Neutral Citation Number: [2019] EWHC 2547 (TCC)

Case No: HT-2019-000118

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

The Rolls Building
Fetter Lane, London, WC2A 2LL

Date: 02/10/2019

Before:

MRS JUSTICE O'FARRELL DBE

- -

Between:

C SPENCER LIMITED **Claimant**

- and -

MW HIGH TECH PROJECTS UK LIMITED **Defendant**

- -
- -

Alexander Nissen QC & Matthew Finn (instructed by Gosschalks) for the **Claimant**
Simon Hargreaves QC & Tom Owen (instructed by Clyde & Co LLP) for the **Defendant**

Hearing date: 1st July 2019

- -

Approved Judgment

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

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MRS JUSTICE O'FARRELL DBE

Mrs Justice O'Farrell:

1. This is a Part 8 claim by the claimant ("CSL") against the defendant ("MW") for £2,683,617.09 plus VAT based on the alleged failure by MW to serve a valid payment notice or pay less notice for the purpose of the Housing Grants, Construction and Regeneration Act 1996, as amended by the Local Democracy, Economic Development and Construction Act 2009 (together referred to as "the Act") in response to CSL's interim payment application dated 4 February 2019.

2. The question raised by the dispute is whether, in the case of a contract for the execution of both: (i) construction operations within the ambit of the Act and (ii) non-construction operations falling outside the Act, a valid payment notice for the purpose of section 111 of the Act must identify separately the sum due in respect of any construction operations and the basis on which that sum is calculated.

Background to the dispute

3. By a contract dated 20 November 2015 MW was engaged as the main contractor by Energy Works (Hull) Ltd to design and construct a power plant, capable of processing refuse derived fuel produced by commercial and industrial waste and municipal solid waste.

4. By a subcontract dated 20 November 2015 ("the Subcontract") CSL was engaged by MW to design and construct the civil, structural and architectural works for completion of the facility. The Subcontract price is £35,650,398.

5. On 2 February 2017 the parties entered into a Deed of Variation and Settlement, the terms of which do not affect the issues raised in these proceedings.

6. The Subcontract works include construction operations for the purposes of Part II of the Act but also include the assembly of plant and erection of steelwork to provide support or access to plant and machinery, works which fall outside the ambit of the Act.

7. The Subcontract makes provision for periodic interim payments to be made.

8. Initially, the parties operated the payment machinery provisions without any regard to the division between milestones or works that fell within or outside the definition of construction operations for the purpose of the Act.

9. In 2018 a dispute arose between the parties in respect of interim payment application number 31. Neither the application for payment submitted by CSL nor the payment notice issued by MW separated out the sums due in respect of construction operations from the sums due in respect of non-construction operations.

10. In July 2018 CSL gave notice of an intention to refer the dispute to adjudication. MW raised a jurisdictional challenge in respect of the proposed adjudication. The ground of challenge was that the contractual adjudication provision was limited to disputes in respect of construction operations within the Act; the adjudicator did not have jurisdiction to determine the dispute as framed because it failed to distinguish between the works and associated sums claimed falling within and outside the ambit of the Act.

11. In the face of such challenge, CSL withdrew its adjudication claim.

12. On 4 February 2019 CSL issued its application for interim payment number 32 in the sum of £3,353,219.22 plus VAT, of which sum £2,683,617.09 plus VAT was claimed in respect of construction operations and the balance was claimed in respect of other works. The covering letter stated:

> "We enclose our interim application for payment No.32 in respect of the period ending 31st January 2019 in respect of the above Sub-Contract in the sum of £34,611,646.42 (includes 2.5% Retention deducted) excluding VAT.
>
> As you are aware this is a "hybrid contract" where some of the works carried out by CSL are construction operations within the meaning of the Housing Grants, Construction and Regeneration Act 1996 (as amended) ("the Act") and some of the works are not construction operations within the meaning of the Act. The enclosed application therefore draws a distinction between construction operations that are subject to the Act (entitled "Inc Operations") and other operations which are not so subject (entitled "Exc Operations").
>
> Until now, this is not a distinction which either party has previously made in respect of the payment process. However, following the abortive adjudication of last year, we now consider it to be appropriate given the acknowledgement of both parties that this is a hybrid contract.
>
> Accordingly, we look forward to receiving your assessment of the sum due in respect of:
>
> a) The sum applied for in respect of construction operations that are subject to the Act;
>
> b) The sum applied for in respect of other operations which are not so subject.
>
> Please forward your certification for payment to the undersigned …"

13. The enclosed application for payment included a breakdown of the amount claimed as due under the Subcontract, each item allocated to or divided between construction operations and/or non-construction operations.

14. By letter dated 19 February 2019 MW served its payment notice number 35, stating:

> "We refer to the Civils, Structural and Architectural Subcontract between you and us dated 20th November 2015 and your application for payment dated 4th February 2019 for the sum of £3,353,219.22 excluding VAT.
>
> We hereby give you notice of the sum that we consider to be, or to have been due at the payment due date in respect of the above

> application being a Certificate that the Subcontractor owes the Contract £6,818,521.70 excluding VAT. [T]he basis on which that sum is calculated, is set out in the attached spreadsheet [CSL Application 32 M+W Assessment 35xlsx]."

15. The attached spreadsheet contained a breakdown of the measured work and variations, indicating a negative sum due to CSL. The sums were not allocated to or divided between construction operations and non-construction operations. MW did not respond to the substance of CSL's position regarding the appropriate allocation of the works between construction and non-construction operations.

16. By letter dated 14 March 2019 Gosschalks, solicitors acting for CSL, claimed the sum of £2,683,617.09 plus VAT as the notified sum due in the absence of any valid payment notice or pay less notice.

17. By letter dated 19 March 2019 Clyde & Co LLP, solicitors acting for MW, disputed the alleged debt, arguing that the failure of MW to specify the sums due in respect of construction and non-construction operations did not invalidate its payment notice.

The Claim

18. On 5 April 2019 CSL commenced these Part 8 proceedings, seeking payment of £2,683,617.09 plus VAT and/or damages in the same sum together with interest.

19. CSL's case is:

    i) On a proper construction of the Act and clause 38.4 of the Subcontract, any certificate of payment issued by the Contract Manager must identify the sum assessed as due at the payment due date in respect of those works that comprise construction operations and the basis on which that sum is calculated.

    ii) The certificate of payment was not a valid notice of payment for the purpose of section 110A(2) of the Act because it failed to identify that part of the amount assessed as due in respect of construction operations and the basis of that calculation. It simply assessed the overall sum due in respect of both construction and non-construction works.

    iii) In the absence of a valid payment notice or any pay less notice, pursuant to section 111 of the Act, the "notified sum" to which CSL became entitled was the amount assessed as due in its application for payment.

20. MW disputes the claim and submits that Part 8 is inappropriate for determination of this matter. MW's case is:

    i) The payment provisions in the Subcontract are compliant with the requirements of the Act. Payment notice 35 complies with the requirements of section 110A of the Act. The parties decided that all operations would be subject to the same payment regime. They were entitled to do so and it did not make an otherwise compliant scheme thereby non-compliant.

    ii) If CSL's argument is correct, which is disputed, CSL must prove that all sums claimed in these proceedings are sums for construction operations.

iii) The Subcontract is a milestones contract and it is not possible to distinguish between included and excluded operations.

iv) CSL is estopped by convention from contending that the parties' agreement requires that applications for payment and payment notices distinguish between included and excluded operations.

v) MW is entitled to rely on the payment notice as notice of its cross-claims.

vi) MW is entitled to rely on the payment notice as a pay less notice.

vii) MW is entitled to raise a set-off in the sum of £6,818,521.70.

21. The issues for determination by the Court can be summarised as follows:

i) on a proper construction of the Subcontract and the Act, whether MW issued a valid payment notice in response to CSL's application no.32;

ii) whether CSL is estopped from relying on its construction argument;

iii) if MW failed to issue a valid payment notice, whether CSL is entitled to rely on its payment application as "the notified sum" for the purposes of the Act;

iv) whether MW is entitled to rely on its negative valuation as a pay less notice, cross-claim or set off;

v) whether this claim is suitable for determination by Part 8 proceedings.

The Subcontract

22. The Subcontract incorporates the general conditions of the IChemE Form of Contract for Civil Engineering Subcontracts ("the Brown Book"), 3rd edition 2013, as amended and subject to special conditions agreed by the parties.

23. The Subcontract Agreement contains an entire agreement provision at clause 2:

> "The Subcontract constitutes the entire agreement between the Contractor and the Subcontractor with respect to the performance of the Subcontract Works and supersedes any prior negotiation, representation or agreement relating thereto, whether written or oral, except to the extent that they are expressly incorporated in the Subcontract. No change, alteration or modification to the Subcontract shall be effective unless the same shall be in writing and signed by both parties. The Contractor and the Subcontractor agree that they shall not be entitled to enforce or otherwise rely on any term or condition (including but not limited to any term or condition, standard or otherwise, contained in a Quotation, acceptance of Quotation, Purchase order or any Standard Terms and Conditions of either party) which is not contained or incorporated expressly in the Subcontract."

24. The material payment provisions of the Subcontract are as follows:

> Clause 38.1
>
> "The Contractor shall pay the Subcontractor the Subcontract Price in instalments against completed Milestone Events as set out in table [14.5] of Schedule 14 (Subcontract Price and payment), subject to:
>
> (a) Sub-clause 38.1A and clause A2 (Retention Bond); and
>
> (b) the aggregate of the amounts having been paid and which are due to be paid to the Subcontractor as at the relevant payment date not exceeding the amount stated in the "Cumulative" column of table [14.5] of Schedule 14 (save where amounts payable to the Subcontractor are adjusted in accordance with Clause 18 or 19, or approved for early payment under 38.2A)."
>
> …
>
> Clause 38.2
>
> "If any instalment is to be paid upon the completion of a specified task or milestone, the Subcontractor shall only be entitled to apply for payment for that instalment when he can provide evidence of completion of the task or milestone as stated in Schedule 14.
>
> The Subcontractor may not include in any request for payment the value of any work that has not been carried out on or before the date of the application or for a Milestone Event which has not been completed …"
>
> Clause 38.3
>
> "The Subcontractor shall submit a request for payment to the Contract Manager at intervals of not less than one calendar month showing:
>
> (a) the Subcontractor's assessment of the amount to be paid for Subcontract Works carried out up to the end of the period for which it is submitted, together with any other scheduled payment as may have become payable;
>
> plus
>
> (b) the amounts to which the Subcontractor considers himself entitled in connection with all other matters for which provision is made under the Subcontract;
>
> less

(c) the total of all sums previously certified by the Contract Manager for payment.

The Subcontractor's requests for payment shall each state the sum that the Subcontractor considers is to be paid and the basis upon which the amount applied for is calculated and shall be supported by all relevant documentary evidence appropriately itemised."

Clause 38.3A

"Each instalment of the Subcontract Price shall become due on the date which is:

(a) 16 days after the date of the Subcontractor's request for payment of that instalment in accordance with clause 38.3; or

(b) 56 days after the date of the Subcontractor's request for payment in accordance with clause 38.3, in the case of the final request for payment.

The Subcontractor's final request for payment shall state that it is his final request for payment."

Clause 38.4

"Sixteen days after the date of the Subcontractor's request for payment in accordance with clause 38.3, or in the case of the final request for payment fifty-six days after that date, the Contract Manager shall issue a certificate to the Subcontractor and the Contractor for the instalment to which the request for payment relates. The certificate shall show the sum which the Contract Manager considers to be due at the payment due date determined in accordance with Sub-clause 38.5, and the basis on which it has been calculated. The total certified shall comprise all sums listed in the Subcontractor's statement which, in the opinion of the Contract Manager, are properly payable under the Subcontract and shall show separately any elements within the sums certified in respect of nominated Sub-subcontractors. The Contract Manager may in any certificate delete, correct or modify any sum previously certified by him as he shall consider proper. If in respect of any Subcontractor's request for payment, the contractor, or the Contract Manager on his behalf, considers that nothing is due to the Subcontractor he shall issue a certificate for zero."

Clause 38.5

"In respect of each instalment of the Subcontract Price the Contractor shall pay the Subcontractor the amount specified in

clause 38.6 (or, if applicable, the amount specified in a notice under clause 38.7) on a date 19 days after the payment due date of that instalment (Final Date for Payment)."

Clause 38.6

"Subject to clauses 38.7 and 41.1A (Subcontractor's Insolvency) the amount to be paid by the Contractor under clause 41.5 in respect of each instalment of the Subcontract Price is:

(a) the amount certified for payment in the relevant Contract Manager's certificate issued under clause 38.4; or

(b) if the Contractor, or the Contract Manager on his behalf, omits to issue such certificate, the amount applied for in the relevant Subcontractor's application under clause 38.3."

Clause 38.7

"If the Contractor intends to pay less than the sum due in accordance with Sub-clause 38.4 or 38.6 for any reason including any sum that may be due from the Subcontractor to the Contractor under the Subcontract or any sum not payable in accordance with Sub-clause 41.5, the Contractor shall notify the Subcontractor not later than one day before the Final Date for Payment, specifying the amount he considers to be due on the date the notice is given and the basis on which that sum is calculated."

Clause 38.8

"For the purposes of the Late Payment of Commercial Debts (Interest) act 1998, the rate of interest payable on any sum withheld contrary to any requirement of the Subcontract Conditions is 3% (simple) over the Agreed Rate."

Clause 38.11

"If the amount of a payment which is:

(a) notified in accordance with Sub-clause 38.4 (and no notice is given by the Contractor under Sub-clause 38.7 in respect of such payment); or

(b) stated in a notice given by the Contractor under Sub-clause 38.7;

is referred to an adjudicator appointed in accordance with Clause 44 (Adjudication) and if the decision of the adjudicator as to the amount which is to be paid by the Contractor is that more shall

> be paid than the amount stated as in (a) or (b) as applicable, the additional amount shall be paid not later than:
>
> (i) seven days from the date of the adjudicator's decision; or
>
> (ii) the Final Date of Payment;
>
> whichever is the later."
>
> Clause 42.5
>
> "Nothing in the Subcontract Conditions (other than provisions for the giving of notices) shall exclude or limit any right of set-off in law or equity."

25. Thus, the contractual regime for interim payments under the Subcontract is as follows. CSL is entitled to make an application for an interim or instalment payment on a monthly basis upon completion of each milestone. Each application submitted by CSL must set out CSL's assessment of the amount due in respect of completed milestones and any other amounts to which CSL considers itself to be entitled, together with the basis of calculation of the sum claimed and supporting documentation, less sums previously certified. Each instalment payment becomes due sixteen days after the date of CSL's application ("the Payment Due Date"). The contract manager issues a certificate sixteen days after the application, setting out his response to the application, including the basis on which the certified sum has been calculated. MW is obliged to pay the sum due nineteen days after the Payment Due Date ("the Final Date for Payment"). If MW intends to pay less than the sum due, it must issue a pay less notice no later than one day before the Final Date for Payment. Subject to any pay less notice, the sum due is (a) the amount certified for payment in the contract manager's certificate or, in the absence of such certificate, (b) the amount assessed by CSL as due in its application.

26. The dispute resolution provisions of the Subcontract include adjudication at Clause 44.2:

> " … either party shall have the right to refer any dispute or difference (including any matter not referred to the Contract Manager in accordance with Sub-clause 43.3) as to a matter under or in connection with the Subcontract to adjudication and either party may, at any time, issue a Notice (a 'Notice of Adjudication') to the other stating his intention to do so…"

27. However, clause 44.1 states:

> "This clause 44 applies only to the extent (if any) required by [the Act]."

28. Therefore, although the dispute resolution provisions of the Subcontract include an entitlement for either party to refer any dispute to adjudication, such right is limited to

disputes in respect of those parts of the Subcontract works that constitute construction operations within the meaning of the Act.

The Act

29. Section 104 of the Act defines the construction contracts to which it applies:

> "(1) In this Part a "construction contract" means an agreement with a person for any of the following –
>
> (a) the carrying out of construction operations …
>
> (5) Where an agreement relates to construction operations and other matters, this Part applies to it only so far as it relates to construction operations."

30. Section 105 defines construction operations for the purposes of the Act:

> "(1) In this Part "construction operations" means, subject as follows, operations of any of the following descriptions …
>
> (2) The following operations are not construction operations within the meaning of this Part …
>
> (c) assembly, installation or demolition of plant or machinery, or erection or demolition of steelwork for the purposes of supporting or providing access to plant or machinery, on a site where the primary activity is –
>
> (i) … power generation …"

31. It is common ground that the Subcontract works have been carried out on a site where the primary activity is to be power generation. The Subcontract works comprise a combination of construction operations and works that are not construction operations for the purposes of the Act. Therefore, application of the relevant provisions of the Act is limited to those parts of the Subcontract works falling within the definition of construction operations.

32. Section 108 of the Act sets out the right to refer disputes to adjudication:

> "(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.
>
> (5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."

33. The Subcontract contains provision for the parties to refer disputes to adjudication under a compliant procedure, limited to disputes arising in respect of construction operations within the meaning of the Act.

34. Section 109 of the Act entitles the parties to construction contracts to stage payments:

> "(1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract
>
> (2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.
>
> (3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.
>
> …

35. Section 110 of the Act requires construction contracts to provide for an adequate payment mechanism, in the absence of which the statutory Scheme applies:

> "(1) Every construction contract shall –
>
> (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
>
> (b) provide for a final date for payment in relation to any sum which becomes due.
>
> The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.
>
> (3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1), the relevant provisions of the Scheme for Construction Contracts apply."

36. Section 110A sets out mandatory requirements for contractual payment notices:

> "(1) A construction contract shall, in relation to every payment provided for by the contract –
>
> (a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or

(b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.

(2) A notice complies with this subsection if it specifies –

(a) in a case where the notice is given by the payer –

(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated …

(3) A notice complies with this subsection if it specifies –

(a) in a case where the notice is given by the payer –

(i) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated …

(4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero…

(5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply."

37. Section 110B provides for a payee's notice to be given in default of a payer's notice (or, where the contract so provides, for the payee's application notice to be regarded as a payee's notice):

"(1) This section applies in a case where, in relation to any payment provided for by a construction contract –

(a) the contract requires the payer or a specified person to give the payee a notice complying with section 110A(2) not later than five days after the payment due date, but

(b) notice is not given as so required.

(2) Subject to subsection (4), the payee may give to the payer a notice complying with section 110A(3) at any time after the date on which the notice referred to in subsection (1)(a) was required by the contract to be given.

> (3) Where pursuant to subsection (2) the payee gives a notice complying with section 110A(3), the final date for payment of the sum specified in the notice shall for all purposes be regarded as postponed by the same number of days as the number of days after the date referred to in subsection (2) that the notice was given.
>
> (4) If –
>
> (a) the contract permits or requires the payee, before the date on which the notice referred to in subsection (1)(a) is required by the contract to be given, to notify the payer or a specified person of –
>
> (i) the sum that the payee considers will become due on the payment due date in respect of the payment, and
>
> (ii) the basis on which that sum is calculated, and
>
> (b) the payee gives such notification in accordance with the contract,
>
> that notification is to be regarded as a notice complying with section 110A(3) given pursuant to subsection (2) (and the payee may not give another such notice pursuant to that subsection)."

38. Section 111 imposes a statutory requirement on the payer to pay the notified sum:

> "(1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.
>
> (2) For the purposes of this section, the "notified sum" in relation to any payment provided for by a construction contract means –
>
> (a) in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
>
> (b) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

> (c) in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.
>
> (3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.
>
> (4) A notice under subsection (3) must specify –
>
> (a) the sum that the payer considers to be due on the date the notice is served, and
>
> (b) the basis on which that sum is calculated.
>
> It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.
>
> (5) a notice under subsection (3) –
>
> (a) must be given not later than the prescribed period before the final date for payment, and
>
> (b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.
>
> (6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a)."

39. Section 114(4) of the Act states:

> "Where any provisions of the Scheme for Construction Contracts apply by virtue of this Part in default of contractual provision agreed by the parties, they have effect as implied terms of the contract concerned."

40. The material requirements of the payment regime imposed by the Act, in respect of construction contracts, can be summarised as follows. The contractor is entitled to interim payments (save for certain short-term contracts). The contract must provide an adequate mechanism for determining what payments become due and when, including the final date for payment of those sums. The parties are free to agree such mechanism but in the absence of an adequate contractual mechanism, the statutory scheme applies. The contract must require one of the parties (or a specified person) to give a payment notice in respect of each interim payment, not later than five days after the payment due date, setting out the sum considered due and the basis on which such sum has been calculated. The paying party is obliged to pay the sum due (the notified sum) on or before the final date for payment. If the paying party intends to pay less than the sum due, it must issue a pay less notice no later than an agreed period before the final date for payment (or, in the absence of an agreed period, as prescribed by the scheme).

Subject to any pay less notice, the notified sum due is (a) the amount specified in in the paying party's payment notice or, in the absence of a valid payment notice, (b) the amount specified as due in the contractor's application or payment notice.

Construction of the Subcontract

41. Mr Nissen QC, for CSL, submits that MW's certificate was not a valid payment notice for the purposes of the Act. The express language of the Subcontract contemplates the issue of only one payment certificate per payment cycle. It draws no distinction between those operations that are subject to the Act and those that are not. Section 111 of the Act is mandatory and of direct application, regardless of whether it is replicated in the contract: *Grove Developments Ltd v S&T (UK) Ltd* [2019] BLR 1 (CA) per Jackson LJ at [40]. However, Section 111 applies only to those operations that are subject to the Act. For the statutory provision to work, it is necessary to identify the notified sum in respect of construction operations. If a contract is capable of being read in two ways, one of which would involve a contravention of a statute and the other would not, that may be a powerful reason for reading the contract in the sense which its compliant with the statute, even if it is the less natural construction: *Great Estates Group Ltd v Digby* [2011] EWCA Civ 1120 (CA) per Toulson LJ at [98]. This Subcontract must be construed in a way that is compliant with the Act, that is, by reading clause 38.4 as requiring the payment notice to identify separately the sum considered due in respect of construction operations. CSL's application for payment distinguished between the sums claimed in respect of construction operations and the sums claimed in respect of other operations, allowing the parties to comply with the mandatory regime in section 111 of the Act. However, MW issued a single payment certificate that failed to make such distinction. For the purpose of the Act, it did not amount to a valid payment notice. No pay less notice was served. Therefore, CSL is entitled to the amount claimed for construction operations in its application.

42. Mr Hargreaves QC, for MW, submits that MW's certificate was a valid payment notice for the purposes of the Act. The payment provisions of the Subcontract in clause 38 comply with the requirements of section 110A of the Act. Payment notice 35 complies with the Subcontract. Therefore, payment notice 35 must be compliant for the purposes of sections 110(A)(2) and 111(2)(a) of the Act.

43. The starting point for the Court is to consider the purpose of the statutory payment scheme under the Act, namely, to preserve cash flow for smaller contractors and sub-contractors during the execution of the works and prevent the paying party from abusing its position by wrongly withholding payments that are due. This objective is achieved by the imposition of a contractual payment scheme. The scheme must include a timetable for notices and payments, and a minimum standard of notification of the payments to be made or withheld, including the basis on which sums have been calculated, so that they can be justified or challenged. The purpose of section 111 of the Act is to support compliance with the payment scheme, by requiring the paying party to pay the sum assessed as due by the receiving party, if no proper notice is given disputing entitlement to that sum.

44. Where, as in this case, the contract is a hybrid, it is necessary to consider the impact of section 104(5) of the Act on the contractual payment regime. Section 104(5) limits the application of the statutory payment requirements to the construction operations forming part of the Subcontract. The parties are not permitted to contract out of the

statutory payment requirements in so far as they relate to construction operations. The parties have no power to extend the ambit of the Act. However, the parties are free to agree that non-construction operations should be subject to the same requirements as those contained in the Act. Section 104(5) does not preclude the parties from agreeing a contractual payment regime pursuant to which the statutory requirements are applied to both construction operations and non-construction operations.

45. The Subcontract contains one payment regime that applies to both construction operations and non-construction operations. For each interim payment there is one application made by CSL, one payment certificate issued on behalf of MW, one pay less notice (if any), and one sum payable by the final payment date.

46. On their face, the payment provisions in the Subcontract comply with, or are consistent with, the material provisions of the Act. Clause 38.1 contains an express entitlement to interim payments as required by section 109 of the Act. Clauses 38.2 to 38.3A set out the contractual machinery for determining what payments become due and when, and clause 38.5 fixes the final date for payment, as required by section 110 of the Act. Clause 38.4 sets out the requirements for the contract manager's certificate, namely, to identify the sum that is considered to be due and the basis on which that sum is calculated, in accordance with section 110A of the Act.

47. Clauses 38.5 to 38.7 mirror the obligations imposed by section 111 of the Act. Clause 38.5 obliges MW to pay the amount specified in clause 38.6 by the Final Date for Payment (the effect of section 111(1)). Clause 38.6 specifies the amount to be paid as the sum set out in the contract manager's certificate or, in default, CSL's application (the effect of section 111(2)). Clause 38.7 requires MW to issue a pay less notice if it intends to pay less than the sum due (the effect of sections 111(3)-(6) and specifies the prescribed period for service of such notice.

48. The question that arises is whether, as contended by CSL, it is necessary for the operation of sections 110A(2)(a) and 111 that the payment notice should state the sum considered due, and the basis of calculation of that sum, in respect of construction operations, so as to distinguish it from any sum due in respect of non-construction operations falling outside the Act.

49. The applicability of the Act to hybrid contracts was considered in *Cleveland Bridge (UK) Ltd v Whessoe-Volker Stevin Joint Venture* [2010] EWHC 1076 (TCC). In that case, the court refused to enforce an adjudication decision in circumstances where the contract did not contain an adjudication agreement and the statutory scheme applied only to the construction operations; not to the other operations. Having referred to section 104(5) of the Act, Ramsey J stated:

> "[63] It follows that the statute contemplated a position where one agreement related to both construction operations under section 105(1) and operations which were excluded by section 105(2).
>
> [64] It also follows that the right to refer disputes to adjudication under section 108, the entitlement to stage payments under section 109, the provisions as to dates of payment under section 110, the provisions as to notice of intention to withhold payment

> under section 111, the right to suspend performance for non-payment under section 112 and the prohibition of conditional payment provisions under section 113 will only apply to the subcontract in this case, insofar as the subcontract relates to construction operations…
>
> [91] It is clear that the legislation could have dealt with agreements which related both to construction operations and to "other matters" being operations which were not construction operations, in a number of ways. It would have been possible to treat them either as being agreements for construction operations or as not being agreements for construction operations. It would also have been possible for that question to depend on the relative values of the construction operations and of the "other matters". It is clear that Parliament decided that, just because an agreement related, in part, to operations which were not construction operations, this did not prevent the implied terms under section 114(4) of the Act from applying to the construction operations. It follows that a party can refer a dispute arising under the agreement, insofar as it relates to construction operations, to adjudication under a procedure complying with section 108 of the Act. In this case the contract contained no provision for adjudication and it is common ground that any adjudication would have to be carried out in accordance with the Scheme for Construction Contracts ("the Scheme")."

50. The case of *Severfield (UK) Ltd v Duo Felguera UK Ltd* (2015) 163 Con LR 235 (TCC) concerned the application of the statutory scheme payment provisions in respect of a hybrid contract. In that case, the contract works comprised construction operations under the Act but also works that were excluded from the scope of the Act pursuant to section 105(2). The contractual payment regime did not comply with Part II of the Act. As a consequence, the statutory scheme applied to the construction operations under the contract but a different contractual scheme applied to the other operations. Having referred to the *Cleveland Bridge* case, Coulson J (as he then was) explained:

> "[21] At one point, it was apparent that Mr Hickey was itching to submit that the provisions in the 1996 Act ought to be incorporated wholesale, even in a hybrid contract, to apply to all the works. But it seems to me that, first, that submission would have run counter to s 104(5), which expressly provides that the provisions in the Act apply 'only so far as' they relate to construction operations; and secondly, ignores the fact that the parties have expressly agreed a different payment regime … In my view, the court must uphold that different regime in respect of all claims to payment in respect of works which are excluded by the 1996 Act.
>
> [22] This means that, under a hybrid contract such as this, there are two very different payment regimes. That is what Ramsey J indicated in *Cleveland Bridge*. Although I find that uncommercial, unsatisfactory and a recipe for confusion, it is the

> inevitable result of Parliament's desire to exclude what would otherwise have been obvious construction operations from the ambit of the 1996 Act."

51. Having initially submitted a claim for an interim payment in respect of all works under the contract, the claimant in that case then sought to revise it by limiting it to sums claimed in respect of construction operations to which the Act applied. The court rejected the claimant's argument that the revised claim could stand as a payment notice for the purposes of the Act:

> "[32] The whole point of the default provisions in the 1996 Act, by which an employer becomes liable for the sum notified, is to encourage simplicity and clarity. If x notifies y of a claim for £1,000, and y does not respond in the prescribed time to challenge that claim, £1,000 becomes due because it is the notified sum. Introducing the possibility of a partial claim for £675, by reference to a gloss put on an accompanying spreadsheet, would be to confuse the simple system of notification envisaged by the 1996 Act.
>
> [33] That interpretation is reinforced by a consideration of the next statutory requirement, that in order to be payment notice, the notice has to set out the basis on which the sum claimed has been calculated … interim payment claim 15 was for everything. There was therefore no explanation in the payment notice of the calculation of £1.4m as being the minimum due in respect of construction operations within the 1996 Act…
>
> [34] … Because this was a hybrid contract, it was imperative that the claimant spell out the fact that, regardless of the position in relation to excluded operations, this was a payment notice (with all that that entailed) in respect of the claim for construction operations.
>
> …
>
> [36] In those circumstances it seems to me inequitable now to penalise the defendant for failing to respond within the limited time prescribed by the 1996 Act, in circumstances where the parties had been operating the contract in a different way, and when interim application 15 did not give any indication that it was a payment notice in respect of a specific part of the claim. If the claimant wanted to take advantage of the right that it has under the 1996 Act, then it had to do so in an open way. The least that the claimant could have done was to spell out in the December 2014 notice how the claim was split and why it was that in respect of the claim for construction operations, a very truncated timetable applied."

52. The above cases both concerned contracts to which two separate schemes applied. In *Cleveland Bridge*, the statutory adjudication scheme applied in respect of construction

operations but there was no adjudication scheme in respect of non-construction operations. In *Severfield*, the statutory payment scheme applied in respect of construction operations but the contractual scheme continued to apply in respect of non-construction operations. In both cases it was necessary to distinguish the claims in respect of construction operations from the claims in respect of non-construction operations so that the material statutory or contractual scheme could be applied. In the absence of such clarity from the party seeking to rely on it, the Court would not undertake an investigation to establish the appropriate apportionment.

53. *Cleveland Bridge* and *Severfield* are authorities for the proposition that Part II of the Act applies only to that part of a hybrid contract that concerns construction operations as defined by section 105. The Act contemplates that separate payment or adjudication provisions may apply to construction operations and non-construction operations under a single, hybrid contract. If separate schemes apply in such a hybrid contract, it is essential for an interim payment applicant to identify the sum claimed in respect of the part of the works covered by the Act, so that he can take advantage of the scheme provisions, including the default provisions in section 111 of the Act.

54. However, those cases do not provide support for the proposition that parties to a hybrid contract are unable to agree a single adjudication or payment scheme that is applicable to construction and other operations and capable of achieving compliance with the Act.

55. I am grateful to the parties for drawing to my attention the recent decision of the Court of Appeal in *Bennett (Construction) Limited v CIMC MBS Limited* [2019] EWCA Civ 1515 and providing additional short submissions. The case provides a helpful exposition of the relevant principles that arise but deals with different issues to the one before this Court. The issues in *Bennett* were whether the contractual payment mechanism in that case complied with section 110 of the Act and, if not, whether the inadequacy should be resolved by wholesale or piecemeal imposition of the statutory payment scheme. In this case, it is common ground that section 38.4 of the Subcontract complies with section 110; the primary issue is whether it is necessary for it to be construed as contended for by CSL to render it compliant with sections 110A and 111. This issue did not arise and therefore was not considered by the Court of Appeal in *Bennett.*

56. In my judgment where, as here, a hybrid contract contains a payment scheme that complies with, or mirrors, the relevant provisions of the Act for both construction and non-construction operations, a payment notice that does not separately state the sums due in respect of the construction operations is capable of constituting a valid notice for the purposes of sections 110A and 111 of the Act for the following reasons.

57. Firstly, the express words of sections 111 and 110A do not stipulate separate identification of the sums due in respect of construction operations. Section 111 simply identifies the "notified sum" by reference to a valid payment notice in section 110A. Section 110A(2) contains two requirements for a valid payment notice, namely, the sum considered due at the payment due date and the basis on which that sum is calculated. To comply with section 110A(2), the sum considered due must include, but is not expressly limited to, such sum in respect of construction operations. That may be satisfied by stating the overall sum considered due in response to the relevant application.

58. Secondly, although the statutory provisions apply only to the construction operations under a contract, as explained above, it is open to the parties to agree a payment scheme that sits alongside the statutory provisions, such that it complies with the statutory provisions in respect of construction operations and mirrors those provisions in respect of other operations. In such circumstances, it is possible for a payment notice to satisfy both the statutory requirements (in respect of construction operations) and the contractual requirements (in respect of non-construction operations). Such a payment notice could be valid under the contract and under the Act.

59. Thirdly, as a matter of principle, there is no difficulty in implementing section 111 where the same provisions apply to both construction and non-construction operations. I agree with CSL that, where separate payment machinery applied, as in the case of *Severfield*, it would be necessary to distinguish construction operations from non-construction operations in respect of each application notice and payment notice. Otherwise, it would not be possible to identify the notified sum which became payable pursuant to section 111. There might also be cases where one party sought to enforce section 111 in isolation from any contractual entitlement to a payment. In such cases, it would be necessary for the party seeking to rely on section 111 to identify the notified sum to which the section applied so that the default provision in section 111 could be implemented. However, such difficulty would not arise where the same provisions applied to both construction and non-construction operations, whether by way of statutory requirement or contractual obligation. As a matter of principle, validity of the payment notice in respect of both the construction and non-construction operations would be determined against the same parameters. In such cases, it would be possible to identify the sum payable by way of each interim payment, applying section 111 (in respect of the claims for construction operations) together with the provisions replicated in the Subcontract (in respect of the claims for non-construction operations).

60. Fourthly, the above approach does not undermine the purpose of the statutory payment provisions. It could be described as a pragmatic solution to the illogical and uncommercial impact of section 104(5) of the Act. If parties agree a payment scheme that complies with, or mirrors, the statutory scheme in respect of both construction and non-construction operations, the cash flow benefits conferred by the Act are simply extended to cover those additional works.

61. In this case it is necessary for CSL to distinguish between the sums claimed for construction operations and sums claimed for other works because it seeks to limit its claim to the notified sum payable pursuant to section 111 of the Act. However, it is open to MW to defend that claim by relying on a payment notice, setting out the basis on which no sum is due in respect of any construction or non-construction operations.

62. Of course, it is necessary to construe each payment notice against the relevant contractual and statutory background to determine its validity. A payment notice must be sufficiently clear and unambiguous in form, substance and intent so that the parties have proper notice of the sum assessed as due and the basis of calculation. It is possible that a paying party who declined to apportion or allocate the sums due or deducted as between construction and non-construction operations might struggle to rely on its notice for the purpose of the Act if a deficiency in the notice undermined the validity of its global assessment. No such issue has been identified in this case.

63. MW's payment notice 35 set out the sum which the contract manager considered due at the relevant date and the basis on which it was calculated. I am satisfied that on a proper construction of the Subcontract and the Act, MW issued a valid payment notice in response to CSL's application no.32.

64. The issue of a valid payment notice by MW is sufficient to defeat CSL's claim for monetary relief in these proceedings and dispose of the Part 8 claim. However, for completeness, I consider the alternative arguments deployed by the parties below.

Estoppel by convention

65. MW wishes to plead a case (for future determination) that CSL is estopped by convention from contending that the Subcontract requires that applications for payment notices distinguish between included and excluded operations. MW has not set out its argument and evidence on this issue in detail but in his skeleton Mr Hargreaves states that the convention arose from the parties' conduct in the first thirty-one interim payments. Neither party distinguished construction operations from non-construction operations or suggested that the Subcontract required such distinction to be drawn. MW relied on the convention when issuing payment certificate 35. It would be unjust or unconscionable to allow CSL to resile from the convention in all the circumstances.

66. CSL's position on the case indicated by MW is that estoppel by convention must fail because: (i) it is not possible to contract out of the mandatory effect of the Act; (ii) the entire agreement clause in the Subcontract precludes the doctrine of estoppel by convention from operating on the Subcontract; and (iii) any such estoppel would have been brought to an end by the time that MW issued its payment notice in response to CSL's interim application 32.

67. Where parties to a transaction proceed on the basis of a shared underlying assumption on which they have conducted their dealings between them, neither will be allowed to depart from that assumption, even if it is shown to be wrong, when it would be unfair or unjust to do so in all the circumstances: *Amalgamated Property Company v Texas Bank* [1982] 1 QB 84 (CA) per Lord Denning pp.121-122; Brandon LJ pp.131; *The Indian Endurance* [1998] AC 878 (HL) per Lord Steyn pp.913-914; *ING Bank NV v Ros Roca SA* [2012] 1 WLR 472 (CA) per Carnwath LJ at [55]-[65].

68. Mr Nissen's first point is that it is not possible to contract out of Part II of the Act, or to avoid its application by reliance on estoppel: *Keen v Holland* [1984] 1 WLR 251 (CA) per Oliver LJ pp.261-2. Mr Hargreaves does not dispute that proposition but has clarified in his submissions that he relies on an estoppel by convention in relation to the proper construction of the Subcontract, rather than the Act, as summarised above. I accept Mr Nissen's submission that, if established, such an estoppel would not assist MW. The estoppel argument arises only on the premise that CSL is correct that sections 110A and 111 of the Act require the parties to separate out claims for construction operations from other operations in application and payment notices. In such circumstances, if CSL were estopped from asserting its construction of the Subcontract, the Subcontract would not comply with the mandatory provisions of the Act and the statutory scheme would be implied as necessary: *Bennett v CIMC* (above) at [54]. On CSL's construction of the Act, the scheme (construed so as to comply with sections 110A and 111) would incorporate the same requirement to identify separately sums

assessed as due in relation to construction operations. On that basis, MW's payment notice would be invalid even if its estoppel argument were successful.

69. Mr Nissen's second point is that the no oral modification ("NOM") provision forming part of the entire agreement clause in the Subcontract precludes the doctrine of estoppel by convention from operating upon the Subcontract. Reliance is placed on *Sere Holdings Ltd v Volkswagen Group United Kingdom Ltd* [2004] EWHC 1551 (Ch) [25]; *Lloyd v MGL (Rugby) Ltd* [2007] EWCA Civ 153 [28] and *Jet2.com v Blackpool Airport Ltd* [2010] EWHC 3166 (Comm) [40]. Those cases do not go so far as to exclude all estoppels as incompatible with an entire agreement clause. I reject the submission that an estoppel cannot operate in the circumstances of this case. In *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 24, the Supreme Court held that a NOM clause would be enforced by the courts to preclude reliance on an oral variation but subject to potential estoppel arguments: per Lord Sumption at [10]-[16] and Lord Briggs at [24]-[25]. Therefore, as a matter of principle, estoppel by convention could operate on the Subcontract despite the existence of the NOM clause.

70. Mr Nissen's third point is that any estoppel by convention would have been brought to an end by the time that MW came to issue its payment notice in response to CSL's interim application 32. The applicable principles are not in dispute. Once a common assumption is revealed to be erroneous, the estoppel will not apply to future dealings: *Hiscox v Outhwaite* [1992] 1 AC 562 per Lord Donaldson MR p.575. The reliant party is commonly afforded a limited time within which to protect itself from the consequences of discovering the true legal or factual position *HM Revenue & Customs v Benchdollar Ltd* [2009] EWHC 1310 per Briggs J at [44], [45], [52] and [59]-[61].

71. The documentary evidence before the Court is sufficient to demonstrate an arguable case for an initial common understanding that the Subcontract did not require any breakdown between construction and other operations for the purpose of operating the payment mechanism. However, it is common ground that, during the adjudication concerning disputed application 31, MW raised the issue of the hybrid nature of the Subcontract and the application of the Act. That challenge was in the context of adjudication but the limited application of the Act relied on by MW against CSL to challenge jurisdiction introduced the necessity for the parties to distinguish between payment claims for construction and other operations, contrary to any earlier assumption. Even if it could be said by MW that it was not clear at that stage that the point would affect payment notices, CSL raised the point fairly and squarely in its letter dated 4 February 2019. Thereafter, it must have been plain and obvious to MW that CSL required MW's payment notice to set out sums assessed as due in respect of construction and other operations to comply with the Act. Thus, any shared assumption was at an end. Having already raised the hybrid nature of the Subcontract in the adjudication and having received CSL's breakdown in its interim application notice, MW had sufficient time to comply with CSL's requirement prior to the date for service of its payment notice.

72. I do not accept Mr Hargreaves' submission that this issue would be unsuitable for Part 8 determination. In general, Part 8 proceedings are unsuitable for the trial of an issue of estoppel: *ING Bank* (above) per Stanley Burnton LJ at [77]. That is because such issues require careful and precise formulation, and identification of the matters in dispute. In most cases, that is best done through pleadings using the Part 7 procedure. Further,

many cases of estoppel involve substantial disputes of fact. However, where the court is concerned with enforcement of the payment and adjudication provisions in the Act, designed to promote cashflow during construction projects through swift interim resolution procedures, it is not sufficient for a party to rely on a vague, unparticularised issue to derail such enforcement.

73. MW has not identified any relevant issue of fact that is in dispute. The history and basis of earlier interim payments is a matter of documentary record, as are the abortive adjudication reference in respect of interim application 31 and the reason for withdrawal. The exchanges between the parties in regard to interim application 32 are likewise a matter of documentary record. It is not suggested by MW that there were oral meetings or agreements that are pertinent to the issue and require oral evidence to be given. The Court has before it the relevant material to determine the question.

74. For the above reasons, had CSL's construction argument succeeded, Mr Nissen's first and third points would have been sufficient to defeat any reliance by MW on a plea of estoppel by convention.

Proof of sums claimed

75. MW's alternative case is that, if CSL's argument is correct, which is disputed, CSL must prove that all sums claimed in these proceedings are sums assessed as due in respect of construction operations.

76. CSL's case is that the division of work between construction and non-construction operations was set out in its application 32. MW did not raise any objection to the application on grounds of validity or respond with an alternative breakdown. There is no dispute between the parties as to any of the milestone payments; the dispute centres on variations and other claims. In any event, any impossibility to disentangle the construction and non-construction operations would not relieve MW of the obligation to serve a payment notice, setting out its assessment that no sum was due in respect of the construction operations.

77. MW's case is that the Subcontract is a milestones contract and it is not possible, or very difficult, to distinguish between included and excluded operations, as explained in the witness statement of Mr Greggan dated 10 May 2019. The Act, including section 111, does not apply to non-construction operations. The absence of a valid payment notice would not preclude MW from relying on a set-off or cross-claim to defeat CSL's claim if it included non-construction operations. Therefore, in order to succeed in its claim, CSL must establish that the claim does not include sums in respect of any non-construction operations.

78. CSL set out in its application for payment 32 its position as to the breakdown of the works between construction and non-construction operations. MW did not dispute the validity of the application. MW failed to set out in its payment notice any alternative breakdown for which it contended. The evidence served in these proceedings identified potential arguments but did not set out MW's case on allocation of the works. It is not sufficient for MW to raise this matter as a potential issue for future investigation. It is incumbent on MW to condescend to detail and identify a positive, alternative case if it seeks to resist enforcement of the statutory payment provisions. Otherwise, the purpose of the statutory payment provisions would be undermined.

79. I am not satisfied that MW has raised an arguable case that CSL's application included non-construction operations to which the Act did not apply. Therefore, had the Court found that MW failed to issue a valid payment notice, CSL would have been entitled to rely on its payment application as the notified sum for the purposes of the Act.

Reliance on negative valuation

80. MW's case is that if the Court finds that its payment notice does not comply with sections 110A and 111 of the Act, MW may still rely on the negative valuations in its payment notice as (i) a pay less notice for the purpose of section 111; or (ii) a set-off or counterclaim, reducing the notified sum to £NIL.

81. The essential requirement for the service of a contractual notice is that the sender has the requisite intention to serve it, objectively ascertained from the document relied on against the factual context: *Jawaby Property Investment Limited v The Interiors Group Limited & another* [2016] EWHC 557 (TCC) per Carr J at [63]-[65].

82. On an objective construction of payment notice 35, it was served as a payment notice pursuant to clause 38.4 of the Subcontract. It was stated to be notice of the sum considered to be due in response to CSL's application for payment. It was stated to be a certificate of the sum due (as required by clause 38.4). It was not identified as a pay less notice and it was not intended to be read as a pay less notice. Therefore, MW did not have the requisite contractual intention to serve it as a pay less notice. It follows that MW is not entitled to rely on the payment notice as a pay less notice.

83. Case law has established that a payer is entitled to raise any legitimate set off as part of its payment notice or pay less notice: *Henia v Beck* [2015] BLR 704 per Akenhead J at [32]. However, a payer cannot avoid the operation of section 111 by relying on a defence of set-off or a cross-claim if not raised in a valid payment notice: *VHE Construction plc v RBSTB Trust Co Ltd* [2000] BLR 187 (TCC) per His Honour Judge Hicks QC at [36]; *Severfield* (above) at [47]; *Letchworth Roofing v Sterling Building Company* [2009] EWHC 1119 (TCC) per Coulson J at [25]-[26] and [33].

84. Mr Hargreaves submits that MW is entitled to rely on its negative valuation in the payment notice as a set-off or counterclaim against CSL's claim. The restrictions on deployment of any set-off defence or counterclaim do not apply where there is a hybrid contract: *Severfield* (above) at [47]-[51]. The variation and delay claims forming the set-off and counterclaim cannot be broken down as between construction and non-construction operations. Therefore, it is arguable that MW does not have any obligation to pay the sum claimed until both claim and counterclaim have been assessed.

85. The difficulty raised by hybrid contracts identified in *Severfield* merits further consideration following full argument. However, it would not assist MW in this case because the Subcontract produces the same result as the Act. The premise of the argument is that MW failed to serve a valid payment notice. The Subcontract has replicated the effect of section 111 of the Act through clauses 38.5 and 38.7. If MW wished to pay less than the sum due in CSL's application *"for any reason"*, including a set-off or counterclaim, it was obliged to serve a pay less notice. In the absence of a pay less notice, and in the absence of a valid certificate under clause 38.4, the amount applied for under clause 38.3 would be payable.

86. Therefore, had the Court found that the payment notice was invalid, MW would not be entitled to rely on its negative valuation as a set-off or counterclaim against the notified sum determined by section 111 of the Act.

Suitability of Part 8 proceedings

87. The courts have urged parties to consider carefully whether their disputes should be pursued by Part 7 proceedings rather than Part 8 proceedings. Where the matter raises substantial issues of fact or expert evidence, Part 7 should be used. Where the case is complex and requires pleadings to identify the issues, Part 7 should be used. In this case I am satisfied that the claim raises a point of construction that is suitable for determination by Part 8 proceedings.

Conclusion

88. For the reasons set out above:

    i) on a proper construction of the Subcontract and the Act, MW issued a valid payment notice in response to CSL's application no.32;

    ii) CSL is not estopped from relying on its construction argument;

    iii) if, contrary to the finding in (i), MW failed to issue a valid payment notice, CSL would be entitled to rely on its payment application as the notified sum for the purposes of the Act;

    iv) MW would not be entitled to rely on its negative valuation as a pay less notice, cross-claim or set off;

    v) this claim was suitable for determination by Part 8 proceedings.