract) the proper construction of the amendment made clear that the due date was when the milestone was achieved and the invoice comprised the contractor's payment notice although, as he said, in fact there was no difference between the two dates on the facts of the case.

114. He then had to deal with the problem that there was no express agreement as to the minimum "prescribed period" between the date of any payless notice and the final date for payment, in circumstances where the pay less notice may not be given before the payment notice. In paragraph 65 he identified the solution as being that the amendment impliedly reduced the prescribed period to nil, so that the pay less notice could be issued "at any time before the final date for payment: that is to say, within the 72 hour period between receipt of the invoice and the final date for payment 72 hours later". In paragraph 67 he said that he had already "rejected the submission that the final date for payment was some date other than 72 hours following receipt of the invoice". This appears to have been a reference to his earlier paragraph 48 and following, where he rejected the submission of counsel for the employer that the final date for payment was the date provided for in the contract in its unamended form or by the Scheme. On the unusual facts of that case he held that the proper approach was to give the amendment effect by construing the prescribed period to be nil, on the assumption that the final date for payment was 72 hours after the invoice. It was on that basis that at paragraph 72 he declared that "as a result of the amendment, the final date for payment is 72 hours after receipt by MAL of DSL's invoice following achievement of a milestone."

115. As counsel for Lidl submit Edwards-Stuart J must, when making that declaration, have proceeded on the assumption that there was no objection to having the final date for payment determined by reference to the date of receipt by the employer of the contractor's invoice. However, as counsel for 3CL submits, there is no indication from the judgment he had received submissions on, or specifically considered for himself, the question as to whether taking the date of the invoice as the trigger for the final date of payment contravened s.110(1)(b) on its proper construction. It follows, I accept, that in the same way as VHE, whilst Manor Asset is authority for the proposition that the final date can be set by reference to the date of an invoice from the contractor, since the finding was made without the benefit of argument on the point and without giving any reasons the decision, notwithstanding the eminence of Edwards-Stuart J in the field, it must carry little weight when set against the detailed reasons given by Cockerill J for determining this point the other way in Rochford.

116. I have already noted that Cockerill J cited paragraph 58 of Edward-Stuart J's judgment in paragraph 20 of her judgment in Rochford, but did not expressly refer to it when making her decision on the proper construction of s.110. It may very well be, however, that her recognition that she was departing from the approach adopted by Edwards-Stuart in Manor Asset explains why she stated her conclusion on this legal point "with some diffidence".

117. The final authority upon which Lidl relied was the (slightly later) decision of Edwards-Stuart J in Volkerlaser Limited v Nottingham City Council [2016] EWHC 1501 (TCC). That was a case of a partnering agreement under which the claimant contractor was to undertake insulation works to the defendant employer's council properties in Nottingham pursuant to individual orders.

118. Clause 7.6 provided for payment when the contractor had submitted its payment application and the employer had submitted its payment notice, and provided that the employer should pay the sum stated in the payment notice "within 30 days from the due date for payment or within 30 days from the date of receipt by [the

employer] of any required VAT invoice in the same amount as such notice, whichever shall be the later, and the later of such dates shall be the final date for payment". Clause 7.7 made provision for payment where – as applied in that case - the employer issued no payment notice so that the payment application was to be treated as the contractor's payment notice but did not make express reference to any VAT invoice.

119. One argument advanced by the employer and addressed by Edwards-Stuart J at paragraphs 46 – 60 of his judgment was that in the absence of a VAT notice issued by the contractor the final date for payment had not arrived and that no payment was therefore due. It is clear from paragraph 48 that the argument advanced by counsel for the contractor was not that setting the final date for payment by reference to a VAT invoice offended against s.110(1)(b) of the Act, but that because of the particular drafting of clause 7.7 the identification of the final date for payment in clause 7.6 was not carried through into clause 7. At paragraph 49 Edwards-Stuart rejected this argument. It is true that in his reasons for rejecting the argument Edwards-Stuart J did not identify any difficulty in holding that the determination of a final date for payment could run from the date of a VAT invoice. He stated:

> "59. Accordingly, I consider that the alternative construction is correct with the result that, where there has been no payment notice under clause 7.4, the final date for payment is either 30 days from the due date for payment or 30 days from the issue of a VAT invoice, whichever is later. Where there has been a payment notice, the final date for payment is the later of either 30 days from the due date for payment or the receipt by the Client of a revised VAT invoice which corresponds with the sum stated in the payment notice.
>
> 60. For these reasons, since no VAT invoice has been issued in respect of the sum claimed, VL's claim must fail on this ground also."

120. In my view precisely the same point applies to this case as made above in relation to the VHE and the Manor Asset cases, i.e. that in none of these cases: (a) was the s.110(1)(b) point argued; (b) was the s.110(1)(b) point expressly identified by the judges concerned as requiring consideration; (c) was any reason given as to why a provision fixing the final date for payment other than solely by reference to the date of the due date did not contravene s.110(1)(b). Of course, it is open to Lidl to make the perfectly valid forensic submission that it may be thought surprising that this point was not argued by any of the experienced counsel appearing for the paying parties or raised by the experienced and eminent judges involved in these cases. That, however, in my judgment is as much as can be said about them in terms of their persuasive force. It also follows that counsel for Lidl's submission that Rochford was decided per incuriam, because Cockerill J did not refer to the previous judgments in VHE and Volkerlaser in Rochford, is misconceived, since neither is binding authority for the particular point argued and determined in Rochford.

121. It follows that counsel for Lidl has failed to persuade me that the decision in Rochford is inconsistent with previous authority.

122. Moreover, with respect I am satisfied that the decision in Rochford is correct for the reasons given by Cockerill J in her judgment. Counsel for Lidl did not in their written submissions articulate any basis for contending that the decision was wrong. They did refer me to the reasons given by Edwards-Stuart J in Volkerlaser for saying that it made sense for the contractor to be required to provide a VAT invoice and they did submit that requiring a contractor to submit an invoice is not obviously and inherently objectionable in the same way as are the provisions rendered unenforceable by the amendments to the Act, where the due date for payment depends upon occurrences under a separate contract. Whilst I accept all of these points, they do not in my view sufficiently engage with the key point articulated by Cockerill J in Rochford and repeated by counsel for 3CL in this case, which is that there is a very obvious and compelling difference between the wording used and the plain intent of s.110(1)(b) when compared with that of s.110(1)(a) and, that on a proper analysis, that is because the only discretion intended to be and actually given in the former case is for the parties to agree the length of the time period between the due date for payment and the final date for payment. If it was open to a paying party to include a provision which required the fulfilment of some further condition between the due date for payment and the final date for payment, that would have the effect of driving a coach and horses through the wording and the clear intention of this part of the Act, which is to allow the parties a wide discretion as regards when payments become due under a contract, constrained only by the requirement that it be an adequate mechanism and the specific anti-abuse provisions of s.110(1A) and (1D), but in contrast a much narrower and more

circumscribed discretion as regards the final date for payment – only as to the length of the period between the due date and the final date.

123. I can see that the potential for abuse is not present to anything like the same extent where, as in this case and in the Volkerlaser case, the only additional requirement is for the contractor to serve a VAT invoice as well. However, if the way in which Parliament has decided to address this problem is to introduce a blanket prohibition on party autonomy as regards the ascertainment of the final date for payment save as to the length of the period, it is not for the courts to allow parties to agree terms which go beyond that narrow limit simply because they do not appear to have the same potential for abuse.

124. It follows that I find against Lidl on this point and therefore will answer declaration 6 in the negative.

Issue 2 – was it a condition precedent to the validity of AFP19 that a VAT invoice compliant with the terms of the payment schedule was submitted?

125. Given my conclusion on declaration 6, I deal with this briefly.

126. It will be recalled that the payment schedule required "receipt of the Contractor's valid VAT invoice in the sum due by the Employer from the Contractor attaching a copy of the relevant Payment Notice or in the event of a default Payment Notice in accordance with the Conditions the Application for Payment submitted by the Contractor".

127. In this case, because - on 3CL's case and as I have found – PAY-7 was not a valid payment notice, what was required was a copy of AFP19.

128. As I have already stated 3CL did in fact issue a VAT invoice on 17 October 2022 but, although both the covering letter and the invoice itself referred to the contract in question and to AFP19, a copy of AFP19 was not attached.

129. The legal principles to be applied are as set out above in the earlier sections dealing with this point of construction. The simple question is whether the requirement for a copy to be attached of the payment notice or the payment application is a condition precedent to the obligation to pay on receipt of the valid VAT invoice. There is nothing in the words used which indicate that this is the case. It is difficult to see why this should be the case. Counsel for Lidl submitted that since Lidl must receive any number of invoices every year it should not be surprising that it should insist on a copy of the relevant payment document accompanying an invoice. However, if it had been genuinely intended that the invoice would not be payable unless that happened it would have been necessary in my view for this to have been made far clearer and more explicit. As happened in this case, it was to be expected that both the invoice and the covering email / letter would themselves gave sufficient information to enable Lidl to identify the contract and the payment application without any difficulty. There is no basis for construing this requirement as an additional condition precedent to the obligation to pay the due sum above and beyond the provision of the valid VAT invoice.

130. Accordingly, Lidl is not entitled to declarations 6 or 7.

Appendix 1 – the relevant terms of the agreement

1.3. Communications

1.3.1 Wherever this Contract and any Order provide for the giving or issuing of approvals, certificates, consents, determinations, notices and requests, these communications shall be:

(a) in writing; and

(b) delivered by hand (against receipt) or sent by mail or courier; and

(c) with a copy transmitted by email; and

(d) delivered, sent or transmitted to the addresses for the recipient's communications as stated in the Project Particulars relating to the Project.

...

1.3.3 Subject to the specific provisions referred to in sub-clauses 1.3.1 and 1.3.2 [Communications] and 1.6 [Calculating Periods of Days], other communications between the Parties may be made by email using the email addresses identified in the Project Particulars for each Project or otherwise as agreed in writing by the Parties.

7.4 Interim Payments

7.4.1 Issue of Interim Payments

Interim Payments shall be made by the Employer to the Contractor under each Order and in accordance with this clause 7.4 [Interim Payments].

7.4.2 Amounts Due in Interim Payments

The amount due as an Interim Payment shall be an amount equal to that stated in the Payment Schedule in respect of each Milestone, less any amount which may be deducted and retained by the Employer as provided in clause 7.8 [Retention].

7.4.3 Contractor's Applications

(a) In respect of each Interim Payment, the Contractor may submit, following achievement of each respective Milestone as set out in the Payment Schedule for each Project, an Application for Payment in the form attached at Appendix 5 which must include:

(i) the Milestone to which the Application for Payment relates and the relevant amount pertaining to such Milestone;

(ii) evidence that all insurances are maintained with the Application for Payment for the first Milestone and evidence of renewals of such insurances with the relevant subsequent Applications for Payment;

(iii) photographic evidence that the Milestone has been achieved;

(iv) the appropriate invoice code as identified in the Project Particulars to the relevant Order;

(v) any other supporting information as may be stated in the Updated Specification for Works and/or any Order and/or the Payment Schedule; and

(vi) any other information as may be reasonably required by the Employer.

(b) The Employer will inspect the Works within seven (7) days of receipt of an Application for Payment in accordance with clause 7.4.3(a) [Contractor's Applications].

(c) The Due Date for payment of an amount due shall be the date seven (7) days after receipt of the Application for Payment or, if earlier, the date of the inspection of the Works by the Employer.

(d) The Employer shall no later than five (5) days after the Due Date either:

(i) issue a Payment Notice specifying the sum the Employer considers to be due at the Due Date in respect of the relevant payment and the basis on which that amount has been calculated; or

(ii) initial and return the Application for Payment to the Contractor as acknowledgement that the relevant Milestone has been reached and of agreement to payment of the relevant Milestone as set out in the Application for Payment such acknowledgement will be deemed to be the Payment Notice.

(e) If after an inspection by the Employer as referred to in clause 7.4.3(b) [Contractor's Applications] the Employer in its sole discretion considers that the relevant Milestone has not been reached in full then no payment will be made

to the Contractor and the Employer will issue a Payment Notice stating that the sum considered to be due will be a zero.

(f) The Final Date for Payment of any Interim Payment shall be as set out in the Payment Schedule to the relevant Order.

(g) Not later than one (1) day before the Final Date for Payment for any Interim Payment, the Employer may give a Pay Less Notice to the Contractor which shall specify the sum that the Employer considers to be due on the date the notice is served and the basis on which that sum is calculated.

(h) If the Payment Notice is not issued in accordance with clause 7.4.3(d) [Contractor's Applications] then the Application for Payment submitted by the Contractor shall be treated as the Payment Notice.

12. Waiver

…

12.6 No term of provision of this Contract shall be considered as waived by any Party unless a waiver is given in writing by that Party.

12.7 No waiver under clause 12.6 [Waiver] above shall be a waiver of a past or future default or breach, nor shall it amendments, delete or add to the terms, conditions or provisions of this Contract unless (and then only to the extent) expressly stated in that waiver.

Appendix 5 to the framework agreement (the application for payment form referred to in clause 7.4.3(a) above)

RE: [Site description and Project name and number]

We hereby request payment of E[Y] ([7 pounds Sterling]) (excluding VAT) .

In support of our application we attach the following:

1 [copies of insurance certificates for:

1.1 [•]

2 Photographs of [V] as evidence of the completion of the Milestone; and

3 [detail any other supporting information as may be stated in the Employer's Requirements and/or any Order and/or the Payment Schedule, or any other information as may be reasonably required by the Employer].

We look forward to hearing from you in relation to when you plan to visit the site to inspect the Works.

Schedule 6 to the Order – Payment Schedule

Application Date (Stage)	Amount of Interim Payment	Due Date	Final Date for Payment
The Contractor will only be entitled to make Applications for Payment on the last Thursday of every calendar month in respect of each completed Milestone or Milestones at the time of such application. Such Milestones are as set out in the excel spreadsheet located on the CD attached hereto[2].	As set out in the excel spreadsheet located on the CD attached hereto.	As set out in the Conditions	21 days following: a)the Due Date; or b) receipt of the Contractor's valid VAT invoice in the sum due by the Employer from the Contractor attaching a copy of the relevant Payment Notice or in the event of a default Payment Notice in accordance with the Conditions the Application for Payment submitted by the Contractor; whichever is the later.

[2] I have been provided with the Milestone payment schedule which is a table setting out the individual works elements and their respective milestone stages and values.