Neutral Citation Number: [2024] EWHC 2627 (TCC)

Case No: HT-2023-000458

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

Rolls Building,
London, EC4A 1NL

Date: 21 October 2024

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

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Between :

WORKMAN PROPERTIES LIMITED **Claimant**

- and -

ADI BUILDING AND REFURBISHMENT LIMITED **Defendant**

- -

Mathias Cheung (instructed by **Trowers & Hamlins LLP, Birmingham**) for the **Claimant**
James Thompson (instructed by **Pinsent Masons LLP**) for the **Defendant**

Hearing date: 8 October 2024
Draft judgment circulated: 15 October 2024

Approved Judgment

This judgment was handed down remotely at 10.30am on 21 October 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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His Honour Judge Stephen Davies:

1. This is a Part 8 claim where: (a) the claimant (sometimes referred to as WPL) asks the court to make declarations relating to the interpretation of a construction contract, in circumstances where an adjudicator has previously made determinations against the claimant in relation to the same or similar issues as part of his overall determination of the dispute referred, and (b) the defendant (sometimes referred to as ADI) argues that: (i) the case is unsuitable for the Part 8 procedure, because it raises disputed factual issues; and (ii) in any event, it is inappropriate to make the declarations sought without a full Part 7 process at which all factual and legal issues are addressed at the same time.

2. The dispute at the heart of this case is whether it is the claimant or the defendant which is contractually responsible for completing the design of the works, the subject of the JCT 2016 design and build contract in question, to RIBA stage 4 and/or to the equivalent BSRIA stage 4(i) – for convenience referred to before me and in this judgment as "stage 4/4(i)". Further details as to the relevant background appear in paragraph 37 and following and the relevant terms are explained at paragraph 54 and following.

The approach of the parties to the suitability issue

3. I must start my judgment by making some observations on some aspects of the approach taken by each of the parties to this case in relation to the vexed issue of suitability. In so doing I am not intending any specific criticism of the solicitors for the parties. However, in certain respects neither has fully complied with guidance previously given by the courts as to how such cases should be conducted. As this case illustrates, that approach has not ultimately assisted their clients nor has it assisted the court in dealing with this case in an effective or proportionate manner.

4. In particular, neither party has properly engaged with the guidance referred to and given by Mr John Kimbell QC (sitting as a Deputy High Court Judge) in Cathay Pacific Airlines Limited v Lufthansa Technik AG [2019] EWHC 484 (Ch), as subsequently endorsed by Mr Neil Moody KC (sitting as a Deputy High Court Judge) in Berkeley Homes (South East London) Limited v John Sisk and Son Limited [2023] EWHC 2152 (TCC), notwithstanding that both decisions were referred to in the relevant inter-solicitor correspondence at the outset.

5. Thus, in its letter before action the claimant's solicitors contended that Part 8 proceedings were appropriate because any disputed factual issues would not form part of the Part 8 claim, but did not back that up by including a draft agreed statement of facts or suggesting a procedure for agreeing one.

6. Then, in its letter of response the defendant's solicitors raised a plethora of objections to the use of the Part 8 procedure, including that it would be necessary to analyse "the facts at the time the parties entered into the contract", but without explaining which particular facts were relevant to the questions of contractual interpretation and were, or might be, in dispute and why.

7. In response, without further engagement or discussion the claimant simply commenced these Part 8 proceedings, without first asking the defendant to explain which facts were relevant and why, and were or might be in dispute, or suggesting a

procedure for dealing with any such facts, either by agreement or, if appropriate, for resolving them as part of a modified Part 8 procedure.

8. The defendant duly responded with two substantial witness statements (from Mr Chapman and Mr Ball, as persons involved with the project from the defendant's side) which contained a plethora of evidence, including comment on documents, statements of the defendant's contemporaneous subjective belief, argument and submission. The defendant did not, however, attempt to explain, whether in those witness statements, in the accompanying witness statement of the defendant's solicitor, or in the 16 page "summary of the defendant's position" attached to its acknowledgment of service, which of the facts stated were relevant to the issues of contractual interpretation and on what basis. In short, it was an exercise of throwing everything but the kitchen sink into the response.

9. The claimant's witness evidence in reply took up, at least to some extent, the cudgels and the defendant's witness evidence in reply continued the same approach as previously.

10. The claimant's witness statements also contained a statement that the maker had been advised by the claimant's legal representatives that Practice Direction 57AC (witness statements in the Business and Property Courts) did not apply because the proceedings fell within the exception at paragraph 1.3(9) of Practice Direction 57AC for "proceedings in the Technology and Construction Court relating to adjudication awards under Section 9 of the TCC Guide".

11. However, section 9.4.3 of the TCC Guide states that "not all applications that have some connection with an adjudication are ones where the TCC will hear applications for declaratory relief with the abbreviated timescales applied in the case of adjudication enforcement. The label of 'an adjudication application' should not be used by parties to obtain an expedited hearing (for example of a Part 8 claim for declaratory relief) where there is no other justification for an expedited hearing".

12. As will be seen below, this was not a case where the Part 8 proceedings were being brought for a declaration as a pre-emptive response to an anticipated application to enforce the decision (section 9.4.5). In Merit Holdings Limited v Michael J Lonsdale Limited [2017] EWHC 2450 (TCC) Jefford J explained why it was appropriate to distinguish between cases which are, and which are not, within the category of "adjudication application" cases. This was not one such case, so that the witness statements ought to have complied with PD57AC. If that discipline had been followed it might have helped to concentrate minds on what facts were in dispute and why and for the witness statements to deal only with such facts about which the witnesses could properly give evidence in compliance with PD57AC.

13. On 15 March 2024, following the service of the claimant's evidence in reply, the claimant belatedly and unilaterally produced what it described as a statement of agreed facts, although in fact it was simply its own draft. On 26 April 2024 the defendant's solicitors replied, explaining why it was not agreed and stating that it was not possible to agree it, given the extent of disputed facts. The defendant did not, however, as it could and should have done in my opinion, adopt the more helpful approach of: (a) identifying which further facts were relevant to the contractual interpretation issues and why; (b) stating whether they were agreed or disputed and, if disputed, why; or (c) suggesting how they could be included in the statement on either basis.

14. Neither side appreciated that in the light of these fundamental disagreements it would be sensible to apply to the court for directions as to whether the case should continue as a Part 8 claim in full or modified form or be directed to continue as a Part 7 claim which would, of course, have a major impact on directions and listing. Instead, the claimant's solicitors were pressing for a one day listing (no doubt with a view to getting the earliest possible hearing date) and the defendant's solicitors contending for a 2 day listing (no doubt with a view to getting the listing pushed back as far as possible, given their intention to commence a second adjudication in the meantime). In such circumstances, the court had little option but to list the case for a one day hearing on the first available date convenient to the parties, which is when it came before me.

15. I shall have to deal with costs of this case in due course, but it is worth noting at this stage that the financial consequences of this approach are exemplified by the fact that the statement of costs served by the defendant in advance of the hearing states that its total costs of these Part 8 proceedings amount to £227,182.55. I have no doubt that costs could have been reduced on both sides had the guidance given in the TCC Guide and the authorities been followed and PD57AC been adopted by both parties in the production of their witness statements.

Suitability by reference to the issue of contract interpretation

16. In his written opening submissions Mr Cheung helpfully identified the relevant principles of contractual interpretation including, pertinently, the limits on admissible evidence as to the factual matrix. This included the general proposition that pre-contractual negotiations are inadmissible, save where they explain the genesis and objective aim of the transaction or identify the meaning of a descriptive term or establish relevant facts known to the parties at the time: see the principles set out by Leggatt LJ in Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council [2019] EWCA Civ 526 at [51] - [55] and, more recently, by Newey LJ in Schofield v Smith [2022] EWCA Civ 824 at [22]-[27]. Mr Cheung submitted that none of the factual evidence adduced by the defendant fell within the scope of these exceptions to the general principle.

17. In his written opening submissions Mr Thompson identified what he contended were three areas of factual dispute.

18. The first area was "the factual circumstances surrounding tendering, design and procurement in the construction industry at a time when the COVID pandemic was ongoing". Since the procurement took place post COVID, and since the evidence referred to did little more than explain the defendant's general approach to contracting in the light of the COVID pandemic and generally, without suggesting that this was shared with the claimant or why it was relevant to issues of contract interpretation, it is clear that this evidence is irrelevant to that issue.

19. The second was "the factual circumstances surrounding the tender on this project, including meetings that took place between the parties and WPL's statements to ADI that the design was complete to RIBA Stage 4/4(i)". The general reference to what might have happened or been said at meetings was obviously insufficient to identify a genuine factual issue relevant to contract interpretation, let alone a dispute about such facts. Whilst evidence as to what the claimant's representatives said to the defendant's representatives about the level of design completion might, at least

potentially, have been relevant, it was plainly necessary to go further and identify whether any such statements were contained in contractual documents, in agreed pre-contract minutes, in correspondence or otherwise, and why it was said to be both relevant and actually or potentially disputed. In the context of this case, as will be seen below, nothing identified added anything material to what was in the contract documents or was in dispute.

20. The third was said to be "most importantly, the facts surrounding the appointments of the consultants engaged to carry out design services". These were identified as "facts relating to their original engagement by the claimant and relating to their new fee proposals for post-contract services to ADI at tender stage". Again, however, the particular relevance of these facts was not explained and nor was it suggested that what was relevant was disputed, let alone not found either in the contract documents or in other contemporaneous correspondence.

21. Perhaps recognising the difficulty, Mr Thompson returned to this point in his supplemental note for the hearing and identified "two fundamental issues at the heart of 'the dispute derived from particular facts' to which the evidence adduced by both parties is relevant". This was a reference to the observations of Eyre J in Solutions 4 North Tyneside Limited v Galliford Try Building 2014 Limited [2014] EWHC 2372 (TCC) at [76], where he stated the need for caution in granting declarations in Part 8 proceedings such as the present, where no substantive claims are made so that the judge does not have the benefit of seeing how the competing cases advanced by the parties work out against the actual claims in play.

22. The first fundamental issue identified by Mr Thompson was "what design work had, and had not, been done at the time the Contract was entered into and ADI took over that design? In particular, what part(s) of that design had, and had not, been taken to RIBA Stage 4/4(i)?".

23. That is plainly an issue which would, had the case been issued and proceeded as a Part 7 claim where all of the substantive claims advanced before and decided by the adjudicator were to be finally decided, need to have been resolved. It was thus relevant when considering suitability by reference to Eyre J's observations in the Solutions case. It is also relevant that the claimant's position in this respect is that, whilst it does not accept the defendant's case (as upheld by the adjudicator) that some elements of design work were not completed to those stages, it is prepared to proceed with the Part 8 claim on the basis that it may be assumed in the defendant's favour that this is the case. I will consider this point below. However, it is plainly not an issue which is relevant to the question of contractual interpretation which the claimant is seeking the court to determine.

24. The second fundamental issue identified was "(i) what were the facts available to the parties at the time of contracting in relation to the status of the tender design; and (ii) in light of those facts, what was the veracity of the pre-contractual and contractual statements that the design had been taken to RIBA Stage 4/ 4(i)?"

25. This issue is closely connected with the first issue. The three issues would, if resolved, decide whether or not the claimant knew what the position was in relation to design work and whether the claimant had misrepresented the true position. Again, however, it is not explained how this is relevant to the question of contractual interpretation, and it is not at all obvious that it is on an application of the relevant principles identified above.

26. In my judgment the defendant has failed at any stage to identify in clear terms any particular facts included within its witness evidence or otherwise which: (a) are relevant to the issue of contractual interpretation on the basis of well-established legal principles; and (b) which are not facts which appear either from contractual documents or other contemporaneous documents which are not in dispute, such that there is a substantial dispute of fact about them which makes the case unsuitable for Part 8 proceedings.

27. It is not for the claimant, still less for the court, to scrabble around in the undergrowth of the defendant's evidence to identify any such particular facts. It is for the defendant in such a case to identify them in clear terms from the outset. If it does so, and if it is plain that they are relevant and disputed, then the defendant will be able to apply to the court for a summary determination of unsuitability and the parties will be saved much time and cost and the court's time will not be unnecessarily wasted. If it chooses not to do so, then it cannot complain if the court is not persuaded that the Part 8 proceedings should not proceed.

28. In the course of oral submissions Mr Thompson suggested that the evidence contained in his client's witness statements might support an alternative claim for rectification if the court was against him on the question of contractual interpretation. He submitted that this was an illustration as to why it was unfair to determine this claim as a Part 8 claim, because he had not had the opportunity to plead his client's case in the way which he might have done if it had been brought as a Part 7 claim. I reject this submission. The defendant was represented by experienced specialist lawyers and, as already stated, filed a detailed summary of its position (in the form of a statement of case, verified by statement of truth) as well as comprehensive witness evidence. If the defendant had seriously believed that it was able to raise an alternative defence based on rectification, it had every opportunity to identify it and explain how it was advanced, so that the claimant and the court could see whether it raised disputed issues of fact or otherwise made the case unsuitable for Part 8. Having failed to do so, it is not sufficient for the point to be floated for the first time in oral submissions. In any event it is not at all apparent that such a claim is tenable, even on the defendant's witness evidence.

29. It is clear that the court's approach to this question in any particular case will depend on the particular facts and the way in which the party contending that Part 8 (or other summary) determination is inappropriate chooses to present its case.

30. Thus, in the Berkeley Homes case, to which I have already referred, the dispute was similar to the present, being about which party was liable for alleged omissions and errors in a design. In that case, by reference to the particular facts of the case, including the reliance by both parties upon the disputed circumstances in which the design work was undertaken in the period up to the formation of the contract, the judge was satisfied that these circumstances were relevant to the factual matrix and, hence, to the proper construction of the contract. In the circumstances, he rightly declined to decide the Part 8 claim.

31. By contrast, in the case of Pinewood Technologies Asia Pacific Ltd v Pinewood Technologies Plc [2023] EWHC 2506 (TCC) at [104], to which I was also referred, in the context of a summary judgment application Joanna Smith J concluded that evidence which might be available at trial in relation to pre-contractual negotiations and subjective intentions would be inadmissible anyway and should not prevent the

court from determining a point of contractual interpretation on a summary basis, stating:

> "I have little reason to suppose that the context at the time of concluding the First Reseller Agreement is genuinely contentious (given the evidence I have seen to date) and it is difficult to see that the court's understanding or assessment of that context will be affected to any material degree by the evidence at trial. No doubt there would be more details as to the approach each party took to the Reseller Agreements, their subjective intentions and the negotiations, but little, if any of this is likely to be admissible and accordingly it is very unlikely that the court's understanding of the overall picture will really change. PTAP could have done more to seek to convince the court that the picture at trial will be different, but where it has apparently chosen not to engage with that exercise, it cannot expect the court to shy away from the invitation to grasp the nettle."

32. In my judgment, there is no proper basis in this case for not proceeding to determine the contractual interpretation issues, since the defendant has failed to show that there are disputed facts going directly to the question of contract interpretation which are relevant to that particular issue. I will therefore turn to and consider the defendant's case as to unsuitability by reference to the wider issues which are said to arise.

Suitability by reference to wider issues

33. I turn next to the wider issue whether or not I should nonetheless decline to do so, given that this Part 8 claim does not permit the court to have the opportunity of deciding the question of interpretation against the background of proper statements of case pleading the respective cases as to contract terms, breach, causation and loss, or disclosure and witness evidence relevant to such matters, or with the advantage of a Part 7 trial on all such issues, in circumstances where this issue is only one of the issues which divide the parties.

34. I have already referred above to Mr Thompson's submission that the court should only determine the question of contract interpretation after having heard evidence and been able to make determinations as to whether or not and, if so, to what extent, the design work was or was not completed to stage 4/4(i) as at the time of contracting and, therefore, to what extent the claimant's alleged statements or representations about that fact were true.

35. Whilst, in respectful agreement with the observations of Eyre J in the Solutions case, I recognise the general advantages of making final determinations after a full Part 7 trial process, I am unable to see how in this case the resolution of the point can be of real assistance in the resolution of the contract interpretation issues. Whilst I also recognise the potential disadvantages of resolving disputes on the basis of disputed facts or assumptions, if – as is the case here in my judgment - the disputed facts or assumptions are wholly irrelevant to the question of contractual interpretation before the court, then that is not a good reason for declining to proceed on that basis.

36. Moreover, it is worth considering the reasons why the claimant is asking the court to determine the question of contract interpretation in this Part 8 claim and, thus, whether doing so – if it can fairly be done – at this stage may benefit both parties.

37. The relevant background for these purposes can be summarised as follows.

38. The contract was entered into on 6 January 2022. Its subject was the design and construction of the expansion of existing facilities, to include new cold stores and offices, regrading of the yard and a new drainage system, at Cotteswold Dairy, Dairy Way, Northway Lane, Tewkesbury, Gloucestershire, GL20 8JE (the "works").

39. On 22 May 2023, the defendant wrote to the claimant, raising a formal complaint that the tender design contained in the Employer's Requirements had not been developed up to RIBA Stage 4 (or Stage 4(i) for the design of specialist elements / building services), such that there was a breach of paragraph 1.4 of the Employer's Requirements and the defendant was entitled to claim damages and/or additional time / costs ("the first dispute").

40. On 4 August 2023, the defendant issued a notice of adjudication notifying its intention to refer the first dispute to an adjudication. The defendant did not make financial claims or claims for specified extensions of time and consequential financial claims; instead it sought various declarations with a view to establishing a foundation for making such claims.

41. Mr Christopher Hough was appointed adjudicator and, on 23 September 2023, he produced his decision on the matters referred to him, which was as follows:

"a. The design contained in the Employer's Requirements was not:

i. generally a completed RIBA Stage 4 design; and

ii. except in relation to containment, a completed stage 4(i) design for Building Services.

b. WPL warranted to ADI that:

i. the design included in the Employer's Requirements had been taken to the end of RIBA Stage 4; and

ii. the design of the Building Services had been developed to RIBA Stage 4(i).

c. ADI is entitled to damages for breach of contract and/or the Warranty caused by:

i. the failure of the design included in the Employer's Requirements to achieve RIBA Stage 4; and

ii. the failure of the design of the Building Services to achieve RIBA Stage 4(i).

d. The Contract terms in relation to extensions of time under Section 2 continue to apply and the obligation to complete under those terms has not been replaced by an obligation to complete within a reasonable time.

e. The liquidated damages regime at Clause 2.29 of the Contract continues to apply.

f. Works carried out by ADI to develop the design from that set out in the Employer's Requirements so as to achieve RIBA Stage 4 and to achieve RIBA Stage 4(i) for the Building Services constitute Change(s) under Clause 5.1 of the Contract.

g. WPL's breach of the Warranty constitutes a Relevant Event under clause 2.26 of the Contract and a Relevant Matter under Clause 4.21."

42. It will immediately be seen that, in addition to his factual finding that the design was not completed to stage 4/4(i), the adjudicator's key decision was that the claimant had given a contractual warranty that the design had been completed to stage 4/4(i). The

remaining parts of the decision essentially flowed on from those two key findings, one of fact and the other of contract interpretation. It has not been suggested that the adjudicator was asked to make his decision in relation to contract interpretation on facts, disputed or otherwise, outside the four corners of the contract.

43. In my view, in circumstances where the defendant chose to bring an adjudication claim seeking a decision on a matter of contract interpretation which does not turn on the resolution of disputed facts, it lies somewhat ill in its mouth to complain that it is somehow unjust for the other party to bring court proceeding seeking a final determination in relation to that subject of the referral. The only potentially legitimate complaint here could be that the claimant has not also sought to have the question of the design being completed to stage 4/4(i) determined in these proceedings.

44. As already noted, however, since there was no decision requiring the claimant to pay the defendant a sum of money, there was nothing for the defendant to enforce by way of adjudication claim. Nonetheless, as has already been indicated, the claimant was plainly aware that the defendant's likely next step would be to commence a second adjudication claiming money awards on the back of the first decision, which explains why the claimant was keen to bring these Part 8 proceedings following on from that decision and why it did so, relatively speedily, after that first decision. It is not immediately obvious that the claimant ought to have issued Part 7 proceedings at that stage, seeking to have determined: (a) precisely the same limited factual dispute; and (b) the issue of contract interpretation, instead of the instant Part 8 proceedings seeking solely determination of issue (b).

45. In the event, however, the defendant did not bring its second adjudication until 1 May 2024 when, pursuant to a notice of adjudication of that date, Mr Philip Eyre was appointed adjudicator. The subject of this second adjudication was the defendant's challenge to the gross valuation of the then prior payment certificate, together with claims for extensions of time and loss and expense, with the total claim being some £8.5 million, of which some £6.5 million related to the loss and expense claim.

46. Mr Eyre proceeded on the basis, undoubtedly correctly as matters then stood, that the decision made by Mr Hough was binding on him as regards the matters as decided by Mr Hough within his jurisdiction. Mr Eyre had the benefit of 13 witness statements and 6 expert reports in relation to the issues which he had to decide, which was far more heavily factually related and contested than was the first adjudication.

47. His decision, as issued and corrected on 19 August 2024, was that the defendant was entitled to an additional payment of some £3 million plus contractual interest. He concluded that the changes, partly flowing from the failure to complete the design to stage 4/4(i) and partly for other reasons, had been valued at some £1 million less than allowed. He concluded that the defendant was entitled to extensions of time for the works, again partly flowing from the failure to complete the design to stage 4/4(i) and partly for other reasons. He concluded that the defendant was entitled to loss and expense of some £1.6 million more than allowed, again partly flowing from the failure to complete the design to stage 4/4(i) and partly for other reasons.

48. It may be seen, therefore, that the second adjudication was by no means simply a follow-on from the first adjudication, with the defendant limiting its claims to those in respect of which it already had findings on liability in its favour from Mr Hough.

49. At the hearing I asked for and was subsequently provided with a copy of Mr Eyre's decision. I was also informed that the claimant had already paid the defendant the amount awarded by Mr Eyre. I was also post-hearing referred to a lengthy letter written by the defendant's solicitors to the court on 13 September 2024[1], referring to the fact of such payment as another reason to vacate the listing and either direct that the claim proceed as a Part 7 claim or be re-listed for a two day hearing. One reason given as to why a one day estimate was inappropriate was that the court would need to be referred to the material generated in the second adjudication. The relevance of such material was not explained, almost certainly because it is completely irrelevant to the question of contract interpretation. Simply writing a letter requesting the court to make such a decision, rather than issuing an application for an order vacating the hearing, when it was bound to be contested, was plainly inappropriate and, not surprisingly, produced no response.

50. The consequences of my determining this Part 8 claim in favour of the claimant, so far as the decision of Mr Eyre and the claimant's payment of what was awarded under it are concerned, have not been explored before me and I express no opinion on those questions.

51. In my view, however, the fact that the second adjudication has been concluded, and the fact that the claimant has (properly) paid what was awarded under the decision, does not support deferring the determination of the contractual interpretation point. If the defendant chooses to conduct its dispute resolution strategy in the way that it has, in the face of an extant challenge to the first adjudication, it cannot rely upon that as a reason for the Part 8 claim not being determined at this stage, if that is otherwise appropriate. This is not the common case of a claimant, who has lost a final account claim which was referred to adjudication, then issuing a Part 8 claim seeking to have determined a discrete point of contract interpretation solely with a view to scuppering the subsequent enforcement proceedings.

52. To the contrary, as Mr Cheung submitted, in many ways it would be to the advantage of both parties to know now what their contractual rights and liabilities are as regards this discrete design responsibility point, at a time when there is plainly still significant scope for dispute going forwards in relation to this contract. As to that, all I have been told is that the contract is still in being and that the works have still not been completed, although the defendant is no longer on site and there are disputes as to responsibility for outstanding defects.

53. I am satisfied that it is appropriate to determine the contractual interpretation point at this stage. I do however bear in mind Eyre J's further self-direction in the Solutions case (at paragraphs 76 and 77 of his judgment) to exercise caution not to be drawn into either: (a) simply expressing the contract in different words; or (b) reformulating the terms of the proposed declarations, where doing both may bring a heightened risk that the court will, in effect, be making a contract different from that which the parties agreed, which brings me conveniently to the contract.

The contract

54. As I have already indicated, on 6 January 2022, the claimant and the defendant entered into a JCT Design and Build Contract 2016 (with bespoke amendments as set

[1] This was in the voluminous hearing bundle before me, but I was not specifically referred to it at the hearing.

out in a Schedule of Amendments) (the "contract") in respect of the design and construction of the works identified therein.

55. Vitruvius Management Services Ltd was named as the Employer's Agent under the contract.

56. The Contract incorporated the following contractual documents ("the contract documents").

- The JCT Design and Build Contract 2016, as amended by the Schedule of Amendments.
- The instructions to tenderers ("ITT") and their appendices as follows:
- Appendix A – Schedule of Contract Amendments, Performance Bonds and Sub-Contractor Warranties;
- Appendix B – Post-Tender Negotiations;
- Appendix C – Tender Drawings and Specifications;
- Appendix D – Planning Permission & Pre-Construction Conditions;
- Appendix E – Pre-Construction Information;
- Appendix F – Code of Practice for Construction Sites;
- Appendix G – Site Rules;
- Appendix H – Existing Utilities, Services and Surveys;
- Appendix I – Pricing Document;
- Appendix J – Health & Safety;
- Appendix K – Site Possession;
- Appendix L – Risk Allocation Schedule;
- Appendix M – Indicative Programme.
- The Employer's Requirements, which were attached to the ITT.
- Addendum documentation.
- ADI's tender clarifications dated 26 October 2021.
- The contract sum analysis; and ADI's insurance policies.

57. It is apparent that the contract was professionally drawn, based on the widely-used JCT standard form and fully comprehensive in terms of the relevant contractual documentation.

58. There were various site visits and meetings, some of which are evidenced by minutes, but these were not included as contractual documents.

59. It is clear that all of the information provided by the claimant or its representatives pre-contract was consistent with the design either already having been completed to stage 4/4(i) stage or to be completed to that stage by the time of the contract being entered into. That was made explicit in particular by the reports provided as part of the tender documentation (which became contract documents) from AHR (the architectural services and lead consultant) and from Hydrock (who, rather

confusingly, in two separate consultancies were the MEP services design consultant and the civil and structural design consultant).

60. I was referred for example to the AHR stage 4 report, which stated in terms that the report described the design as it stood at the end of stage 4 (technical design stage) and the next steps as it moved into stage 5 (construction stage).

61. Although Mr Osborn (the employer's agent) suggested in his second witness statement that it would have been apparent from certain tender drawings that the stage 4 design had not been completed in every respect, he does not suggest that this was communicated to the defendant or, more generally, that anyone communicated anything pre-contract which made it clear to each that the other understood and accepted and proceeded on the express basis that this was the case.

The Employer's Requirements

62. It is convenient at this stage to refer to the relevant parts of the Employer's Requirements, because they form the key foundation for the defendant's case.

63. Paragraph 1.4 is relied upon by both parties. It reads:

> "The Contractor will enter into a contract under the JCT Design and Build 2016 (DB2016) as amended by Schedule of Amendments contained within this Employer's Requirements document and will be fully responsible for the complete design, construction, completion, commissioning and defects rectification of the works.
>
> Significant design has been developed to date which has been taken to end of RIBA Stage 4 with some parts of contractor specialist design elements together with Services design to Stage 4 (i) with generic design and performance requirements in order to deliver what the Employer is requiring within their controlled budget."

64. The claimant naturally emphasises the fact that the contractor is to be "fully responsible for the complete design … of the works".

65. The defendant naturally emphasises the clear and unambiguous statements that "significant design has been developed to date" and "which has been taken to the end of RIBA stage 4" and "together with services design to stage 4(i)" in order to deliver what the employer requires.

66. Paragraph 1.5 is relied upon by the claimant and states: "It is the Contractor's specific responsibility to liaise closely with the Employer and his team to fully understand their requirements and to review the current design development in order to ensure those requirements are met". It cannot be disputed that this imposes an obligation to "review" the current design development. The question is what is meant by this statement.

67. I should briefly summarise at this stage the position as regards the RIBA Plan of Work which, it is rightly common ground, is a publicly available document referred to in the Employer's Requirements and, hence, which forms part of the relevant factual matrix.

68. The 2013 version was replaced by the 2020 version, which was thus the version current at the time of the contract. Although some of the documents refer to the 2013 version, it is not suggested that there is any difference of relevance between the two. As explained in the introduction section for both, the RIBA plan of work "was

initiated in 1963 to provide a framework for architects to use on projects with their clients, bringing greater clarity to the different stages of a project". However, it "is not intended to be a contractual document. It defines what outcomes the project team should achieve at each stage, but it does not define who should undertake the core tasks".

69. It identifies 8 work stages from "stage 0: strategic definition" through to "stage 7: use". Stage 4 is technical design and stage 5 is manufacturing and construction. The tasks required under each work stage are then set out.

70. In relation to stage 4, it was said in the 2013 version that: "By the end of this stage, all aspects of the design will be completed, apart from minor queries arising from the site during the construction stage". It adds, however, that: "In many projects Stage 4 and 5 work occurs concurrently, particularly the specialist subcontractor design aspects". In the 2020 version the "outcome" was stated to be: "All design information required to manufacture and construct the project completed".

71. In relation to stage 5, it was said in the 2013 version that: "During this stage, the building is constructed on site in accordance with the Construction Programme. Construction includes the erection of components that have been fabricated off site". In the 2020 version the "outcome" was stated to be: "Manufacturing, construction and commissioning completed", although it also adds that "It is likely that Stages 4 and 5 will overlap. The extent of overlap will be dictated by the Procurement Strategy and the Project Programme".

72. I could devote more time to referring to further details from the 2013 and 2020 versions, however that is unnecessary for present purposes. It suffices to say that they envisage that when stage 4 is completed all aspects of the design information required to manufacture and construct the project will be completed. They do, however, also explain that this is not intended to be used as a contractual document and that different procurement strategies (as well as the use of specialist sub-contractors with design responsibilities) may impact on who should produce different design elements and when.

73. I should also record that it is common ground that stage 4(i) is a reference to the equivalent stage in relation to building services design, as found within the BSRIA Design Framework for Building Services 5th Edition BG6/2018, to which reference was also made in the Employer's Requirements.

74. Section 2 of the Employer's Requirements identified the "pre-contract" project architect, structural engineer, civil engineer and M&E engineer (the latter three all from Hydrock) and stated (at paragraph 190) that the contractor was to review the information provided by them (in Appendix C) and "ensure they are satisfied and accept responsibility for any design contained in the Employer's Requirements". In the same paragraph it was stated that the claimant intended to novate AHP and Hydrock structural and civil to the contractor but to retain Hydrock MEP as a separate adviser.

75. Section 2 also stated (at paragraph 512, headed "design responsibilities") that "the contractor is to take full responsibility as designer for the works" and warranted both the exercise of reasonable skill and care in relation to the design and also that it should be "suitable in every respect for the purposes made known in or reasonably capable of being inferred from the contract documents".

76. Section 3 referred to the drawings in Appendix C and stated that it was the contractor's responsibility to design the [works], including preparing all drawings necessary for their proper competition, and also that "should any of the drawings issued as being the Employers Drawn Requirements be utilised by the Contractor as part of his proposals it will be deemed that he has checked the accuracy and workability of the same and will take full responsibility for their constructability".

The contract terms

77. The claimant relies upon the recitals to the contract, as amended, and in particular to amended recital 3 which stated that "the Contractor has examined the Employer's Requirements and has agreed to accept full responsibility for any design contained in them and acknowledges that the Employer's Requirements form part of the Contractor's Design Documents". This is materially different from the deleted standard words, which contain no such express agreement or acknowledgment.

78. The claimant also relies upon Article 1 under which the contractor was required, in unqualified terms, to "complete the design for the works", consistently with clause 2.1.1 of the conditions.

79. The claimant also relies upon amended clause 2.17.1 headed "design work – liabilities", under which the defendant was to be "fully responsible in all respects for the design of the Works including all design work proposed by or on behalf of the Employer on or before the date of this Contract forming part of the Employer's Requirements" and (by clause 2.17.2 and amended clause 3.3) including design work carried out by consultants and sub-consultants, whether before or after the date of the contract.

80. This is materially different from the standard clause 2.17, under which the contractor is only liable for design inadequacies in the contractor's proposals and in what it is to complete in accordance with the Employer's Requirements and these conditions.

81. The claimant also relies upon the amendments to the clauses in the standard conditions in relation to discrepancies and divergences (clauses 2.10 to 2.15).

82. In the standard provisions the contractor is not responsible for the contents of the Employer's Requirements or verifying the adequacy of any design contained within them (clause 2.11), and any correction required due to any design inadequacy in them is to be treated as a contract change in the contractor's favour.

83. In the amended provisions the employer is entitled under clause 2.11 to give the contractor notice of any error or defect in the design of the works and the contractor is obliged to rectify or correct the same without being entitled to have such change treated as a contract change. Similar provision is made in clause 2.14 in relation to any discrepancy within the Employer's Requirements or the Contractor's Proposals or any divergence between them both.

84. The claimant also draws attention to the novation provisions of the contract as regards the architect and the civil and structural engineer, under which the defendant was to enter into a novation contract with these consultants on the form of a specified deed of novation under which, in effect, the defendant was to be novated to the rights against these consultants which the claimant (or Vitruvius as its lead consultant) previously enjoyed. In short, argues the claimant, by this means the defendant would be entitled

to enforce against the consultants any obligation to complete the design to stage 4/4(i) and any claim in relation to any deficient design.

The claimant's submissions

85. The claimant submits that these contractual provisions are clear and unequivocal and place all design responsibility on the defendant as design and build contractor, regardless of whether the design was included in the Employer's Requirements or might have been expected to have been included in the stage 4/4(i) services under RIBA or BSRIA respectively. The claimant also points to the fact that there is nothing in the contract which in any way expressly limits these obligations to particular design elements or stages. It submits that the defendant's reliance on the second part of paragraph 1.4 of the Employer's Requirements amounts, effectively, to seeking to re-write the contract to exclude any design work which was or should have been carried out up to the end of stage 4/4(i) from the scope of any of these obligations.

86. The claimant draws support from the decision of HHJ Seymour QC sitting as a High Court Judge in Co-operative Insurance Society Ltd v Henry Boot (Scotland) Ltd [2002] EWHC 1270 (TCC), where he held at [68] that:

> "In my judgment the obligation of Boot under Clause 2.1.2 of the Conditions was to complete the design of the contiguous bored piled walls, that is to say, to develop the conceptual design of CHW into a completed design capable of being constructed. That process of completing the design must, it seems to me, involve examining the design at the point at which responsibility is taken over, assessing the assumptions upon which it is based and forming an opinion whether those assumptions are appropriate. Ultimately, in my view, someone who undertakes, on terms such as those of the Contract (that is to say, including Clause 2.7) an obligation to complete a design begun by someone else agrees that the result, however much of the design work was done before the process of completion commenced, will have been prepared with reasonable skill and care. The concept of "completion" of a design of necessity, in my judgment, involves a need to understand the principles underlying the work done thus far and to form a view as to its sufficiency. […] If and insofar as the design of the walls remained incomplete at the date of the Contract, Boot assumed a contractual obligation to complete it, quite apart from any question of producing working drawings. […]".

The defendant's submissions

87. Mr Thompson placed emphasis on paragraph 1.4 of the Employer's Requirements. He submitted that this was consistent with the information provided by the architectural and civil and structural consultants at the time of the contract, from which it was clear that they proceeded on the basis that they had competed stage 4/4(i) under their retainers with the claimant and would contract with the defendant to undertake the remaining stages. There was no dispute that this is what had been said, which was contained in the contract documents in question.

88. He submitted that this was also consistent with the defendant's tender, which indicated its intention to "novate the existing design team … throughout RIBA stage 5 and beyond", and which stated that the defendant had "thoroughly evaluated all of the

design information in the Employers Requirements and believe them to be accurate and an excellent base from which the design can be developed through to RIBA stage 5 and beyond".

89. It seemed to me, however, that these statements in the tender indicated, if anything, that although the defendant envisaged that it only needed to contract with the design team to undertake the remaining work stages, it had also separately undertaken its own "thorough evaluation" of the existing design and was satisfied with it, consistent with its contractual obligations in the amended contract conditions and Employer's Requirements upon which the claimant relied.

90. He relied on what the defendant said was an unexplained mismatch in the fees quoted to the defendant for the remaining services and the fees initially quoted to the claimant for such services, which had been redacted from the documents shared with the defendant at tender stage. However, whatever the reasons for this, and however genuine the defendant's expressed frustration at discovering that it had apparently agreed to pay them more than they would have received from the claimant but for the novation, it was not apparent to me how this could be relevant to the issue of contractual interpretation and Mr Thompson was unable, despite his best efforts, to explain - to my satisfaction at least - how they could be said to be relevant.

91. He submitted that the obligation to review the current design development in paragraph 1.5 of the Employer's Requirements and other similar obligations relied upon by the claimant was only intended to apply to what was contained in the design information provided, not to what was not contained which should have been there, i.e. the design information which should have been provided to complete stage 4/4(i). However, Mr Cheung made what in my view was a convincing answer to this point, which was that an obligation to verify the existing design extended just as much to verifying that what was there was sufficient for the purposes of constructing the works (i.e. that no necessary design work for that purposes had been omitted) as it did to verifying that the design work which had been done was not defective. He submitted that it was unrealistic to attempt to draw a clear dividing line for these straightforward contractual purposes between omission and defective commission.

92. Mr Cheung also submitted that there was nothing in the defendant's tender, let alone the other contractual documents, which showed that the defendant's tender was conditional on and subject to the existing design being complete in every way such as would enable the defendant to proceed straight to construction without the need to verify the sufficiency of that design information. In my judgment what was stated by the defendant in its tender amply supported that submission.

93. Mr Thompson submitted in similar fashion that bespoke clause 2.17 was irrelevant because it only applied to responsibility for defects in the design work actually produced, but for the same reasons I prefer Mr Cheung's analysis. Indeed, his argument is even stronger here, because being "fully responsible in all respects for the design of the works" cannot sensibly be read as being limited to design work which has actually been undertaken by the existing consultants prior to the date of contract. The same arguments apply in my judgment in relation to the amendments to clauses 2.11 to 2.15.

Conclusions on the question of contract interpretation

94. I do not need to refer to well-known principles, because they are not in dispute. Mr Cheung referred me to the convenient summary provided by Jacobs J in Global Display Solutions Ltd and Others v NCR Financial Solutions Group Ltd [2021] EWHC 1119 (Comm) at [316] - [320]. There are of course a large number of other decisions, both at first instance and at appellate level, which cover the same ground and are to the same effect. This is a case which simply requires the application of those established principles to the facts of the instant case.

95. In the end, it seems to me that all of the relevant contract terms point firmly towards the claimant's case, save for the second part of paragraph 1.4 of the Employer's Requirements, to which I have already referred, which is consistent – I fully accept – with what is also contained within the information provided by the consultants, both in the contractual documentation and in the other contemporaneous documentary material.

96. Ultimately, the question is whether what is stated in that second of paragraph 1.4 is so clear as to amount to a contractual warranty that the existing design had been completed in all respects up to stage 4/4(i), so that there was no need for the defendant to satisfy itself that this was indeed the case. In my judgment this involves treating the obligation to complete the existing design and to be fully responsible for the whole design as excluding all design work up to and including the end of stages 4/4(i). It also involves treating the further obligations to review and verify the existing design as being read instead as an obligation only to do so in relation to any design work actually completed where that was included within the design stages up to and including the end of stages 4/4(i). That would mean that the defendant had no obligation to satisfy itself that the design had in fact been completed to those stages or, thus, to satisfy itself that it could safely, as design and build contractor, proceed straight to construction stage without checking that the existing design was sufficient and adequate for that purpose.

97. In my judgment, the words used in that second section are nowhere near sufficient to require the other unequivocal contract provisions to be read as so heavily qualified. As Mr Cheung submits, this is not merely a case of qualifying the unamended provisions of the JCT 2016 design and build contract, but of qualifying the bespoke conditions which impose a far more wide-ranging design responsibility, including a responsibility for the whole of the Employer's Requirements. It also involves overriding the remaining sections of the Employer's Requirements to which I have referred.

98. In the end, I am satisfied that the defendant did have the contractual responsibility to satisfy itself that what was in the existing design was sufficient in all respects as, indeed, it appeared to accept by what it stated in its own tender. If it decided simply to accept that the consultants had done what they had said that they had done, then that was at their own risk and, in any event, was something which they were able to protect against by enforcing the novated contracts against those consultants.

99. I am therefore satisfied that the claimant's case is to be preferred to that of the defendant.

100. In those circumstances I now turn to the declarations sought to consider whether or not they are, individually, declarations which are appropriate to be made.

The declarations sought

101. As pleaded, the declarations sought are that:

i) The defendant has taken full responsibility for and taken the risk of the entirety of the design of the Works, including as to the adequacy of the design contained in the Employer's Requirements.

ii) The defendant is contractually obliged to complete any and all necessary works to complete the design of the Works as a whole, including any outstanding design works required to develop the design up to and beyond RIBA Stage 4/4(i).

iii) The claimant has not contractually warranted or undertaken to the defendant that the design contained in the Employer's Requirements (or the majority thereof) had been adequately developed up to RIBA Stage 4/4(i).

iv) The defendant is in any event contractually estopped from denying that it had thoroughly examined the design contained in the ERs and/or that the design contained in the Employer's Requirements had been adequately developed up to RIBA Stage 4/4(i).

v) The defendant is not entitled to damages for breach of contract and/or breach of a warranty, even if the design contained in the Employer's Requirements did not achieve RIBA Stage 4/4(i).

vi) The design works (if any) carried out by the defendant to develop the design in the Employer's Requirements to achieve RIBA Stage 4 / 4(i) do not amount to a Change under clause 5.1, a Relevant Event under clause 2.26 and/or a Relevant Matter under clause 4.21 of the Contract.

vii) The defendant is not contractually entitled to any additional time, costs and/or loss and expense for design works (if any) carried out by it to develop the design in the Employer's Requirements up to RIBA Stage 4/4(i).

viii) Any other declarations that the Court considers to be appropriate.

102. As to (i), Mr Thompson submitted that this was hopelessly broad and that the court should not grant such a wide-ranging declaration going to the heart of contractual design responsibility, particularly in the absence of any explanation by the claimant of a dispute derived from particular facts.

103. I agree. This was not an issue raised or decided in the first adjudication, and is a paradigm example of the court being invited to make a declaration of wide-ranging effect in a vacuum.

104. As to (ii), Mr Thompson again submitted that this was also hopelessly broad, especially insofar as it goes beyond the scope of any design work required in order to complete the design up to RIBA Stage 4/4(i).

105. I also agree. Again, there is no basis for going beyond what was in issue and decided in the first adjudication and thus extending beyond the specific issue about design responsibility up to the end of stage 4/4(i).

106. Mr Thompson next submitted that the claimant, having failed to set out any basis for this declaration or to formulate it in precise terms, should not be permitted to develop its case in support of it, whether in its written submissions or at the hearing.

107. I do not accept this. Whilst the claimant is to be criticised for seeking an overly-wide declaration, the question as to whether or not the defendant was contractually obliged to complete any and all necessary works to complete the design of the Works up to RIBA Stage 4/4(i) was at the heart of the issues which were referred to Mr Hough. Mr Hough concluded that it was not, because he concluded that the claimant had warranted to the defendant that the design had been taken up to RIBA Stage 4/4(i).

108. It is therefore entirely appropriate in my judgment, and not remotely unfair to the defendant, that this court, having reached a different view in this Part 8 claim, should make a limited declaration to this effect. It determines the very issue which the defendant chose to refer to adjudication and has been the subject of dispute ever since, and will assist the parties in relation to their ongoing disputes under this contract going forwards.

109. Hence, I am satisfied, that the court should make a declaration to the effect that the defendant was contractually obliged to complete any and all necessary works to complete the design of the works up to RIBA Stage 4/4(i).

110. My only caveat is that, for clarity, the declaration should be re-worded for greater clarity, given that during the course of the hearing it was made clear that it was common ground that, as I have already said, stage 4(i) is not a reference to the RIBA stages but to the equivalent stages in relation to building services design, as found within the BSRIA Design Framework for Building Services 5th Edition BG6/2018.

111. As to declaration (iii), save for the words in brackets ("or the majority thereof"), this was a decision which the defendant asked Mr Hough to make and which he did make. Although it may be said to be subsumed within declaration (ii) anyway, I am satisfied that it has utility, not least because it avoids any sterile debate about whether Mr Hough's decision to that effect has been finally determined to the contrary by this Part 8 claim, so that I will make a declaration in these terms, although removing the section in brackets.

112. As to declaration (iv), I have not needed to determine this issue and, therefore, it is not appropriate to include it as a declaration.

113. As to declarations (v) and (vi), the same reasoning applies as it does in relation to declaration (iii), so that I will make these declarations in the terms sought.

114. I agree with Mr Thompson that declaration (vii) appears to be a less precise reformulation of declaration (vi) and also goes beyond what Mr Hough was asked to and did determine, so that on that basis it should not be granted.

115. Declaration (viii) is a backstop, now seen to be unnecessary if, indeed, it was ever appropriate.

116. I will ask counsel to agree a form of words, failing which I shall rule accordingly. If any other issues arise the parties should liaise to see whether they can most conveniently be dealt with on written submissions or if a further short hearing is required.

A final observation about venue

117. I end by including a final observation about the consequences of the claimant's choice of venue.

118. This is a dispute about a construction project at a dairy in Tewkesbury, which is where the claimant company is based. The defendant company is based in Birmingham. The claimant's solicitors are also based in Birmingham. The defendant's solicitors are a national firm, with offices in Birmingham as well as London, where the fee-earners are apparently based. One of the consequences of the success of the London TCC is that listings for one day Part 8 claims such as the present, which do not fall into the category of adjudication applications which are to be expedited, are at a premium, so that some delay in listing them for final hearing is inevitable. The same is true of any directions hearing which may be required in relation to such claims. By contrast, both the Birmingham TCC and the Bristol TCC are, due to their less heavy workload, able to list such claims for final hearing, and for interlocutory directions hearing where required, within a much shorter timeframe.

119. Paragraph 2.3(1) of Practice Direction 57AA – Business and Property Courts states that before a claimant issues a claim in the Business and Property Courts it must determine the appropriate location in which to issue the claim. Sub-paragraph (2) states that claims which are intended to be issued in the Business and Property Courts and which have significant links to a particular circuit outside London (or anywhere else in the South Eastern Circuit) must be issued in the Business and Property Court District Registry located in the circuit in question. If a claim has significant links with more than one circuit, the claim should be issued in the location with which the claim has the most significant links.

120. As relevant to this case, sub-paragraph (3) states that a link to a particular circuit is established where: (a) one or more of the parties has its address or registered office in the circuit in question; (b) at least one of the witnesses expected to give oral evidence at trial or other hearing is located in the circuit (insofar as relevant here Mr Osborn is based in Gloucestershire and Mr Chapman and Mr Ball are based in Birmingham); (c) the dispute occurred in a location within the circuit; (d) the dispute concerns land, goods or other assets located in the circuit; or (e) the parties' legal representatives are based in the circuit.

121. Had the claimant's legal representatives had regard to this guidance they could and should have issued this claim in either the Birmingham or the Bristol TCC. Had they done so then they would, ironically, almost certainly have had this Part 8 claim finally determined well before the second adjudication decision of Mr Eyre was promulgated. Issuing claims in the most appropriate TCC location also has the benefit of reducing the workload of the London TCC and, thus, enabling cases which ought properly to proceed there being determined more speedily.