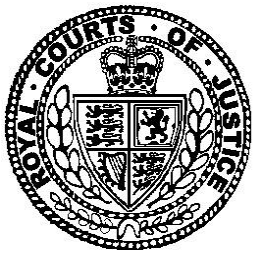

Neutral Citation Number: [2024] EWHC 2025 (TCC)

Case No: HT-2020-000448

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

Date: 1 August 2024

Before :

MR JUSTICE CONSTABLE

Between :

TATA CONSULTANCY SERVICES LIMITED

Claimants

- and -

DISCLOSURE AND BARRING SERVICE

Defendants

- -
- -

Stephen Cogley KC, Matthew Lavy KC and Iain Munro (instructed by Bryan Cave Leighton Paisner LLP) for the Claimants
Simon Croall KC, Andrew Carruth and William Mitchell (instructed by Bristows LLP) for the Defendants

Hearing date: 23 July 2024

- -

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 1st August 2024.

Mr Justice Constable:

1. This judgment deals with a number of consequential matters following the handing down of the substantive judgment in this matter (see [2024] EWHC 1185 (TCC) ('the Judgment'). The Judgment ran to 242 pages and dealt with a very significant number of legal, factual and technical issues. The vast majority of both claims and counterclaims were dismissed. I concluded (at paragraph 821) that, subject to VAT arguments and any applicable interest:

   (1) The Claimant ('TCS') is entitled to:

   (a) Manpower costs (R1-D): £666,735.00
   (b) Non-Manpower costs (R1-D): £1,732,989.70
   (c) Volume Based Service Charge ('VBSC'): £6,976,737.00

   (2) The Defendant ('DBS') is entitled to:

   (a) CCN041 £4,559,439.00
   (b) Barring Portal Defects (Snowbound) £8,270.00

2. I am grateful to the parties for their clear and efficient written submissions, and their succinct supplemental submissions as requested by the Court. This judgment should be read together with the facts and findings set out in the Judgment, details of which are not repeated here.

(1) Correction of Judgment

3. Due to the availability of the parties and the Court, the consequentials hearing has taken place a number of months after the handing down of the Judgment. DBS, in its Skeleton Argument for the consequentials hearing, pointed out for the first time that it considered that an error existed in respect of the award of delay damages for the period prior to 7 September 2018. TCS responded explaining why it considered that there was no error.

4. Following oral submissions, and the handing down of a draft of this judgment, TCS then provided a two page note identified what it considered was an error in the original (and, as set out below, corrected) quantification of non-manpower (and manpower) costs.

5. If and to the extent that an error has been made, the Court has an unfettered jurisdiction to correct it at any time before the order giving effect to the Judgment is perfected by being sealed: *In re L & anr (Children)* [2013] UKSC 8; [2013] 1 WLR 634 at [16], [19], and [27]:

   '16. It has long been the law that a judge is entitled to reverse his decision at any time before his order is drawn up and perfected.

   ...

   19. Thus there is jurisdiction to change one's mind up until the order is drawn up and perfected. Under CPR r 40.2(2)(b), an order is now perfected by being sealed by the court. There is no jurisdiction to change

one's mind thereafter unless the court has an express power to vary its own previous order. The proper route of challenge is by appeal. On any view, therefore, in the particular circumstances of this case, the judge did have power to change her mind. The question is whether she should have exercised it.

...

27. This court is not bound by the Barrell case or by any of the previous cases to hold that there is any such limitation upon the acknowledged jurisdiction of the judge to revisit his own decision at any time up until his resulting order is perfected. I would agree with Clarke LJ in Stewart v Engel [2000] 1 WLR 2268, 2282 that his overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially in a case where it is expected that they may do so before the order is formally drawn up.....Every case is going to depend upon its particular circumstances.'

6. The Order arising out of the Judgment has not been sealed. As set out below, I consider that DBS is correct and there is an erroneous internal inconsistency which affects the quantification of the damages awarded to TCS in respect of delay. It is open to me to correct the Judgment in this respect. In circumstances where there is no detrimental reliance on the part of TCS, it is obviously in the interests of justice that I do so. If the error had been pointed out in the draft judgment, I would have corrected it at that point, prior to handing down.

7. I consider that TCS is, however, incorrect and there is no error in the manner in which manpower and non-manpower costs have been approached. No correction is required.

8. I would only add that, notwithstanding the existence of discretion until the order giving effect to the Judgment is perfected by being sealed, it remains the case that parties should draw the Court's attention to anything that it considers may amount to a substantive error capable of correction as soon as possible. An error of the type identified by DBS is readily distinguishable from a point on which a party simply disagrees and in respect of which it will, in the ordinary way, seek permission to appeal. It is perhaps unfortunate that these potential errors were not identified when the parties were provided with the judgment in draft before being handed down formally, but given the length and complexity of the Judgment it is understandable why this did not happen. The consequentials hearing was, due to the availability of the parties and the Court, not for some three months after the handing down of the Judgment. In such circumstances, it would have been far preferable if the points raised by the parties had been raised much sooner, not least because the circulation of the Judgment in relation to any points of interest increases as time goes by and a judgment should be corrected, if that is necessary, as soon as possible.

DBS's contended error

9. The underlying contractual regime in respect of the entitlement to loss and expense in the face of AUTHORITY Cause was that if TCS would not have achieved a Milestone by the Milestone Date in any event (even where its own delays were sub-critical) it would not get relief or compensation for the period during which it would have been in delay in any event (see [57]).

10. At [258] I found:

> "…for the purposes of the Clause 7 analysis, TCS were never going to achieve the R1-D Milestone until between July and September 2018, if one assumes a period of around 9-12 months from Final SIT to Go-Live. (9 months is not an unreasonable planned period: for example, the 4 October 2017 Microsoft update plan showed a period of 9 months from the start of Final SIT to Go-Live; the 12 December 2017; the February 2018 POAP showed a duration for this period 8.5 months; Dr Hunt's evidence referred to further below suggests 12 months)."

11. At [346(1)], I found:

> "As at 7 September 2017, but for the following delays, TCS would have, with no other interference, achieved the Go-Live Milestone for R1-D within about 1 year (I will assume a Go-Live Date of 7 September 2018, insofar as it may be relevant). The delays accrued to R1-D at this point were driven by preceding R1-B&B delays and were not matters for which TCS is entitled to relief or damages for the reasons set out in relation to R1-B&B"

12. The one year reflects the upper end of the 9-12 month period referred to in paragraph 258. Whilst completion in 9 months was 'possible' using accelerative measures, using 12 months was a conscious acknowledgment that this was the more realistic timeframe. This was also reflected in the one-year period I referred to at paragraph 397.

> "On the basis of my analysis of delays as set out above, (a) TCS has established an entitlement to loss and expense for 98 days, and (b) but for the wrongful de-scoping, TCS would have delivered R1-D by 19 September 2019."

13. At [346(4)] I found:

> "(4) For the period from 14 June 2018 to 19 September 2018, TCS has established that the further accrued critical delays (day for day) were caused by 'AUTHORITY Cause'. This is a period of 3 months and 5 days (98 days)."

14. In light of my finding at [346(1)], and the proper construction of the Agreement as set out at [57], DBS is correct that this contains an internal inconsistency. My specific finding that the assumed Go-Live Date of 7 September 2018 makes clear the factual basis upon which the legal analysis should follow. It is consistent with the factual findings/observations at both paragraphs 258 and 397.

15. Based on this factual finding, DBS is correct that the proper application of the contract means that TCS should not be entitled to loss and expense for the period during which it would otherwise have been working to complete the Milestone due to its own prior delays.

16. As a result, the Judgment should stand corrected. Paragraph 346(4) should properly read:

> (4) For the period from 14 June 2018 to 19 September 2018, TCS has established that the further accrued critical delays (day for day) were caused by 'AUTHORITY Cause'. This is a period of 3 months and 5 days (98 days). However, for period through to 7 September 2018, TCS would not have, in any event, achieved the Milestone Date and loss and expense is therefore irrecoverable. The relevant period is limited to 12 days from 8 September 2018 to 19 September 2018."

17. As a consequence:

(1) paragraph 378 should then read:

> 'Doing the best I can by a pro-rata of the days, the claimed sum for the period ~~13 June 2018~~ 8 September to 19 September 2018 would be a total of ~~£1,640,562~~ £119,381.20 (constituting ~~£666,7352~~ £50,279.60 verified costs and £69,101.60 ~~£973,8273~~ unverified as to amount).'

(2) footnote 2 should be replaced with:

> 'The total of the September top line (£125,699) multiplied by 12/30 (number of recoverable days 8 September-19 Sept/total number of days in September)'.

(3) the first sentence in paragraph 388 should read:

> 'In the circumstances, the claim for Period 2 succeeds in the sum of ~~£666,735~~ £50,279.60.'

(4) paragraph 397 should read (also correcting a typographical error in relation to a reference to 2018 which should be 2019):

> 'On the basis of my analysis of delays as set out above, (a) TCS has established an entitlement to loss and expense for 12 ~~98~~ days, and (b) but for the wrongful de-scoping, TCS would have delivered R1-D by 19 September 2019. It is usual that claims for prolongation costs are calculated by references to the expenses incurred during the period of relevant critical delay. However, in the circumstances of the present case, I consider that the fairest method of analysis which gives effect to the factual findings above, and takes DBS's point about the timing of renewals into account, is that I should assess TCS's entitlement by allowing all non-manpower costs incurred after 12 ~~98~~ days prior to 19 September 201~~8~~9, i.e. after ~~13 June~~ 7 September 201~~8~~9. I therefore allow all of the sums claimed for the months of ~~July~~ October 2019 to the end, together with ~~17~~24/30 of the sum claimed for ~~June~~ September 2019 (~~£206,733~~£173,831). That comes to ~~£1,615,841~~ £1,083,652 plus ~~£117,148.70~~ £139,064.80, making ~~£1,732,989.70~~ £1,222,716.80.'

(5) footnote 4 should read:

'£173,831 x 24/30'

(6) Paragraph 821(1) (a) and (b) should read:

'(a) Manpower costs (R1-D): ~~£666,735.00~~ £50,279.60
(b) Non-Manpower costs (R1-D): ~~£1,732,989.70~~ £1,222,716.80'

(7) Paragraph 823 should read:

'The net sum payable by DBS to TCS is therefore ~~£4,808,752.70~~ **£3,682,024.40** (subject to the remaining issue of applicable VAT).'

TCS's Contended Error

18. The Court has found that critical delays to R1-D were caused by 'AUTHORITY Cause' from 13/06/2018. Based on the 'artificial' third alternative analysis at [370], TCS says that the Court has also found that DBS's removal of scope and non-engagement could be 'AUTHORITY Cause' of critical delay. The Court has also found that, for period through to 07/09/2018, TCS would not have, in any event, achieved the Milestone Date and loss and expense is therefore irrecoverable until after that date. TCS contends that loss and expense in respect of R1-D should be recoverable from 07/09/2018 until the end of the Contract. Consequently, TCS's claim, it says, should be calculated on the basis of the period from 07/09/2018 to 31/03/2020, subject to the salary data point. Inconsistently, it says, [397] of the Judgment seeks to quantify the non-manpower loss only from 07/09/2019 to 31/03/2020.

19. TCS's analysis is wrong. The explanation of my approach is set out clearly in paragraph 389. The Court found that from September 2017 there was about one year of work for TCS to complete. TCS would plainly not be entitled to any losses during the time it would have been carrying out its original scope of work. There was a year of delay between September 2017 and September 2018, when Partial Termination took place. Having analysed the reasons for delay against contractual entitlement during that year, I found that TCS is entitled to 12 days' loss and expense. TCS may then, because of the wrongful partial termination, claim losses post partial termination, but this must take account of the fact that – as at the actual date of partial termination – TCS still had one years' worth of its own scope which it would have needed to carry out had the Agreement not been partially terminated. TCS's proposed approach would allow it, unjustifiably, to claim for losses equivalent to the period during which it would have been carrying out its own scope but for the partial termination. This would not be permitted by Clause 7 or by the application of ordinary principles of causation. The logic of the approach in paragraph 389 is correct.

(2) Interest on the VBSC

20. TCS claims interest on the VBSC of £6,976,737 which the Court awarded to TCS under the Late Payment of Commercial Debts (Interest) Act 1998 ('the 1998 Act'). The claim is substantial; the precise figure is not clear given the lack of precision

surrounding the commencement date for the calculation of interest referred to further below, but the delta between a claim at 8% over base and 2% over base (as otherwise contended for by TCS pursuant to section 35A of the Senior Courts Act 1981 ('the 1981 Act')) is in excess of £2m.

21. TCS's claim under the 1998 Act was not pleaded. There is no suggestion that such a claim was not required to be pleaded: it plainly was, not least in accordance with CPR 16.4. This requires that if a claimant is seeking interest they must (a) state whether they are doing so under the terms of a contract; under an enactment and, if so, which; or on some other basis and, if so, what that basis is; and if the claim is for a specified amount of money (which is the case here), the pleading must state (i) the percentage rate at which interest is claimed; (ii) the date from which it is claimed; (iii) the date to which it is calculated, which must not be later than the date on which the claim form is issued; (iv) the total amount of interest claimed to the date of calculation; and (v) the daily rate at which interest accrues after that date.

22. TCS applied on 10 July 2024 for permission to re-amend its Particulars of Claim to plead such a claim, as well as to claim VAT. The draft amended pleading merely included the following addition:

> 'Further, the Claimant claims interest on such sums as are found to be due to it pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 for the unpaid Transaction Charges plus VAT; and section 35A of the Senior Courts Act 1981 for sums due in damages (and, in the alternative, for the unpaid Transaction Charges plus VAT), for such periods and at such rate as the Court thinks fit.'

23. The pleading therefore remained substantially non-compliant with the CPR at the point at which permission to amend was sought. I should add, however, that the draft pleading was provided at the same time as a letter to which was appended TCS's interest calculations from which TCS's case on the matters required by (i) to (v) of CPR16.4 where the claim is for a specified sum could be discerned.

24. The application for permission to amend is resisted. DBS contends that the application is made very late. The principles applicable to very late applications to amend were set out by Carr J (as she then was) in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm) at [36]-[38] (endorsed by the Court of Appeal in *Nesbit Law Group LLP v Acasta European Insurance Company Ltd* [2018] EWCA Civ 268 at [41]) and Coulson J in *CIP Properties (AIPT) Ltd v Galliford Try Infrastructure Ltd & ors* [2015] EWHC 1345 (TCC); 160 Con. L.R. 73 at [19]. As summarised at [41] of *Nesbit Law*:

> "*In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal.*"

25. TCS contends, in this regard, that their application should not be regarded as a 'very late' application on the basis that no hearing date will be lost, nor indeed any other disruption caused. Mr Cogley KC, for TCS, points to the observation of Carr J as she then was in *Quah Su-Ling* that '*lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation of the consequences in terms of work wasted and consequential work to be done*'. On any view, this is a very late amendment. It is brought two months after the judgment has been handed down and two weeks before the consequentials hearing. The application to amend itself is being considered as part of the consequentials. Other than being brought during an appeal, it could not, by definition, be any later. That conclusion does not mean it is not, of course, necessary to consider the implications, if any, arising out of the time at which it is brought; but in the circumstances of this case, it cannot realistically be considered anything other than a very late application.

26. Next, DBS argues that no reason, let alone a good reason, has been identified for the lateness of the application. No evidence was submitted explaining the lateness of the application. In its skeleton argument TCS explained the lateness of the pleading by reference to its increased focus on the question of interest in the context of the consequentials hearing. On the assumption that TCS considered it was entitled to bring such a claim, this explanation amounts to no more than an acceptance that the issue had effectively been overlooked. As a reason, this is not a 'good' reason. This, of itself, is not determinative against the application, but it is a factor to be weighed in all the circumstances, increasing as it does the indulgence required of the Court.

27. DBS also raises a number of points which went to merits of the 1998 Act interest claim, which were advanced to establish either that I can conclude on this application that it has no real prospect of success at this stage (such that permission should not be granted); or alternatively conclude that evidence would be required in order to consider the merits of the claim, which is not available now and which it is now too late to have adduced, militating strongly against permitting the amendment at this stage.

28. These three points were (in the order in which they logically arise):

    (1) The 1998 Act has been ousted by Clause 16.3 of the Agreement;

    (2) Interest did not start to run;

    (3) Interest should be remitted pursuant to Section 5 of the 1998 Act.

29. Following argument, I raised a potential interaction between Clause 16.3, which was central to the first of these arguments, and Clause 3.3 of Schedule 2-4 of the Agreement, which had not been the focus of any submissions by either party. I therefore invited short, further submissions from the parties. A fresh point was raised by DBS as to the existence of any qualifying debt for the purposes of the 1998 Act in light of Clause 3.3. TCS were given the opportunity to, and did, provide submissions in reply to this point.

Qualifying Debt

30. DBS argues that pursuant to Clause 3.3 of Schedule 2-4, there is no obligation to pay that element of an invoice which is disputed. The obligation to pay, in respect of a disputed invoice, is limited to the undisputed amount. In these circumstances, non-payment of the disputed element does not create a debt, and there is therefore no qualifying debt for the purposes of the 1998 Act.

31. TCS contends that this analysis is wrong. Clause 3.3 of Schedule 2-4, it argues, sets out the immediate steps to be taken in the event of a disputed invoice. One of those steps is immediate payment of the undisputed amount. However, nothing in Clause 3.3 provides that the disputed amount is not payable; it simply recognises that the question of whether it is payable is disputed. It contends that Clause 3.3 does not say that upon a dispute, the invoice becomes invalid; rather, it says that DBS may raise a dispute and propose amendments to an invoice; if it does so and TCS accepts the proposed amendment, it then raises a "replacement" valid invoice. Absent such a replacement invoice, the position is that the invoice stands and accrues interest. TCS further submits that DBS's construction is inconsistent with Schedule 2-9 (the Dispute Resolution Procedure) which is drafted on the premise that '*the parties shall continue to comply with their respective obligations under the Agreement regardless of the nature of the Dispute and notwithstanding the referral of the Dispute to the Dispute Resolution Procedure*' (Clause 1.3) and the ability to commence or continue litigation or arbitration proceedings (Clause 3.20). TCS asks rhetorically, on DBS's construction, from what point does interest begin to run after the dispute? The Dispute Resolution Procedure is silent on this issue. TCS contends that the answer must be the date that the invoice should have been paid absent the dispute (i.e. 30 days from invoice).

32. If, contrary to this, Clause 3.3 of Schedule 2-4 operates so as to remove the payment obligation in respect of disputed invoices, such that they are not "qualifying debts", then TCS contends that the provision is void. That is because the process that is engaged when an invoice is disputed provides for no payment of any interest. TCS argues that Section 8 of the Act cannot be circumvented by providing that disputed debts are non-payable, any more than it can be circumvented by providing for applicability of the Act in relation to undisputed debts (Clause 16.3); in both cases, the substantive position would be the same – namely, no remedy for a sum due by way of charges under the contract.

33. A debt arises where a contractual obligation to pay is not met. The existence of a debt is necessary for there to be a qualifying debt which engages the 1998 Act, pursuant to Section 3 which states:

> '**3.— Qualifying debts.**
>
> (1) A debt created by virtue of an obligation under a contract to which this Act applies to pay the whole or any part of the contract price is a "qualifying debt" for the purposes of this Act, unless (when created) the whole of the debt is prevented from carrying statutory interest by this section.'

34. The starting point of the analysis is therefore, by definition, to identify what the obligation upon DBS to pay a valid invoice submitted by TCS is. The obligation to

make payment in consideration of the services provided by TCS is set out in Clause 16.1:

> '16.1 In consideration of the CONTRACTOR carrying out its obligations, including the provision of the Services under this Agreement, the AUTHORITY shall pay the Charges to the CONTRACTOR in accordance with the payment profile and the invoicing procedure specified in schedule 2-3 (The Charges and Charges Variation Procedure) and schedule 2-4 (Invoicing Procedure).'

35. Clause 16.3 of the Agreement then states:

> '16.3 The CONTRACTOR shall not suspend the supply of the Services unless the CONTRACTOR is entitled to terminate this Agreement under clause 55.16 for failure to pay undisputed Charges. Interest shall be payable on the late payment of any undisputed Charges properly invoiced in accordance with the Late Payment of Commercial Debts (Interest) Act 1998.'

36. Clause 3.3 of Schedule 2-4 (Invoicing) of the Agreement states:

> '3.1. The AUTHORITY shall pay all valid invoices submitted by the CONTRACTOR in accordance with the provisions of this Schedule in accordance with the provisions of Clause 16 of this Agreement.
>
> 3.2. Invoices shall be due for payment within 30 elapsed days of receipt of a valid invoice.
>
> 3.3. In the event of a disputed invoice, the AUTHORITY shall make payment in respect of any undisputed amount in accordance with the provisions of Clause 16 of this Agreement and return the invoice to the CONTRACTOR within ten (10) Working Days of receipt with a covering statement proposing amendments to the invoice and/or the reason for any non-payment. The CONTRACTOR shall respond within ten (10) Working Days of receipt of the returned invoice stating whether or not the CONTRACTOR accepts the AUTHORITY's proposed amendments. If it does then the CONTRACTOR shall supply with the response a replacement valid invoice. If it does not then the matter shall be dealt with in accordance with the provisions of Clause 27 of this Agreement.'

37. The obligation to *'pay all valid invoices*' in Clause 3.1 is qualified by the words which follow it: '*in accordance with the provisions of this Schedule…*'. Clause 3.3 of the Schedule deals specifically with what happens if an invoice is disputed. If any element of a valid invoice is disputed, the express obligation to make payment attaches only to any undisputed amount. The disputed amount is then dealt with by the procedure which follows, and in turn the Dispute Resolution Procedure under Clause 27. There are simply no words to give rise to a contractual obligation to pay the disputed part of an invoice. TCS argues that nothing in Clause 3.3 provides that the disputed amount is not payable, but this is the wrong way round: nothing in Clause 3 provides that DBS *is* obligated to pay the disputed element of an invoice, in clear contradistinction to the express obligation to pay the undisputed element. TCS is right that the invoice does not suddenly become 'invalid' – it is just that there is no contractual obligation to pay the invoice unless it is, or it becomes, 'undisputed'. This is not inconsistent with Clause

1.3 of Schedule 2-9 because this merely provides that the parties must continue to comply with their obligations. It is therefore necessary to consider what those obligations are, and this returns to Clauses 3.1-3.3. Clause 1.3 of Schedule 2-9 is entirely neutral on what the parties' obligations are.

38. The outcome of the Dispute Resolution Procedure will mean, by agreement or determination, a sum does or does not become 'undisputed'. Once it becomes 'undisputed' the contractual payment obligation under Clause 3.1 operates (unless varied by the terms of any settlement or determination) to require payment in accordance with Clause 3.1 of Schedule 2-4, and pursuant to Clause 16.3, the 1998 Act interest will run at that point to the extent the obligation to pay is not met, and a debt is created.

39. 'Disputed' has, as TCS correctly contends, an ordinary and natural meaning. However, it may be that, implied into Clause 3.3 of Schedule 2-4, is a requirement that a 'dispute' be a 'genuine' or 'bona fides' one. Indeed – although it is not necessary for me to decide on the facts of this case – possibly even a 'reasonable' one. The language I use in the remainder of the Judgment is not intended to preclude this being the proper construction: in some cases (albeit not this one) it may be an important distinction.

40. This construction does not 'oust' the Act. In conjunction with Clause 16.3, the 1998 Act only applies to 'undisputed' sums because there is no obligation to pay a disputed sum, pursuant to the procedure in Clause 3.3 of Schedule 2-4. In the absence of an obligation to pay, non-payment cannot create a 'debt', and there is no qualifying debt for the purposes of Section 3 of the 1998 Act. There is no avoidance of the payment of interest on a qualifying debt because there is no qualifying debt. In any event, even if I am wrong about this, for the reasons I set out further below, I consider that an overall remedy which seeks to distinguish between sums that are undisputed and those which are disputed for the purposes of the application of the 1998 Act is nevertheless a 'substantial' remedy.

41. Whether the invoices relevant to the sums in issue in this case were 'disputed' for the purposes of Clause 3.3 (triggering the contractual right not to pay) is a question of fact. TCS relied, in its argument before this point arose, upon its notification of the entitlement to charge 1998 Act interest on invoices by reference to a letter dated 31 July 2018, in which Mr McCarthy of TCS identified 'Overdue Invoices' which were all more than 30 days overdue. The letter said:

> '*This letter therefore constitutes written notice that DBS is in breach of its payment obligations under the Contract and that TCS requires payment of the Overdue Invoices on an urgent basis.*
>
> *In the meantime, TCS reserves all of its rights in respect of the Overdue Invoices, including the right to charge interest on the outstanding amounts in accordance with the Late Payment of Commercial Debts (Interest) Act 1998 pursuant to Clause 16.3 of the Contract.*'

42. This elicited a response from DBS that:

> '*We refer to your letter of 31 July 2018 enclosing an Appendix containing a list of the sums claimed by TCS in respect of invoices dated 29 September 2017 to 11 April 2018 (the "Disputed Invoices"). In each case, DBS has paid the undisputed amounts. TCS is well aware of the fact that the balance of £3,158,283.95 (the "Outstanding Sum") is disputed.*
>
> *In response to that letter, please find below a Notice of Dispute in accordance with paragraph 1.2 of Schedule 2-9 of the Agreement dated 4 October 2012*'

43. Mr Croall asserted, and it was not disputed, that TCS did not respond to this letter. I consider that this letter, contrary to Mr Cogley's submissions, was plainly seeking to engage the contractual distinction between 'disputed' and 'undisputed' amounts for the purposes of Clause 3.3 of Schedule 2-4, and by implication the claim for interest under Clause 16.3, which TCS themselves had specifically raised - rightly or wrongly - as the basis to their entitlement to interest under the 1998 Act. On 7 September 2018, BCLP on behalf of TCS proposed that the Dispute Resolution Procedure in respect of the Charges Variation Dispute be waived and Bristows, on behalf of DBS, consented to this. The Charges Variation Dispute included the Clause 2.8.8 issue.

44. On the basis of the limited evidence before me on this application to amend, it is likely that the parties were operating on the basis that those elements of the invoices which were not being paid because of the parties' known differing positions on the proper construction of the contract relating to the VBSC were 'disputed' for the purposes of Clause 3.3 of Schedule 2-4. This being the case, there was no obligation upon DBS to pay the sums and there is therefore no qualifying debt to which the 1998 Act applies. It follows that TCS is not entitled to 1998 Act interest.

45. Insofar as the factual position is, in reality, more complicated in relation to whether or not the invoices were 'disputed' then it is a matter which would require further witness evidence and the potential exploration of that evidence by cross-examination. It is now too late for that. The need for further evidence relating to whether or not an obligation to pay arose would be a decisive reason, at this late stage and in the absence of any good reason, to refuse the application to amend.

46. That is sufficient to deal with the 1998 Act issue, but in deference to the remainder of the arguments advanced by the parties, I consider them further below.

Ousting of the Act

47. This argument proceeds on the basis that, contrary to my conclusion above, disputed elements of invoices remain payable so as to give rise to a qualifying debt for the purposes of the 1998 Act.

48. Sections 8 and 9 of the 1998 Act deal with the circumstances in which it is possible to oust or vary the Act. The present case is not one where it is said to be ousted: instead it is said to be varied insofar as it is limited to debts which are 'undisputed'. This, it is

said, must implicitly be read as disapplying the 1998 Act to those debts which are disputed on a *bona fides* basis.

49. Sections 8 and 9 of the 1998 Act relevantly state:

> '8(3) The parties may not agree to vary the right to statutory interest in relation to the debt unless either the right to statutory interest as varied or the overall remedy for late payment of the debt is a substantial remedy.
>
> (4) Any contract terms are void to the extent that they purport to—
> (a) confer a contractual right to interest that is not a substantial remedy for late payment of the debt, or
> (b) vary the right to statutory interest so as to provide for a right to statutory interest that is not a substantial remedy for late payment of the debt, unless the overall remedy for late payment of the debt is a substantial remedy.
>
> (5) Subject to this section, the parties are free to agree contract terms which deal with the consequences of late payment of the debt.
>
> 9(1) A remedy for the late payment of the debt shall be regarded as a substantial remedy unless—
> (a) the remedy is insufficient either for the purpose of compensating the supplier for late payment or for deterring late payment; and
> (b) it would not be fair or reasonable to allow the remedy to be relied on to oust or (as the case may be) to vary the right to statutory interest that would otherwise apply in relation to the debt.
>
> (2) In determining whether a remedy is not a substantial remedy, regard shall be had to all the relevant circumstances at the time the terms in question are agreed.
>
> (3) In determining whether subsection (1)(b) applies, regard shall be had (without prejudice to the generality of subsection (2)) to the following matters—
> (a) the benefits of commercial certainty;
> (b) the strength of the bargaining positions of the parties relative to each other;
> (c) whether the term was imposed by one party to the detriment of the other (whether by the use of standard terms or otherwise); and
> (d) whether the supplier received an inducement to agree to the term.'

50. There is little authority on the application of sections 8 and 9 of the 1998 Act. One authority which DBS drew to the Court's attention is the decision of Edwards-Stuart J in Yuanda (UK) Co Ltd v WW Gear Construction Ltd [2010] EWHC 720 (TCC); [2011] Bus LR 360. In that case, the learned Judge was required to consider whether a substantially lower interest rate than the statutory rate (of 8%) meant that there was not a substantial remedy. Notwithstanding the different underlying facts, of some interest in the present context is the Judge's general remarks about the factors which ought to

be borne in mind in the necessary analysis, as set out at [87] and [88]. Edwards-Stuart J said:

> '*87. When construing this Act it seems to me that there are several factors that should be borne in mind: (1) Interest rates can vary significantly: I do not suppose that any member of Parliament would have foreseen in 1998 that a decade later the bank base rate would have fallen almost to zero. (2) The Act does not automatically substitute the statutory rate for any lower rate of interest for late payment provided in the contract: it does so only if the contractual rate does not afford a "substantial remedy". (3) The statutory rate could be described as penal in that, when it was set, it produced a rate of interest that was more than double the base rate. (4) Historically, in commercial cases the courts have awarded interest on awards of damages at rates of between 1% and 3% over base, more commonly the former rather than the latter where there is no specific evidence as to the cost to the claimant in question of borrowing money. I accept, of course, that there is a divergence in principle between awarding interest on a sum that was disputed, usually both as to liability and as to amount, and awarding interest on a debt in respect of which there might often be no room for reasonable dispute. Nevertheless, I regard it as legitimate to take note of what the courts have traditionally regarded as the fair remedy for being kept out of one's money.*
>
> 88. *... Putting it crudely, it seems to me that the imposition of the statutory rate is the penalty that a contracting party pays for failing to provide in its contracts a fair remedy for late payment to suppliers (Eady J referred to counsel's description of it as "punitive" in Banham Marshalls Services Unlimited v Lincolnshire County Council [2007] EWHC 402(QB) at [69])*'

51. In the Banham case, referred to in the extract above, Eady J considered the circumstances in which the Section 5 remission might apply. In doing so, he identified the relevance of the distinction, also drawn by Edwards-Stuart J, between what might be described as conscious non-payment of sums known to be due and owing, and those which are the subject of legitimate dispute. The judge observed:

> '*70. ...It is no doubt necessary to have in mind that the mischief to which the statute appears to be primarily directed is that of casual or feckless non-payment. The extent to which the "interests of justice" require that it shall be enforced also upon those who withhold payment because of a bona fide dispute requires careful consideration.*
>
> *71. Mr Ramsden points to the considerable delay in bringing these proceedings (well over two years after the relevant debts accrued). Mr Lenon, on the other hand, unsurprisingly referred to the six year limitation period. I cannot accept, however, that it is appropriate for a creditor to delay without any particular reason for several years and then to expect to recover interest at the enhanced rate. I have little doubt*

that "conduct", as used in s.5 of the statute, would embrace conduct prior to or in the course of litigation to recover the debt.

72. Although I am conscious that there is, from a moral or public policy perspective, a distinction to be drawn between those who choose not to pay their outstanding debts and those who refuse to pay because of a genuine legal dispute, it would be wrong for me to approach the issue on the basis that the statutory interest is not to apply at all in cases of bona fide dispute. That would be to detract from the broad discretion which Parliament clearly intended when formulating s.5 in the terms set out above.'

52. The distinction, again being drawn in the specific context of remission under Section 5 of the 1998 Act rather than the test under Section 8, is echoed by the Court of Appeal in Ruttle Plant Hire Ltd v Secretary of State for the Environment, Food and Rural Affairs [2009] EWCA Civ 97; [2010] 1 All ER (Comm) 444. At [38], Jacob LJ considered the position where the supplier may overclaim by a large amount. The Judge said:

> '*In summary as regards the construction of s 4, I would say this: that my construction does not lead to any unfairness. A paying party can withhold payment for sums reasonably in doubt or not yet properly settled. The court will protect him by the use of s 5 remission because the uncertainty to that extent was created by the supplier. What he cannot do is to pay nothing at all and expect to escape the high rates of interest imposed by the 1998 Act on what on any view is due.*'

53. As indicated by Eady J at [72] in the extract at paragraph 51 above, whilst containing the discretion to remit the application of interest, there is no wording in the 1998 Act which permits the conclusion that the statutory interest regime is not to apply at all in cases of *bona fide* dispute. Nevertheless, each authority recognizes in slightly different ways the existence of an important distinction between awarding interest on a sum that is disputed, whether as to liability or as to amount, and awarding interest on a debt in respect of which there is no room for reasonable dispute. When construing the 1998 Act, it is relevant therefore to bear this distinction in mind, and that the principal mischief the statute aimed to deter was the non-payment of debts which were due – to coin Jacob LJ's phrase – '*on any view*'.

54. Mr Croall accepted that the 1998 Act applied to genuinely disputed debts. Nevertheless, Mr Croall contends that by Clause 16.3, the Agreement has limited the application of the statute to those sums claimed to those which are undisputed, by which he means are not the subject of a *bona fide* dispute. As a matter of construction of the Agreement, it is correct that by stating that the 1998 Act would apply to 'undisputed' invoices, the effect of Clause 16.3, by implication, is to (seek to) disapply the 1998 Act to 'disputed' invoices.

55. In my view, it is no coincidence that Clause 16 refers to Schedule 2-4 (Invoicing Procedure), at Clause 16.1; and that Clause 3.3 of Schedule 2-4 refers back to Clause 16. Clause 3.3 specifically deals with a 'disputed' invoice, and requires the Authority to make payment of any 'undisputed' amount in accordance with Clause 16. It requires

the reason for non-payment to be identified, and for the Contractor to indicate whether those reasons are accepted. If it does, it supplies a replacement invoice; if not then the matter is to be dealt with in accordance with the provisions of Clause 27. Clause 27 is the Dispute Resolution Procedure, and cross-references to Schedule 2-9.

56. It is therefore clear that the word 'undisputed' in Clause 16.3 should be construed in the context of the words 'undisputed' and 'disputed' in Clause 3.3 of Schedule 2.4. If the AUTHORITY does not follow procedure within Clause 3.3, the mere non-payment of part of an invoice does not mean that the sum is 'disputed'. If a sum is to be 'disputed' for the purposes of implication within Clause 16.3, the procedure in Clause 3.3 of Schedule 2-4 needs to be followed. Otherwise, it is 'undisputed' for the purposes of the application of the 1998 Act.

57. On any view, and irrespective of my view of the precise meaning of 'undisputed' and its implied opposite within Clause 16.3, the construction for which Mr Croall contends is one in which the contractual remedy for late payment of debts (assuming a debt exists in relation to the disputed element of an invoice) is clearly of a narrower ambit than the regime within the 1998 Act. The central question is, therefore, whether the clause is void pursuant to Section 8 of the 1998 Act. Mr Croall contends that, by permitting interest on debts which are undisputed, even though the Section excludes the debt from the regime if it is disputed, the overall remedy nevertheless remains a 'substantial' remedy for the purposes of Section 8.

58. Against this, Mr Cogley submitted that the 'qualifying debt' to which the 1998 Act relates is one which may by definition be or include a debt in respect of which there is a *bona fide* dispute. In respect of this, he is undoubtedly correct. Moreover, he is also correct that there is no other contractual provision for interest (applying a lower rate to such disputed debts, for example) under the Agreement for payment of interest on a disputed debt once resolved. By excluding such a debt from the ambit of the contractual regime altogether, Mr Cogley argued that the Agreement was not providing a substantial remedy in respect of late payment of that particular category of debt, namely a disputed debt. To use Mr Cogley's phrase, the position in relation to disputed debts was left *in vacuo*. This, he said, drove a coach and horses through the 1998 Act and the logic which has been applied to it within the authorities referred to above. The disapplication of statutory interest to disputed debts therefore falls foul of Section 8 of the 1998 Act and is void.

59. I was initially attracted to Mr Cogley's submission. However, upon careful reflection, I consider that this conclusion is wrong for a number of reasons.

60. The starting point is that, subject to Section 8, the parties are free to agree contract terms which deal with the consequences of late payment of the debt. Section 8(3) is predicated on the basis that the right to statutory interest may be varied by agreement providing that the remaining 'overall remedy' is a 'substantial remedy'.

61. 'The debt' referred to in Section 8(3) of the 1998 Act is the sum of money owing pursuant to a particular demand for payment (providing it is a qualifying debt). It may or may not be disputed. It is wrong to pre-define, when considering whether the overall remedy in respect of that debt is a substantial one for the purposes of Clause 8(3), 'the debt' as a 'disputed debt' and then ask '*is there a substantial remedy in relation to a*

debt which is disputed?': this necessarily produces the answer 'no', but the answer is the product of asking the wrong question. The correct question is, rather, to ask whether an overall remedy agreed by the parties which limits the application of statutory interest to situations where the debt is (genuinely) disputed is 'a substantial remedy for late payment of the debt'.

62. I then turn to answering this question in stages: is a clause which provides for interest to be paid in respect of the qualifying debt in certain circumstances but not in others nevertheless an 'overall remedy' in respect of that debt? The answer to this question is undoubtedly yes: there is plainly a remedy provided, even though that remedy is more limited than the statutory remedy in that it does not apply in all circumstances. An analogy might be the insertion of a contractual provision that requires the supplier to provide a notice, upon non-payment of an invoice within the relevant period, that the supplier will charge the statutory interest, and that in the absence of such a notice the supplier's right to statutory interest is lost. There is still a remedy in this case, even though the statutory regime is varied so that it is disapplied in certain circumstances.

63. The critical question is then, whether the overall remedy, narrower though it may be than the statutory scheme, is nevertheless a '*substantial*' remedy. To answer this question one must look to Section 9(1).

64. The starting, or default, position is that 'a remedy' *is* to be regarded as substantial *unless* Section 9(1)(a) and (b) apply. By reason of the conjunction 'and' both Section 9(1)(a) and (b) must be established to avoid the presumption that the remedy will be a substantial remedy.

65. Section 9(1)(a) asks whether the remedy is insufficient either for the purpose of compensating the supplier for late payment or for deterring late payment. It is clear that, in a strict sense, removing the right to statutory interest when the debt is genuinely disputed means, in those specific circumstances, there is no (contractual) remedy by way of interest to compensate the supplier for payment which – if the dispute is resolved against the non-payor – will be retrospectively seen as 'late'. There will of course always be the discretion to allow pre-judgment interest at an appropriate rate pursuant to Section 35A of the Senior Court Act 1981, but this is not relevant to the consideration of sufficiency under section 9(1)(a) (although this will be relevant under 9(1)(b)). The first relevant insufficiency, therefore, exists.

66. As to the second, is the overall remedy insufficient '*for deterring late payment*'. In this context, it is necessary to consider what is meant by deterrent. As stated clearly by Eady J, and echoed in the substance of the other authorities, the mischief to which the statute appears to be primarily directed is that of casual or feckless non-payment. Indeed, the 'deterrent' element of the 1998 Act could never sensibly be seen as seeking to '*deter*' a genuine legal dispute, even though the Act is wide enough to catch late payment of debts in respect of which there are such disagreements. Seen through this lens, the modified application of the 1998 Act regime agreed by the parties within Clause 16.3 is clearly sufficient to continue to provide the *relevant* deterrent, namely against non-payment of sums which are due – to repeat Jacob LJ's phrase – '*on any view*'.

67. Thus, there may be a partial insufficiency for the purposes of Section 9(1)(a). It is necessary then to consider Section 9(1)(b).

68. As to Section 9(1)(b):

(1) notwithstanding the fact that the 1998 Act is capable of applying to debts which are genuinely disputed, it is readily apparent that, as the authorities make clear, there is, from a moral or public policy perspective, a distinction to be drawn between those who choose not to pay their outstanding debts and those who refuse to pay because of a genuine legal dispute. As concluded under Section 9(1)(a), the overall remedy, as varied by Clause 16.3, still provides a deterrent by way of the application of penal interest to those who choose not to pay their outstanding debts. This is a weighty factor when considering whether an agreement between parties to reflect this distinction within a contractual regime for the late payment of debts is fair or reasonable, and it militates in favour of the overall remedy remaining a fair and reasonable one.

(2) it is also relevant, in all the circumstances, that the supplier is still able to claim pursuant to section 35A of the 1981 Act that which, as described by Edwards-Stuart J, '*the Courts have traditionally regarded as the fair remedy for being kept out of one's money*', albeit that is only a discretionary remedy and such a claim may be met with arguments that it is not appropriate in particular circumstances;

(3) it is also relevant that the parties have, in this sophisticated contract, specifically put their mind to what is to be regarded as 'undisputed' in the context of Clause 16.3, and provided a specific procedure within Schedule 2-4 by which reasons have to be given for any sums which are 'disputed' and the requirement that such a dispute is to be dealt with in accordance with the dispute resolution provisions, potentially expeditiously. Given the stepped Dispute Resolution Process, there is (at least to some extent) a further guardrail against plainly unmeritorious reasons for withholding payment being any cause of continuing delay to payment;

(4) Mr Cogley argued that such a construction would simply permit any party to avoid the application of statutory interest by disputing an invoice and drive a coach and horses through the 1998 Act; but this is not the case. The dispute has to be (at least) *bona fide*, and as the authorities referred to above each make clear in their different contexts, the Court is readily able to discern between a sum that is genuinely disputed, whether as to liability and/or as to amount, and a debt in respect of which there is no room for reasonable dispute. If the Court determined that the debt was one in respect of which there was no room for reasonable dispute, Clause 16.3 would not apply to protect the non-payer from the application of the 1998 Act. A set out above, the principal purpose of the 1998 Act is not defeated by Clause 16.3;

(5) in addition to these general points, it is necessary to have regard specifically to the matters set out in sections 9(1)(3)(a)-(d). As to section 9(3)(a), it might be said that limiting the application of the act to 'undisputed' invoices detracts from

commercial certainty, and this weighs against the reasonableness of the provision;

(6) As to sections 9(3)(b)-(d), because this is being considered upon an amendment application, the matters have not been the subject of specific pleas or evidence. Were that considered necessary, that of itself would be a reason to refuse the amendment at this late stage. However, on the basis of my understanding of the relationship between the parties from the evidence at trial I have little hesitation in concluding that (a) the strength of the bargaining position between the parties was equal; (b) the form was an amended version of a Government standard form, and Clause 16.3 applied in respect of invoiced Charges from TCS to DBS and, in this respect, was a 'one way' provision; (d) there is no suggestion of any inducement received by the supplier to agree to such a term.

69. Balancing all these factors, I consider that it is fair and reasonable to allow two sophisticated contracting parties to agree freely within their contract to an overall remedy in respect of the late payments of debt which varies the statutory regime which would otherwise apply so as to disapply it to disputed debts. A key consideration is the distinction the Courts have readily drawn between those who choose not to pay their outstanding debts and those who refuse to pay because of a genuine legal dispute, and the fact that Clause 16.3, whilst varying the application of the 1998 Act, still provides the important deterrent against the mischief the statute was primarily directed towards, namely the non-payment of debts known to be due.

70. As such, the requirement of Section 9(1)(b) is not met, and the remedy for the late payment of the debt shall be regarded as a substantial remedy. It is not voided by Section 8.

71. It follows that I accept, as Mr Croall submitted, that in light of Clause 16.3, the claim for interest pursuant to the 1998 Act in respect of debts which were not paid by reason of the existence of a (in this case, both genuine and reasonable) dispute about the proper construction of the Agreement has no reasonable prospect of success and should not be permitted on amendment.

Interest did not start to run

72. Section 4 of the 1998 Act provides that, in the absence of an agreed date for payment of the debt, interest does not start to run until the purchaser has notice of the amount of the debt, or the sum which the supplier claims is the amount of the debt (see Sections 4(2A) and 4(2H)). There was no agreed date for payment of the sums which TCS have been awarded. DBS contended in written submissions that DBS was never asked to pay a debt *in the sum awarded to TCS* at any stage prior to the Judgment on account of the fact that the sums requested by invoice included other sums. As such, it argued that interest had never started to run.

73. This argument was unsustainable in light of Jacob LJ's decision in Ruttle, in which he made clear that the fact of an over-claim by way of invoice or demand does not prevent that invoice or demand from being notice to commence interest running (although the over-claim may be relevant to the question of remission under Section 5 of the 1998 Act). At [30] Jacob LJ said:

'But the use of the phrase in the 'unascertained' alternative, 'the sum which the supplier claims is the amount of the debt' shows that a provisional view of an amount due is within the section. Mr Acton Davis suggested that the alternative was aimed only at cases where you could not do a calculation, such as where the agreement was to pay a reasonable sum—so you could not calculate the exact sum due. That it covers such cases I accept, but I see no reason why it should be so limited. Unless the sum has been determined already in a way binding on the parties, it is likely to depend on calculations which the supplier may have got right, or may have got wrong. In such a case it is not ascertained and what the supplier has to give notice of is what he claims to be due. He may or may not have got it right. In either case he is within the second half of the section.'

74. It is not correct, therefore, that the fact that the invoices represented 'over-claims' means that there was no proper notice by which interest would start to run.

75. It is nevertheless necessary, of course, to identify the date from which such interest is to run. Mr Croall had taken the point that this was not pleaded, nor clear on the evidence. In light of the way the invoices had been submitted and the way that their expert had 'smoothed' the invoices which underlay the interest calculations, Mr Cogley in oral submissions was unable to point to the precise date upon which the first demand for the purposes of satisfying the 1998 Act was given. Nevertheless, he submitted, correctly, that the relevant requirements of the 1998 Act would be met by identifying a 'not later than' date, by which, conservatively, it could safely be concluded that the relevant demand (by reference to the preceding invoices) had been made. This approach was not disputed by Mr Croall. The 'not later than' date contended for in oral submissions was 22 April 2019. I would have accepted, had there been a qualifying debt and/or had the 1998 Act applied unmodified, that interest had started to run from not later than this date.

Interest should be remitted pursuant to Section 5 of the 1998 Act

76. Section 5 of the 1998 Act provides that statutory interest shall not run for a period where, by reason of the conduct of the supplier, the interests of justice require that the supplier should receive no statutory interest for that period. As developed in oral submissions, Mr Croall contended that the interests of justice required that TCS should receive no statutory interest, by reason of the conduct of the supplier, where:

    (1) the parties (and, by definition, by TCS's conduct as well as DBS's) had agreed Clause 16.3 which (irrespective of its contractual validity) purported to disapply the 1998 Act to disputed invoices;

    (2) TCS had expressly sought to rely upon the potential application of the 1998 Act by reference to this clause in Mr McCarthy's letter of 31 July 2018 which I have already referred to. As I have found in the context of the existence, or otherwise, of a qualifying debt, I consider that DBS's response was plainly seeking to engage the contractual distinction between 'disputed' and 'undisputed' amounts for the purposes of the claim for interest under Clause 16.3.

(3) TCS then failed to assert a claim to interest under the 1998 Act in relation to the sums claimed for service year 5 (*i.e.* the Clause 2.8.8 issue) until two months after the Judgment was handed down, years after the performance of the Agreement ended.

77. Mr Croall acknowledged that this was akin to an estoppel, in circumstances where (against the existence of Clause 16.3, valid or invalid), both parties appeared to be operating after the exchange of letters on the basis that the relevant parts of the invoices were validly 'disputed' in accordance with the contractual procedure, and were not therefore 'undisputed' for the purposes of the application of the statutory interest. In line with the fact that no claim was advanced under the 1998 Act for the duration of the litigation (and over six years from the correspondence referred to above) and on the basis of the very limited evidence before the Court on this application, that is not, in my judgment, an improbable proposition of fact.

78. Mr Croall also submitted that, had TCS not intimated that its claim for statutory interest related to undisputed invoices (as opposed to unpaid invoices, whether disputed or not), DBS may have decided to pay the disputed invoices without prejudice to their legal rights so that they were not in danger, if the dispute was resolved against them on the proper meaning of the contract, of paying a penal interest rate.

79. Mr Cogley complains that this is speculation or hypothesis. He is obviously right that there is no direct witness evidence before the Court about whether DBS were in fact operating on this basis, or what they would have done differently, if anything, had they not been.

80. However, in the context of an application to amend after trial in relation to a matter in which, had it been pleaded, DBS would have been entitled to invoke a defence which involved a factual investigation, the absence of evidence from DBS does not assist Mr Cogley. Instead, it demonstrates the potential for prejudice by allowing the amendment at this stage. Against any claim for statutory interest under the 1998 Act, the defending party would plainly be entitled to raise the issue of remission under Section 5. In this case, even on the basis of the limited correspondence before the Court, I consider that DBS would have been entitled to plead and explore in evidence questions which could properly impact what 'the conduct of the supplier' amounted to and how, in light of that, the interests of justice would properly be served for the purposes of remitting statutory interest.

81. Taking into account the potential prejudice in allowing the amendment at this stage, together with the timing of the application and the absence of good reason for the very late amendment, I would – even without consideration of the prospects of success considered above – have declined to exercise my discretion to permit the amendment.

<u>Interest under Section 35A of the 1981 Act</u>

82. I decline the invitation from Mr Cogley, in circumstances where I have refused to permit the amendment to claim 8% over base as interest under the 1998 Act, nevertheless to allow a claim for interest at the same rate under section 35A of the 1981

Act. There is no basis upon which it would be remotely appropriate to do so in relation to the non-payment of legitimately disputed invoices.

83. The remaining question is whether the rate should be 2% (as contended for by TCS) or 1% (as contended for by DBS). DBS contends that in relation to commercial claimants, the general presumption will be that they would have borrowed less and so the court will have regard to the rate at which persons with the general attributes of the claimant could have borrowed. This is, DBS contends, likely to be a percentage over base rate and may be higher for small businesses than for first class borrowers.

84. TCS contends that a rate of 2% has been held to reflect normal practice in the TCC (Fluor v Shanghai Zhenhua Heavy Industry Co. Ltd [2018] EWHC 490 (TCC) at [56]).

85. I consider that 2% over base is consistent with general practice in the TCC and, as indicated at 16AI.7 of the White Book, there are a number of authorities which demonstrate that this approach is common.

86. As to the amount upon which pre-judgment interest is to be awarded and from what date, I consider this further below in the context of interest on the CCN 041 Counterclaim.

CCN 041 Counterclaim

87. DBS's position is that interest should run on the sum of £4,559,439, from 9 February 2016, which is the date which, on the parties became estopped from denying that TCS would pay DBS the sum on account of previous delays. Mr Croall contends that it follows that from around 9 February 2016, DBS was entitled to the benefit of the sum of £4,559,439 from TCS to compensate DBS for the previous delays. The alternative way of putting it is that DBS is entitled to interest from the dates of invoices against which credit should have been given by TCS.

88. Mr Cogley contends that the correct date for interest is that of the Judgment itself. He says that there was no debt (as found in the Judgment) and the sums were not claimed or proven as damages. Rather, in February 2016, TCS offered a compromise amount (on a commercial basis without admission of liability), subject to agreement of a CCN and the payment mechanism. As found in the Judgment, no such agreement was ever finalised. No credit notes were sought by DBS and it did not deduct any sums either. For a claim to be made pursuant to section 35A of the 1981 Act, there needed to be a cause of action in respect of these sums, and none was pleaded against TCS: instead, the entitlement to the sum by way of a credit was admitted by TCS within the pleadings.

89. I consider it would be inconsistent with my findings in the Judgment to permit DBS to claim interest on £4,559,439 in circumstances when there was, as I have found, no failure to pay the sum as at the date of the Amended Defence. I also accept that the DBS's pleaded claim for damages at paragraph 65 to 67 does not, read fairly, in fact relate to damages arising from the underlying matters giving rise to the entitlement to compensation, but to the 'failure to pay' which I concluded did not exist. The pleaded damages claim does not therefore capture a basis upon which an entitlement to pre-judgment interest under Section 35A could attach.

90. However, it does not follow that I must ignore the fact that TCS has accepted that the sum of £4,559,439 was to be set off against its entitlements otherwise secured as owing to them in this litigation. By reference to its delay claims and to the VBSC, it has established an entitlement, on which it seeks payment of pre-judgment interest pursuant to section 35A of the 1981 Act. I have decided that the appropriate rate is 2%. However, it would be obviously unjust for interest to accrue in TCS's favour prior to the sum which needs to be set off in DBS's favour having effectively been 'paid'. Thus, the £4,559,439 owed to DBS should be set against TCS's accruing entitlement (whether in respect of delay related damages or the VBSC), and when the set off is exhausted, TCS will then be entitled to pre-judgment interest at 2% over base on the balance (or, if appropriate, on the balance as it further accrues) from that point only.

VAT

91. The sums sought in the pleadings were not said to be sought subject to applicable VAT. The sum sought in closing submissions was said to be plus applicable VAT (although no amendment to the pleadings was sought at that time – or point taken by DBS about the recoverability of VAT without such an amendment). DBS does not dispute that there is both a contractual and a statutory requirement for sums to be charged by TCS on its Charges (including those subject to the Court's order in due course). DBS's only point is that entitlement to VAT is not pleaded, and the amendment to plead VAT is very late, and there is no good reason for its lateness.

92. In contrast to the question of interest under the 1998 Act, it is plain that notwithstanding the lateness of the amendment, there is no conceivable prejudice to DBS and none is advanced. It is in accordance with the overriding objective to permit the amendment and the sums ordered to be paid will be subject to payment by DBS of the applicable VAT.

Costs

Introduction

93. The parties have, unsurprisingly, starkly contrasting views as to the appropriate order as to costs in this case. The following, somewhat stark, facts are relevant to the points both sides seek to make:

    (1) The ultimate order is for payment by DBS to TCS in the sum of '£3,682,024.4040 (as corrected);

    (2) TCS's pleaded claim was for c.£124m, and it was awarded just over £8m (before set off). This was made up of just over £1m in respect its c.£110m delay losses claim; and just under £7m in respect of its c.£14m VBSC claim;

    (3) DBS's pleaded counterclaim for delay and defects related losses was for around £120m, and it was awarded around £4.6m. Other than the sum of just over £8,000 in relation to one defect, the amount awarded was always accepted as a 'credit' against TCS's claims relating to a period prior to that under consideration in the litigation. The limited issue in relation to this sum related

to whether it could be characterised as a debt for the purposes of whether 1998 Act interest ran, which DBS lost;

(4) The litigation started life as TCS's Part 8 Claim relating to the VBSC issue alone. This was met with a denial of the right to payment and a counterclaim that DBS had overpaid in respect of VBSC, coupled with DBS's enormous counterclaim for delay (liquidated and unliquidated damages) and defects. DBS's position was that the VBSC issue should form part of the same overall claim. TCS did not object. The claim became a Part 7 Claim, and in TCS's Amended Particulars of Claim, it introduced its own enormous delay and partial termination claim for relief from liquidated damages and loss and expense;

(5) If considered in isolation, the VBSC claim probably would have accounted for less than (and possibly significantly less than) 5% of the costs incurred on both sides. It took up, at most, around a day of the 28 day hearing. It was an entirely discrete issue, unrelated to the broader dispute arising out of delay, partial termination and defects. It was plainly the single determining issue upon which the outcome in terms of overall net-payor/payee turned. Ignoring the issue, TCS failed to recover more than the credit it accepted it owed DBS.

(6) No relevant offers were made.

94. Mr Cogley contends that the starting point is that, as net recipient of money overall, TCS is the winner and that it should, in the normal way, receive its costs. DBS could have made an offer to protect its position and it did not. The Court should not depart from this by adopting an issue based or proportional approach. It is also argued that, if a broad issues-based approach is adopted, it should recover costs relating to DBS's counterclaim on an indemnity basis in light of what it says was DBS's unreasonable conduct in advancing and persisting in a hopeless case, which crossed the threshold of being out of the norm.

95. Mr Croall contends that the correct outcome is no order as to costs. This is on the basis that the outcome that TCS is the net recipient is driven solely by the VBSC claim, but for which it would be the receiving party in the sum of over £3m. He argues that R1 B&B was the single biggest issue in terms of evidence and trial time, and TCS lost this completely; that the limited success in respect of R1-D did not overtop the sums owed to DBS in relation to preceding delays; and that TCS's experts' approach to delay was entirely rejected and the cause of significant wasted costs. It is accepted that DBS lost its counterclaims. Overall, no order as to costs, it is said, does justice between the parties. Alternatively, any costs awarded should be of a very small proportion.

The Legal Principles

96. The following is a summary of the relevant legal principles relevant to this case:

(1) the Court has discretion as to whether costs are payable by one party to another, the amount of those costs and when they are to be paid (CPR 44.2(1));

(2) the general rule, or starting point, is that the unsuccessful party will be ordered to pay the costs of the successful party, although the Court may make a different order (CPR 44.2(2));

(3) having regard to the general rule, the first task must be to decide who is the successful party. The Court should then apply the general rule unless there are circumstances which lead to a different result (Straker v Tudor Rose [2007] 368 (CA) per Waller LJ at [12]).

(4) where the claim is for money, particularly in a commercial context, in deciding who is the successful party, the most important thing is to identify the party who is to pay money to the other. This has been made clear numerous times: see e.g. Barnes v Time Talk (UK) Ltd [2003] EWCA Civ 402 per Longmore LJ at [28], with whom Waller LJ agreed in Straker at [13]; Multiplex Constructions (UK) Limited v Cleveland Bridge UK Limited (No.7) [2008] EWHC 2280 (TCC) per Jackson J, as he was then, at [72]; Fiona Trust & Holding Corporation v Privalov [2011] EWHC 664 (Comm) at [36] per Andrew Smith J;

(5) in deciding whether to depart from the general rule, the Court will have regard to all the circumstances, including (as set out at (CPR 44.2(4)):

    (a) the conduct of the parties (including consideration those factors listed at CPR 44.2(5));

    (b) whether a party has succeeded on part of its case, even if that party has not been wholly successful; and

    (c) any admissible offer to settle made by a party which is drawn to the court's attention, and which is not an offer to which costs consequences under Part 36 apply;

(6) as to CPR 44.2(4)(b):

    (a) in departing from the general rule, the Court may order a party to pay a proportion of another party's costs, or from or until a certain date (CPR 44.2(6)(a) and (c)), or an issues-based costs order (CPR 44.2(6)(f)). Before doing the latter, it will consider whether it is practicable to make an order limiting the costs payable to a proportion of the overall costs or by reference to a specific date (CPR 44.2 (7));

    (b) however, a Court will be cautious before departing from the general rule. This is because, particularly in complex commercial litigation such as this, it is regularly the case that arguments or factual disputes may be relevant to a number of underlying issues which have to be addressed in the proceedings; and a party may rely on a number of grounds to support a claim, and succeed on some and not others. Parties should be afforded a reasonable degree of latitude in formulating claims, including pleading alternative bases for the same basic claim, and Courts should avoid an unduly finely detailed division of issues and sub-issues when deciding what costs orders to make (F&C Investments (Holdings) Ltd v Barthelemy

[2011] EWHC 2807 per Sales J at [16]-[21]). Moreover, over-zealous departure from the general rule also generates unwelcome uncertainty for litigants (Fox v Foundation Piling Ltd [2011] 6 Costs LR 961 per Jackson LJ at [62])

(7) as to CPR 44.2(4)(c), the absence of an offer may be as relevant as the existence of one. Where a defendant is faced with an exorbitant claim which they wish to defend vigorously but where they are vulnerable to a finding that they are liable for a much smaller amount, there is a clear process provided by the CPR Part 36 which they can follow to protect their position (Global Energy Horizons Corporation v Gray [2021] Costs LR 133). I would add, in the context of the arguments made by the parties, that this is a relevant factor, not in all cases a determinative one.

97. In light of TCS's specific reliance upon Global Energy in the face of DBS's argument that there should be no order as to costs, it is necessary to consider this case in a little more detail. The Claimant, GEHC, had brought a claim for breach of fiduciary duty against the Defendant, Mr Gray, totalling just under £227.8m. It succeeded in the sum of £3.6m. The Court of Appeal decided that the judge below had been wrong to regard the outcome as a 'score draw' in which both parties had lost heavily. This is essentially the argument urged upon me by Mr Croall. The first reason given for considering that the judge's conclusion was wrong in principle was that relating to the absence of a Part 36 offer which could have protected the defendant, the reasoning for which forms the substance of sub-paragraph 96(7) above. The second reason, however, set out at [11] to [14] of the judgment, was also a clearly material consideration. The Court of Appeal considered that the judge at first instance (who, unusually, determined costs not having had the benefit of being the trial judge – which is likely to have made the Court of Appeal more inclined to interfere with the exercise of discretion: see [6]) had been wrong to dismiss GEHC's point that it had been necessary for it to pursue its claims against Mr Gray as a defaulting fiduciary, given that he had put forward a thoroughly dishonest account of the benefits he had received. The Court of Appeal concluded that GEHC should be regarded as the winner not just because it was awarded a substantial sum of money but also because it succeeded in showing, at great costs in time and money, that Mr Gray's account had been false in many serious respects. The fact that only a small fraction of the amount claimed was awarded did not outweigh this fact. Ultimately, the thrust of the Court's decision was that the enormous amount of time and money spent in the litigation should be laid at the door of the (dishonest) Mr Gray, irrespective of the limited recovery made by GEHC, against which an offer could have been made.

98. It is by reason of the existence of this clear and weighty second reason, linking the extraordinary waste of time and cost on numerous issues and the need for GEHC to prove Mr Gray's dishonesty, that I accept Mr Croall's submission that Global Energy is far from on all fours with the present case. Nevertheless, the absence of a Part 36 offer by which DBS could have protected itself remains an important factor, even though it is not, in this case, a determinative one.

Analysis

99. Applying the general rule, TCS is the successful party, by securing an overall net payment in its favour. This is the starting point.

100. Is it appropriate to depart from this starting point in all the circumstances of the present case? It undoubtedly is, for the following reasons:

(1) this is a case in which, quite unusually, over 95% of the time and cost spent by both parties was entirely unrelated to the single issue of contractual construction which drove the ultimate determination of winner/loser. Whilst not of direct relevance this point is demonstrated neatly as follows: the forensic accounting experts had prepared an agreed table of results in respect of the various outcomes from the VBSC issue, which contained a calculation error not discovered until the end of the trial. Had the error not been discovered, the sum which would have been awarded to TCS for VBSC based on the erroneous joint expert evidence would have been £1,275,638 rather than the £6,976,737 in fact awarded on the basis of the revised agreed calculations. If this had happened, applying the general principle, DBS would have been the net-winner;

(2) this is very a long way from the position in Global Energy where the principal driver for the enormous waste of time and costs remained upon the shoulders of the dishonest losing party, irrespective of the fact that a fraction of the sums claimed were awarded. In that case, the costly process of demonstrating the falsity of Mr Gray's account was always a necessary part of the litigation in order to recover any sums;

(3) by contrast, if the discrete constructional VBSC issue is set to one side, virtually all the costs were incurred in the pursuit and defence (in both directions) of a classic multi-issue delay, defects and termination case between employer and contractor/supplier, in the context of an IT infrastructure project. Looking at the substance of the dispute which drove the expenditure, TCS was not the overall net-winner. Because of the £4.6m owed to DBS on account of a settlement of a claim arising out of previous delays, which it had not been paid by TCS, TCS had to succeed in recovering more than this sum in order, sensibly, to be regarded as the 'winner'. It did not do so.

(4) Whilst Mr Cogley relies upon the fact it was DBS who first met the short constructional VBSC point with its large, and unmeritorious, counterclaim, this is of limited relevance where TCS responded by bringing its own, largely unmeritorious, claim;

(5) the majority of the costs, in terms of factual and witness evidence and time at trial, were undoubtedly taken up by questions of liability/causation in respect of R1 B&B. TCS failed on this completely. Its recovery in respect of R1-D was minimal and, as set out above, even though it succeeded in principle in relation to partial termination, its successful delay/termination claims remained insufficient to over-top the delay monies it accepted it owed DBS in respect of a prior period;

(6) enormous amounts of time and effort were expended on delay analysis, in respect of which TCS's approach led by two experts was rejected. It effectively relied, in closing, on a modified version of DBS's own analysis to establish such little success as it enjoyed.

101. I have concluded that it is necessary in order to do justice between the parties to make an order, in accordance with CPR 44.2(4), reflecting TCS's 'partial' success, notwithstanding the fact it is the overall net-payee, the next question is what order to make.

102. Standing back, it is clear that:

(1) TCS won the VBSC issue, a discrete point accounting for less than 5% of the costs, and which drove its overall net success;

(2) Although its net success was (a) minimal and (b) unrelated to the issues on which over 95% of the costs were expended, it remains the case that DBS could have protected itself against a small liability by making a Part 36 Offer, which it did not do;

(3) In respect of the issues which drove 95% of the time and cost relating to this litigation:

(a) Neither side can sensibly be said to have 'won' delay. TCS's minimal recovery did not overtop the other delay compensation it accepted it owed. However, DBS's delay claims for liquidated and unliquidated damages also failed.

(b) DBS lost its counterclaim. I do not consider the somewhat ambitious approach to causation, in particular, nor the fact that as the litigation progressed defect claims were dropped as sufficient to warrant viewing DBS's conduct as 'out of the norm' in this respect for the purposes of indemnity costs. DBS's approach was no less ambitious than TCS's to entitlement to relief fordamages and/or loss and expense on the basis of its expert analysis and in the face of the terms of Clause 7 of the Agreement.

103. I consider that the appropriate order is that TCS is the successful party and should recover its costs. Not least in light of CPR 44.2(7), I do not consider that it is sensible to make an issue based order separating out the VBSC issue, delay or the defects counterclaim. It is preferable to reflect the very large measure by which TCS failed on matters which generated significant costs in the litigation, notwithstanding its modest net-win. There should be a very significant reduction in the costs recovered to account for the matters I have outlined above. The deduction should be 80%. TCS is to recover 20% of its costs, on the standard basis, to be assessed if not agreed.

Interim Costs

104. TCS is entitled to an interim costs order. I have only the headline figure of £18m. This compares with £12m incurred by DBS, although Mr Cogley may be right that the relative difference may be accounted for at least in part by the distinction between government and commercial rates. Irrespective of this point, in light of the eventual

recovery, there may be forceful points made on assessment, if that occurs, as regards proportionality. The merit of such points is a matter for others, but I cannot assume that they will not be successful.

105. In light of the percentage recovery permitted, I consider that the appropriate sum for an interim payment is £2m.

Appeal

106. DBS seeks permission to appeal in relation to two points of law:

(1) Delay Payments Whether the provision of a Non-Conformance Report under Clause 6 of the Agreement was a condition precedent to the payment of Delay Payments by TCS.

(2) VBSC Year 5 Whether Clause 2.8.8 of the Agreement provided that the VBSC for Year 5 of the Agreement should be an agreed flat charge, as contended for by DBS, or a charge based on actual transaction volumes with no cap, as contended for by TCS.

107. At the outset of the consequentials hearing, I heard from Mr Croall and, for DBS, Mr Lavy KC, in respect of DBS's application for permission to appeal. I refused that application. I set out my reasons below.

108. Permission may be given where there is a real prospect of success that the Court of Appeal will take a different view on the issue: CPR 52.6(1)(a). Each of the issues raised are pure points of construction. I accept, therefore, that the restrictive rules concerning appeals from judgments of the Technology and Construction Court which raise factual issues do not apply.

Delay Payments

109. There is no real prospect that the Court of Appeal will conclude that Clause 6 of the Agreement was not a condition precedent. The Judgment contains a careful analysis of the authorities and, at paragraph 74, a clear distillation of the relevant matters which should be borne in mind when considering whether a relevant clause is a condition precedent. No criticism is made of that analysis of the law. Each of the factors DBS point to is a matter which was considered expressly within the Judgment.

110. Taking the specific points made by DBS at paragraphs 4.1-4.10 of its written reasons for permission to appeal in turn (the numbering below reflecting DBS's points):

4.1: The absence of an explicit warning as to the consequence of non-compliance was taken into account, and is not determinative against construing the regime as one of condition precedent (see [74(4)]). There is express language of conditionality which sits at the heart of the proper construction;

4.2: Pointing to the absence of particular language in Clause 6.2 is irrelevant when the requisite, and express, cross reference and conditionality is in the last sentence of Clause 6.1. The clauses are obviously read together.

4.3 The suggestion that only the conditional 'if…then…' only applies to the first 'then' (the provision of the NCR) was considered expressly: see [91]. It makes no sense (either linguistically or commercially) to apply the conditional link between Clause 6.2 (the entitlement) and just the first part of Clause 6.1, effectively leapfrogging the second part of Clause 6.1 (the obligation).

4.4 The judgment expressly acknowledged that 'shall' was necessary, and not determinative (see [74(3)]). This is correct and the appropriate (i.e. not excessive) weight was placed on this word.

4.5 The word 'then' is, indeed, important, as it provides (particularly coupled with 'if') the requisite expression of conditionality when the words are read naturally. The addition of the word 'only' is not necessary to import that conditionality. DBS advanced, and advances, no sensible meaning to the use of the word 'then' in the last sentence of Clause 6.1.

4.6 The use of the word 'promptly' rather than a defined period of time was a factor specifically considered (at [74(7)] by way of principle and at [93] by way of application). Its use did not outweigh the expression of conditionality conveyed by the ordinary meaning of the rest of the clause.

4.7 Each of the remedies in Clause 6.2 provided entitlements to DBS to the potential detriment of TCS, following the preceding failure(s) by TCS referred to in Clause 6.1. The benefit of clarity as to the basis of failures relied as a condition of exercising those entitlements applies generally.

4.8 This elides two points. The judgment clearly factored in the linguistic asymmetry between Clause 6 and Clause 5 acknowledging it was a point in DBS's favour. The judgment then dealt with commercial/purposive symmetry which acted as a counterbalance (and it is noted that DBS does not deal with the substance of that commercial/purposive symmetry or suggest it was misplaced).

4.9-4.10 The usefulness of direct analogies to other authorities is by definition limited where each clause is specific to its wording. The authorities were principally traversed in order to distil the principles articulated at [74]. That analysis was plainly correct and properly applied.

VBSC

111. There is no real prospect that the Court of Appeal will conclude that DBS's construction is correct.

112. The principal basis upon which I rejected DBS's submissions was the absence of any real meaning given in their submission to the important word 'minimum'. On DBS's case, the word is either otiose or positively misleading (see [812]): in particular, the

word minimum in fact, depending on the circumstances, turns into a cap if DBS is right. Whilst the clause is not well drafted, this cannot possibly be right. The only answer to this is DBS's suggestion that the word 'minimum' attaches to predicted volume rather than VBSC. This point was dealt with explicitly [806] and [807]: the effect of Clause 2.3.3 is to require the VBSC to be based upon actual transactions, and Clause 2.3.3 is not expressly or otherwise overridden by Clause 2.8.8.

113. The specific points at paragraph 15 do not add to this analysis. Nevertheless:

15.1 This ignores entirely reading the clause as a whole, and in particular Clause 2.3.3. It also requires TCS to do a potentially unlimited amount of work for a potentially capped costs. It is this which turns the previously applicable regime for years 1-4 on its head.

15.2 This essentially repeats in different ways the complaint at paragraph 15.1. It ignores the fact that there is, pursuant to the construction contended for, a benefit to *both* parties where there are higher than anticipated volumes: whilst this brings uncapped revenue to TCS, it of course also brings the equivalent revenue to DBS from which the sums owed to TCS are paid. On DBS's construction, higher than predicted volumes merely creates a windfall for DBS by way of revenue collected and no costs.

15.3 This focuses on the word 'minimum' which I have dealt with at [93] above.