Neutral Citation Number: [2024] EWHC 878 (TCC)

Case No: HT-2023-000349 IN THE HIGH COURT OF JUSTICE KING'S BENCH DIVISION BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES TECHNOLOGY AND CONSTRUCTION COURT

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

Date: 19 April 2024

Before :

NEIL MOODY KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

ISG RETAIL LIMITED	Claimant
- and -	
FK CONSTRUCTION LIMITED	Defendant

- -

Sean Brannigan KC and Simon Hale (instructed by Mantle Law (UK) LLP) for the Claimant

Simon Hargreaves KC and James Frampton (instructed by Addleshaw Goddard LLP) for the Defendant

Hearing date: 15th February 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:30 on Thursday 18th April 2024.

NEIL MOODY KC:

Introduction

1. In order to succeed in a Part 8 claim the Claimant must generally first establish that it is unlikely to involve a substantial dispute of fact. The Claimant must necessarily argue that the issues are relatively straightforward and the evidence self-contained. It is not unusual for the Defendant to emphasise potential factual disputes in support of submissions that the proceedings should be dismissed. This case is a rather extreme example of the genre. The Claimant contends that there are two short points to be determined: first, whether a contractual term is a condition precedent, and second, whether it was breached. The Defendant argues that the question of compliance involves the examination of a great deal of factual material. It further relies upon waiver and estoppel and submits that the points are wholly unsuitable for Part 8 determination. It argues that the one day time estimate was inadequate and relies upon 25 authorities. The Claimant's response is that the Defendant is obfuscating the issues and has deployed "every conceivable argument" in a bid to persuade the Court not to decide the case on a Part 8 basis.

2. The Claimant was represented by Sean Brannigan KC and Simon Hale and the Defendant by Simon Hargreaves KC and James Frampton. I am grateful for their succinct oral and written submissions.

3. On 22nd November 2023 Constable J ordered that this claim should be listed for a one day hearing. I consider that one day was sufficient and a fair allocation of the Court's resources. The parties were unable to agree a timetable and so it was necessary for the Court to apportion time so that both parties had a fair opportunity to present their cases.

4. The claim arises from the construction of six new industrial units and associated works at Phase 2 More+, Central Park, Avonmouth, Bristol. The Claimant, ISG Retail Limited ("ISG"), was the main contractor. The Defendant, FK Construction Limited ("FK"), was the roofing and cladding sub-contractor. The

sub-contract sum was £3,400,000. The project was referred to by the parties as "Project Barberry". The work started in late 2021.

5. These parties are serial litigants. I was told that the disputes between them had produced 12 adjudications, eight sets of High Court proceedings and two appeals to the Court of Appeal.

6. The present dispute arises from FK's Application for Payment 21 ("AFP21") for the period ending 28th February 2023. The matter was referred to Mr Matthew Molloy for adjudication. By his decision dated 14th April 2023, he valued the work at £3,736,679.72. One of the issues he decided was that FK was entitled to an extension of time ("EoT") of 188 days. This arose from delays to units 6 and 7. Mr Molloy also awarded prolongation costs of £198,000.

7. This Part 8 claim concerns Mr Molloy's decisions on the EoT and prolongation costs. Put shortly, ISG says that, before FK could be awarded an EoT, they had to comply with clause 9(5) of the sub-contract which required certain particulars as to the delay to be delivered to ISG. ISG says that compliance was a condition precedent and that FK were in breach. FK denies that clause 9(5) was a condition precedent, alternatively says that it complied with the term and, in the further alternative, says that ISG is estopped from relying on the term and/or waived its entitlement to rely on it.

Part 8

8. I addressed the proper approach to Part 8 proceedings in Berkeley Homes (South East London) Ltd v. John Sisk and Son Ltd [2023] EWHC 2152 at [8] to [16] and I do not repeat those points here save to note these salient considerations:

    a. The Part 8 procedure is to be used where the Claimant seeks the Court's decision on a question which is unlikely to involve a substantial dispute of fact: CPR 8.1(2);

b. The Court may at any stage order the claim to continue as if the Claimant had not used the Part 8 procedure and, if it does so, the Court may give any directions it considers appropriate: CPR 8.1(4);

c. The Part 8 procedure is designed for the determination of relevant claims without elaborate pleadings: White Book 8.0.1; ING Bank NV v Ros Roca SA [2012] 1 WLR 472.

The Sub-Contract

9. With that introduction, I turn to the sub-contract. It was dated 28th September 2021 and was on ISG's terms ("the Sub-Contract"). I need not rehearse the terms save for clauses 9 and 20 which are at the heart of the present dispute.

> 9. Progress and Practical Completion
>
> …
>
> (2) The Sub-Contractor shall contact ISG's Site Representative 14 days prior to each anticipated start on site date for the Works and each section thereof to confirm these dates. ISG may instruct that the Works and/or any section(s) thereof are started on site on a later date, in which event the SubContractor shall be entitled to claim an extension to the Completion Date for the Works and/ or the relevant section(s) of the Works but shall not be entitled to claim any additional payment (whether pursuant to any term of this Sub-Contract or as damages) in respect thereof.
>
> (3) After commencing the Works and each section thereof in accordance with the above provisions, the Sub-Contractor shall proceed with the Works and each section thereof regularly and diligently and shall achieve practical completion of the Works and each section thereof on or before the Completion Date relevant thereto. The Works and each section thereof are

to be carried out diligently and in such order, manner and time as ISG may reasonably direct.

(4) The Sub-Contractor shall notify ISG forthwith in the event it becomes aware that progress of the Works is being or is likely to be delayed and/or that it may achieve practical completion of the Works or any section thereof after the Completion Date relevant thereto, together with details of the cause of the delay and the date upon which the Sub-Contractor considers it will achieve practical completion of the Works and/or the relevant section.

Without limiting the Sub-Contractor's obligations hereunder and at no cost to ISG, in such event ISG may instruct the Sub-Contractor to accelerate its performance of the Works and/or any section(s) except where the SubContractor has been delayed by one of the events set out in clause 9(5)(a) to (d) below.

(5) If the Sub-Contractor shall be delayed in the practical completion of the Works and/or any section thereof:

(a) by any circumstance or occurrence (other than a breach of this SubContract by the Sub-Contractor) entitling ISG to an extension of time under the Principal Contract; or

(b) by the ordering of any variation to the Works as defined in clause 18(2); or

(c) by any breach or act of prevention on the part of ISG; or

(d) by a valid suspension by the Sub-Contractor of performance of its obligations pursuant to clause 2(15)(b), then in any such event the Sub-Contractor shall be entitled to a fair and reasonable extension to the Completion Date(s) for the Works and/or the section(s) of the Works affected by such delay provided that[1] the SubContractor has given written notice to ISG of the circumstance or occurrence which is delaying him and details of the effects or likely effects of such delay

[1] In this Judgment I refer to the following words as 'the proviso'.

with a best estimate of the continuing extent of such delay and its impact on practical completion of the Works and/or the
relevant section within fourteen days of such circumstance or occurrence first occurring (or in the case of a variation, within the period specified in clause 18).

…

(7) The obligation of ISG to grant an extension to any Completion Date is also conditional upon the Sub-Contractor demonstrating to the reasonable satisfaction of ISG that the relevant delay will or is likely to delay practical completion of the Works and/or any section(s) beyond the Completion Date relevant thereto, the Sub-Contractor having used its best endeavours to prevent delay to practical completion of the Works and each section thereof and shall continue to do all that may reasonably be required to ISG's satisfaction to proceed with the Works and each section thereof. The SubContractor shall not be entitled to an extension of any Completion Date to the extent that the practical completion of the Works and/or any section thereof is delayed by the Sub-Contractor's negligence or breach of this SubContract.

(8) If the Sub-Contractor is in breach of any of the foregoing provisions of this clause 9 then the Sub-Contractor shall not have any entitlement to an extension of time in relation to any delay to which such breach or breaches relates and without prejudice to ISG's other rights and remedies the SubContractor shall without prejudice to and pending the final determination or agreement between the parties as to the amount of the loss or damage suffered or which may be suffered by ISG in consequence thereof forthwith pay or allow to ISG such sum in which event ISG shall be entitled to deduct such sum from any amount otherwise payable to the Sub-Contractor as ISG shall bona fide estimate as the amount of such loss or damage such estimate to be binding and conclusive upon the Sub-

Contractor until such final determination or agreement. Such estimate may include without limitation a sum in respect of liquidated and ascertained damages paid or to be paid by ISG under the Principal Contract where ISG reasonably considers that the Sub-Contractor has caused or contributed to delay to practical completion of ISG's works under the Principal Contract.
….

20. Loss and/or Expense

(1) if in the execution of this Sub-Contract, the Sub-Contractor incurs or is likely to incur direct loss and/or expense for which the Sub-Contractor would not be reimbursed by a payment under any other provision in this Sub-Contract because the progress of the Works or any part of them has been or is likely to be materially affected by:-

(a) the ordering of any variation to the Works…
(b) any breach or act of prevention on the part of ISG; or
(c) any other circumstances or occurrence (other than a breach of this SubContract by the Sub-Contractor) entitling ISG to loss and/or expense under the Principal Contract,

then the Sub-Contractor may make written application to ISG within 14 days of it having become, or when it should reasonably have become, apparent to the Sub-Contractor that the regular progress of the works has been or is likely to be materially affected.

(2) If the Sub-Contractor makes an application as referred to in clause 20(1), then save where this Sub-Contract provides that there shall be no addition to the Sub-Contract Sum or otherwise excludes the operation of this clause, then the amount of the direct loss and/or expense which has been or is being incurred shall be ascertained by ISG; provided always that the Sub-Contractor shall:
(a) make its application as soon as it has become, or should reasonably have become, apparent to the Sub-Contractor that the progress of the Works or

any part of them has been or is likely to be affected; (b) in support of its application submit to ISG upon request such information and details as ISG may reasonably require; and
(c) in addition to clause 20(2)(a) and (b), provide ISG with such notices, documents and other information as may be required in good time so as to enable ISG to claim loss and/or expense in accordance with the terms of the Principal Contract,

and provided always that no allowance shall be made as part of any ascertainment under this clause for any direct loss and/or expense for which the Sub-Contractor would be reimbursed under any other provisions of this Sub-Contract. The Sub-Contractor shall not be entitled to any loss and/or expense to the extent that it fails to comply with the provisions of clause 20(1) and/or 20(2) in respect of such direct loss and/or expense and/or such direct loss and/or expense is attributable to the SubContractor's negligence or breach of this Sub-Contract.
[bold added]

The Relevant Factual Background

10. FK generally notified ISG of delays on site by way of Early Warning Notices ("EWNs"). These were standard form documents produced by FK. A total of 106 EWNs were served between September 2021 and April 2022. I set out an example EWN below. (The reference to "demurrage" is agreed to be a reference to delays or potential delay.)

FK EARLY WARNING REPORT

Project: C3411 - CENTRAL PARK, AVONMOUTH Created by: Alfie Eagle

Date & time: 2021-10-05 10:18:27 Ref: C3411/0005

Description of work:
Wall Cladding GL L Unit 8

> Reason for early warning:
> Due to heavy rain fall this has caused the ground on GL L to sink and also crack, ISG have been made aware of this and have asked a structural engineer to come to site, they have told us no plant is to go onto the elevation until this is rectified
>
> Labour:
> TBC
>
> Plant:
> TBC
>
> Demurrage:
> Delay to works starting

11. In May 2022 FK lodged an application for an EoT of 183 days. The document set out the first part of clause 9(5) of the Sub-Contract but omitted the proviso. On 7th September 2022 ISG served its response. This referred to the proviso, but ISG did not then allege that FK had failed to comply with it. Later in September 2022 FK lodged a reply. It made no reference to the proviso.

12. By a notice dated 15th March 2023, ISG referred to adjudication the proper gross valuation of FK's works as at AFP21. At paragraph 7.4.3 of the Referral Notice dated 17th March 2023, ISG took the points that FK had failed to comply with clause 9(5), that this was a condition precedent, and that ISG had not waived the requirement. This appears to be the first time that non-compliance with clause 9(5) was raised. In its Response, FK argued (with supporting evidence) that it had issued EWNs which met the contractual notice requirements. FK argued further that in any event ISG had waived its entitlement to rely on clause 9(5), and/or was estopped from doing so. This was put on the basis that, prior to commencing the adjudication, ISG had not raised the failure to issue compliant notices and that in September 2022 it had instead responded substantively to the extension of time claim. ISG served a Reply in the adjudication which rejected the waiver and estoppel arguments.

13. As I have indicated, Mr Molloy issued his decision on 14th April 2023 ("the Molloy Decision"). He decided that clause 9(5) was a condition precedent but

that - on the facts - FK had complied with it. He decided that "having given timely notice of the events relied upon, and where delays were continuing, FK was entitled to wait until the effect of the delay events had finished to provide its analysis of the effects on a retrospective basis." It was therefore not necessary for him to go on to decide the issues of waiver and estoppel. As set out above, he awarded an extension of time of 188 days and prolongation costs of £198,000.

14. ISG later issued proceedings seeking to enforce the Molloy Decision. However, there were also two other adjudications between the parties and these were the subject of Part 8 proceedings before Mr Adrian Williamson KC sitting as a Deputy High Court Judge: see [2023] EWHC 1718 and [2023] EWHC 2012. I need not go into the detail of these proceedings save to note that: (a) they are the subject of pending appeals which are due to be heard by the Court of Appeal on 3rd and 4th July 2024; and (b) as a result of them, the enforcement of the Molloy Decision fell away. It is unclear whether, depending upon the outcome of the appeals, either party will seek enforcement of the Molloy Decision or a final determination of the dispute under Part 7.

These Part 8 Proceedings

15. These proceedings were issued on 21st September 2023. In short Particulars of Claim ISG seeks the following five declarations:

(1) On its express terms or as a matter of true construction, compliance with clause 9(5) of the Sub-Contract dated 28 September 2021 was a condition precedent to FK's entitlement to an extension of time.

(2) The Early Warning Notices issued by FK on various dates as listed in the Schedule to this Order ("the EWNs") and upon which FK relied to support its claim for a 188 day extension of time dated 16 June 2022, did not satisfy the requirements of clause 9(5) of the Sub-Contract.

(3) ISG did not waive, and is not estopped from relying upon, its right to insist upon compliance with clause 9(5). ISG is therefore not prevented from relying upon FK's failure to comply with clause 9(5) as a basis for refusing to award FK the extension of time it claimed on 16 June 2022.

(4) FK was therefore not entitled to the 188 day extension of time which the adjudicator declared it was entitled to, and his declaration number 2 in his Decision dated 14th April 2023 was wrong, is overturned, and shall not be enforced against ISG.

(5) The EWNs were not valid notices capable of forming part of any valid claim to an entitlement to any extension of time under clause 9(5) of the Sub-Contract.

16. In its Acknowledgement of Service dated 10th October 2023 FK took the point that there are substantial disputes of fact between the parties and the proceedings are not suitable for the Part 8 procedure.

17. In support of its position in these proceedings, ISG relies upon witness statements from Gurbinder Singh Grewal, solicitor, dated 21st September 2023 and 24th October 2023. FK relies upon witness statements dated 10th October 2023 from its Managing Director, Paul Bentley, and its solicitor, Paul O'Kane. I have been supplied with a bundle of material which includes the witness and expert evidence adduced in the adjudication.

The Parties' Submissions in Outline

18. For ISG, Mr Brannigan submitted first that clause 9(5) was self-evidently a condition precedent. He relied on Obrascon Huarte Lain SA v Her Majesty's Attorney General for Gibraltar [2014] EWHC 1028 at [311] – [313] in support of his construction. He then argued that clause 9(5) was not complied with. He submitted that this could be established relatively straightforwardly by scrutinising the relevant EWNs and comparing them with the requirements of

the clause. Although 106 EWNs were served, ISG's primary case as set out in the Particulars of Claim was that only 21 EWNs (scheduled to the pleading) needed to be considered because these were the ones which were relevant to delays to units 6 and 7 which in turn were the foundation for the EoT. However, at the hearing Mr Brannigan accepted that the 73 EWNs analysed by Mr Molloy should be considered. He submitted that it made no difference how many were considered since it was plain from inspecting the documents that only one EWN complied with clause 9(5).

19. For FK, Mr Hargreaves submitted first that it was wrong in principle for ISG to bring Part 8 proceedings in relation to one aspect of the Molloy Decision when the entire dispute had not been brought for final determination. He described this as a "category error". He argued that it risked being an abuse of process.

20. As to whether clause 9(5) was a condition precedent, he submitted that the 14 day time limit was "directory" as opposed to mandatory. He relied on Diab v. Regent Insurance Co Ltd [2007] 1 WLR 797 at [14]-[17] in support. He explained that breach of the time limit would amount to a breach of contract which sounded in damages, but not to breach of a condition precedent.

21. On the question of compliance he submitted that FK complied with the clause. He argued that compliance was achieved not necessarily by way of the EWNs but sometimes by correspondence and/or discussion on site. This was a question of fact which could not be determined in these proceedings. He further emphasised that the effect of the EWNs had to be construed in light of the context and circumstances known to the recipient at the time, and that this again was a question of fact.

22. He next argued that, upon the assumption that there was non-compliance, ISG were estopped from relying on this and/or had waived their entitlement to rely upon it.

23. I elaborate on these arguments further below.

Is clause 9(5) a condition precedent?

24. The question as to whether clause 9(5) is a condition precedent is one of pure construction and so in principle it should be capable of determination on a Part 8 basis. Nonetheless, the question as to whether all four limbs of clause 9(5) were conditions precedent, and the relationship with clauses 9(2) and 20, were barely addressed at the hearing. Mr Hargreaves submitted that FK had a separate entitlement to an EoT under clause 9(2) when the delay was caused by late access, and that the claim for prolongation costs derived from clause 20.

25. The declarations sought by ISG do not expressly address clauses 9(2) or 20. Nor do they address the prolongation costs awarded by Mr Molloy. ISG argued that if the Court made declaration (4) which overturned the EoT, then the claim for prolongation costs would necessarily fall away but, in the alternative, ISG sought permission to amend to plead an additional declaration. I consider this to be an unsatisfactory approach since there is a lack of clarity as to precisely what the Court is being asked to decide.

26. If the issues of construction were the only issues before the Court then, notwithstanding my misgivings, I would be prepared to decide them now. However, as appears below, there are other impediments to the determination of these proceedings under Part 8, and so I decline to decide the construction points.

27. It is in any event preferable that the parties' contentions on the four limbs of clause 9(5), clause 9(2) and clause 20 should all be pleaded out. In that way the Court can approach the issues of construction with the parties' positions having been clearly articulated.

Breach

28. In Sleaford Building Services v. Isoplus Piping Systems Ltd [2023] EWHC 969, a Part 8 case, Mr Alexander Nissen KC sitting as Deputy Judge of the High Court noted at [58] that "a submission that allegations of breach of conditions precedent would not give rise to substantial disputes of fact is one to be approached with caution." I agree.

29. ISG says that it is plain from a cursory examination of the EWNs that they did not comply with one or more limbs of clause 9(5). In particular, only one EWN (No 105) gave any indication of the impact on practical completion. It is fair to say that FK's case on compliance has developed over time. FK submitted that the question of compliance gives rise to substantial issues of fact for a number of reasons. The points were put in various different ways but – boiled down – there were two main contentions.

30. First, it was argued that there is evidence that notification of delays was not always given by way of EWNs. Mr Bentley says [32]:

> "In such instances [late handover by ISG] EWNs were not issued by FK, but we relied on the written email exchanges and/or progress reports and/or DABS meeting minutes as providing notice of delays pursuant to clause 9(5)."

31. On the question of notification being given by other means, FK also refer to ISG's response to FK's application for an EoT which says:

> "ISG held daily, weekly and monthly progress meetings to review and coordinate the works where it was made clear the requirements of both the preceding and proceeding trades. Dates were agreed which in turn led to works being programmed in with the following trades. FK continually failed to meet the agreed dates and durations and, in an attempt to mitigate further delays, disruption and abortive costs to follow on trades ISG were left with no alternative but to allow follow on trades to proceed when they were left with no other option."

32. I accept therefore that there is evidence that notification was not or may not always have been given by EWNs. The extent to which notification was given otherwise than by way of EWNs is disputed on the facts and will need to be investigated.

33. The second main point made by FK was that "in the light of the relevant factual context and the state of ISG's own knowledge, the reasonable recipient, circumstanced as ISG was, would have understood the EWNs and/or other forms of notification of delay events as complying with clause 9(5), or would have understood the situation as not requiring any notices." FK relied on this respect on Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749 at 767G-768C per Lord Steyn. In my judgment the knowledge of ISG and the context in which the EWNs were received are likely to go to waiver and estoppel which I address below, but I accept that they may also be relevant to compliance.

34. Overall therefore it is clear that (as is to be expected) there was regular and routine engagement on site between the parties as to the progress of the works. I consider that the question of breach is not suitable for Part 8 determination because it is likely to give rise to substantial disputes of fact as to whether and, if so, how notification was given other than by way of EWNs. Furthermore, I consider that the parties' cases on breach need to be pleaded out.

Waiver/ Estoppel

35. In ING Bank NV v. Ros Roca SA [2011] EWCA Civ 353 Stanley Burton noted [77]:

> "In general Part 8 proceedings are wholly unsuitable for the trial of an issue of estoppel. Once such a claim is disputed, save in exceptional cases, the proceedings will cease to comply with CPR r 8.1(2)(a), since they will cease to be proceedings in which the parties do not seek the court's decision only

on questions which are 'unlikely to involve a substantial dispute of fact'. A disputed claim of estoppel should be carefully pleaded."

36. In CLS Civil Engineering Limited v. WJG Evans and Sons [2024] EWHC 1194, I was able to decide Part 8 proceedings which involved allegations of estoppel. That was in circumstances where the alleged estoppels were clearly articulated, the factual background was largely non-contentious, and it could be seen that that the estoppels stood no real prospect of success. By contrast, in Sleaford the Deputy Judge held at [63] that arguments of waiver based on site practice were unsuitable for Part 8 determination.

37. I did not find FK's articulation of its case on waiver and estoppel to be altogether satisfactory. I pressed Mr Hargreaves to formulate the legal propositions for which he contended and to map them across to the facts of this case. In the end the principles contended for and their application were not entirely clear.

38. ISG submitted that a useful summary of the well-known requirements for an estoppel by convention is found in The Law of Waiver, Variation and Estoppel (3rd Ed 2012 Wilken & Ghaly) at paragraph 10.01. This was cited with approval by Carr J (as she then was) in Jawaby Property Investment Limited v Interiors Group Ltd [2016] EWHC 557 (TCC), at [44]:

"(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.

(ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it.

(iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely forming his own independent view of the matter.

(iv) That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

(v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position."

39. ISG further referred to Westbrook Resources Ltd v Globe Metallurgical Inc [2009] EWCA Civ 310 at [12]:

"It is well established that if a party to a contract who is entitled to receive performance of an obligation by a stipulated date represents to the other that he is willing to accept performance out of time and the other relies on that representation, he cannot insist on performance by the date originally stipulated. If the representation is made before the time for performance has come, the waiver will operate by way of equitable estoppel. If it is made after the time for performance is past it may also take effect as an election to affirm the contract."

40. I accept and adopt those propositions when considering the allegations of waiver and estoppel in this case.

41. As I have indicated, in the adjudication FK relied upon waiver and estoppel in the context of ISG responding substantively to FK's EoT claim without raising the issue of notice under clause 9(5) and FK then going on to incur the costs of a reply. In these proceedings, FK's arguments were rather more elaborate. It was argued that there were four acts or series of acts or conduct which were examples of "waivers or estoppels arising or arguably arising on the facts";

a. First, ISG by its conduct at the time of the delays arising on site, and in particular its engagement with FK in identifying delays and providing new access dates was, in the light of the relevant factual context, to be regarded as having waived the obligation to provide notification of delay, or was estopped from insisting on clause 9(5) notices in respect of those delays over and above the documents and information which FK did provide;

b. Second, FK issued 106 EWNs and ISG never disputed their use. ISG never complained that FK's forecasts of delay were not best estimates. FK's Managing Director, Paul Bentley, says (para [52]) that:

> "To the best of my knowledge and belief, ISG did not and has never claimed (at least up until the date of the Molloy Adjudication), that FK was in breach of clause 9(5) of the subcontract (or any other clause) because of failings/ inadequacies in the EWNs… FK issued over 100 of these notices and [ISG] therefore had ample opportunity to point this out to FK upon receipt if they believed this to be the case. Further I had numerous conversations with [ISG's] Martin Melges (commercial manager), Paul Jones (commercial director), Martin Fletcher (operations director), Mark Cesnek (managing director) during the course of the works and nobody ever questioned or disputed the practice of notifying of delays or potential delays via EWNs. On that basis, the position on the EWNs that ISG took in the Molloy Adjudication and now in these proceedings is entirely contrived; there was simply no issue with FK using EWNs to notify ISG in a timely manner of delays and potential delays at that time."

FK say that ISG engaged with the EWNs, starting with AFP9 in February 2022. FK relied upon ISG's "EWN Response Schedule" which was regularly updated.

c. Third, (echoing the argument made in the adjudication) FK's formal extension of time claim was issued in May 2022, ISG's response was issued on 7 September 2022, but ISG did not then say that FK's claim was precluded by a failure to comply with clause 9(5). ISG, by taking no point on the absence of notices when responding to FK's formal extension of time claim, is to be regarded as having waived the

obligation to provide notification of delay and ought to be estopped from insisting on clause 9(5) notices in respect of those delays.

d. Fourth, ISG by stating in its Payless Notice that the prolongation costs were "Not agreed; Full review to be undertaken once works completed" was to be regarded as having waived the 14 day obligation in clause 9(5) notices.

42. During his oral submissions Mr Hargreaves handed up various documents which he said showed ISG engaging with FK on the EWNs but without taking the clause 9(5) point. Mr Brannigan responded that the documents related to FK's claims for disruption, not delay, and post-dated the relevant events. At the end of his submissions, Mr Hargreaves formulated FK's case thus:

a. ISG received the EWNs and engaged with them. ISG addressed issues of delay on site. ISG did not complain about the EWNs or say they were non-compliant until the adjudication. ISG therefore behaved in such a way as to lead FK to believe that they were waiving the defect in the EWNs. They behaved and conducted themselves in such a way that they had foregone reliance on clause 9(5);

b. Alternatively there was a convention that ISG would engage with FK and ask for further information as if the clause had been complied with;

c. In the further alternative there was an estoppel by representation which arose from ISG's conduct and by FK "going off to do more work on the causes of delay".

43. ISG says that FK has failed to seek any relief in these proceedings in relation to its case on waiver or estoppel. That is true, but in my judgment FK are entitled to raise these matters by way of defence and in support of its argument that the proceedings are not suitable for determination under Part 8.

44. On the substance of FK's arguments, ISG says that there was no unequivocal representation by ISG, and/or reliance by FK. ISG denies that there was a shared convention and/or that FK suffered a detriment or that ISG obtained a benefit sufficient to make it unconscionable for ISG to rely on its contractual rights.

45. Standing back and cutting through all this, it is clear that: (a) FK provided repeated early warnings of delay; (b) ISG engaged with those early warnings; (c) ISG made no complaint that the warnings were inadequate or non-compliant; (d) FK thereafter continued to issue EWNs in the same format; (e) FK arguably relied on ISG's stance in doing so; and (f) FK subsequently expended costs on its EoT claim. I can see that ISG may well have arguments as to whether they made any representation by word or conduct, and/or, if so, whether it was unequivocal, and/or whether it would be unconscionable for ISG to rely on its contractual rights. But in my judgment FK has an arguable case of waiver and/or estoppel which has a real prospect of success. It is clear to me that the arguments on waiver and estoppel are likely to involve substantial disputes of fact and that they need to be properly pleaded out. Stanley Burton LJ's dictum in ING Bank is applicable here. It is not satisfactory and it is not fair to either side for the Court to be asked to decide multiple formulations of estoppel and waiver on the basis of a disputed factual background and without the parties' cases being pleaded out.

Is it permissible to seek the final determination of one aspect of an adjudication by Part 8 proceedings?

46. The point argued by Mr Hargreaves that taking a single part of the adjudication for final determination by way of Part 8 proceedings was a "category error" does not strictly arise for determination. But since it is a point of pure law and it was fully argued, I will state my brief conclusion. I see no reason why one part of an adjudicator's decision should not be the subject of final determination under Part 8 if the issue is otherwise suitable for Part 8 determination (ie it is unlikely to involve a substantial dispute of fact). This is particularly so if the balance of the adjudicator's decision is uncontentious (which may be the position in the

present case); otherwise the parties would be required to litigate matters which are not in dispute. I note that this was essentially the conclusion reached by Edwards-Stuart J in Geoffrey Osbourne Ltd v Atkins Rail Ltd [2009] EWHC 2425 at [18] and I respectfully agree with him.

Conclusion and Disposal

47. I conclude therefore that these proceedings are not suitable for Part 8 determination and I decline to make any declarations. I reach this conclusion because I consider there are likely to be substantial disputes of fact (a) as to whether FK was in breach of clause 9(5), and (b) as to whether ISG has waived its entitlement to rely upon any breach, and/or is estopped from so relying. I decline to make any declaration as to whether clause 9(5) is a condition precedent. There is little purpose in deciding the construction points without also deciding the issues of breach and waiver/ estoppel at the same time. In any event it would be preferable for the construction issues to be pleaded out.

48. The Court has a discretion under CPR 8.1(4) to order a claim to continue under Part 7. I invite the parties to consider how this claim should proceed, and to agree an Order addressing consequential matters and directions if appropriate within 14 days of hand-down. If agreement cannot be reached, then short written submissions should be exchanged and lodged within the same timescale. I will then decide any disputed matters on the papers or list the matter for a hearing if the parties request it.