Neutral Citation Number: [2021] EWHC 2972 (TCC)

Case No: HT-2021-000033

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

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

Date: 12/11/2021

Before :

MR JUSTICE EYRE

- -

Between :

MANSION PLACE LIMITED	**Claimant**
- and -	
FOX INDUSTRIAL SERVICES LIMITED	**Defendant**

- -
- -

Camille Slow and Dalton Hale (instructed by **Addleshaw Goddard LLP**) for the **Claimant**
Katie Lee (instructed by **Excello Law Limited**) for the **Defendant**

Hearing dates: 18th, 19th, 20th October 2021

- -

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.

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday 12th November at 10:30am"**

.....

MR JUSTICE EYRE

Mr Justice Eyre:

Introduction.

1. The Claimant is a property developer. It is a special purpose vehicle which was formed for the refurbishment and extension of student accommodation at Hockley Point in Nottingham. The Defendant is a construction contractor which was engaged on 19th February 2020 by the Claimant to perform those works pursuant to an amended form of the JCT Design and Build Contract (2016 edition) ("the Contract").

2. There were delays in the performance of the works. The Defendant says that those were to a limited extent the result of the Covid-19 pandemic and the national lockdown imposed to address that and, to a greater extent, because of the Claimant's failure to give timely possession of the site and to clear it of students. The Claimant says that there was a failure on the part of the Defendant to progress the works and to commit sufficient labour and resources to undertaking the works. The Defendant sent a number of email communications to the Claimant and contends that those operated as notices of delay for the purposes of clause 2.24 of the Contract. The Claimant denies that the emails were effective as such notices alternatively that the Defendant failed to provide the particulars of the effects of the delay which were also required by clause 2.24. The Claimant served a number of notices of non-completion purportedly under clause 2.28.

3. On 22nd October 2020 the Defendant served Interim Payment Application 10 and this resulted in Certificate 10 from the Employer's Agent in the sum of £367,103.44. On 13th November 2020 the Claimant served a Pay Less Notice and a number of notices of intention to deduct liquidated damages. The Defendant disputed the Claimant's entitlement to make such deduction and referred the dispute to adjudication.

4. In the meantime, on 14th October 2020, there had been a telephone conversation between Mr. Shankar Ramanathan and Mr. Mark Kite. Mr. Ramanathan is and was a director of Mansion Property Management Ltd which carried out property development and contract management functions on behalf of the Claimant. Mr. Kite is and was the Managing Director of the Defendant.

5. The Defendant says that the conversation of 14th October 2020 resulted in a binding agreement whereby the Claimant agreed to forego any entitlement to liquidated damages and in return the Defendant agreed to forego any right to claim payment for loss and expense as a result of the delay in the works. It says that the agreement precluded the Claimant from serving the Pay Less Notice and from seeking to deduct liquidated damages from the sums due to the Defendant. The Claimant says that there was no such agreement. It does not accept that any agreement was made in that conversation and, alternatively, says that to the extent that reference was made to it foregoing its right to claim liquidated damages this was a waiver which it was entitled to and did revoke.

6. On 11th January 2021 Mr. Paul Jensen, as adjudicator, decided that the 14th October 2020 conversation had resulted in a binding agreement whereby the Claimant abandoned its right to claim or deduct liquidated damages and that as a consequence the sum of £367,103.44 plus interest was due to the Defendant.

7. It was that decision which caused the Claimant to commence the current proceedings in which the principal relief sought is a declaration that there was no such agreement on 14th October 2020. The Defendant has counterclaimed seeking declarations giving effect to its interpretation of the dealings on 14th October 2020 and of the parties' rights under the Contract.

The Issues.

8. The parties have agreed a list of seven issues two of which contain three sub-issues. However, there are in reality two central issues.

9. The first is the effect of the conversation on 14th October 2020. Did that result in a binding agreement and if so, was it in terms which precluded the Claimant from seeking liquidated damages under the Contract?

10. Second, if that conversation did not result in a binding agreement with that effect is the Claimant nonetheless precluded from seeking liquidated damages? This involves consideration of the Defendant's contentions that:

    i) It had served valid notices of delay pursuant to clause 2.24 and that such service coupled with the Claimant's failure to respond pursuant to clause 2.25 meant that the Claimant was not entitled to serve a non-completion notice and, accordingly, not entitled to seek liquidated damages under clause 2.29.

    ii) Clause 2.29 is unenforceable as being a penalty.

    iii) Clause 2.29 is unenforceable on the ground of uncertainty and/or by application of the principle in *Bramall & Ogden v Sheffield City Council* (1983) 29 BLR 73.

The Factual Background.

11. There were already 80 student rooms at Hockley Point. The works to be undertaken by the Defendant involved the building of an extension (Section 3 of the works) to increase the capacity to 139 rooms and the conversion of some of the existing bedrooms into en-suite bedrooms (Section 2).

12. Clause 2.24 of the Contract provided as follows for notice by the Defendant of delay to progress:

> ".1 If and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed the Contractor shall forthwith give notice to the

Employer of the material circumstances, including the cause or causes of the delay, and shall identify in the notice any event which in his opinion is a Relevant Event.

.2 In respect of each event identified in the notice the Contractor shall, if practicable in such notice or otherwise in writing as soon as possible thereafter, give particulars of its expected effects, including an estimate of any expected delay in the completion of the Works or any Section beyond the relevant Completion Date.

.3 The Contractor shall forthwith notify the Employer of any material change in the estimated delay or in any other particulars and supply such further information as the Employer may at any time reasonably require."

13. Clause 2.25 dealt with the fixing of the Completion Date and the first three sub-clauses are relevant providing:

".1 If on receiving a notice and particulars under clause 2.24:

.1 any of the events which are stated to be a cause of delay is a Relevant Event; and

.2 completion of the Works or of any Section is likely to be delayed thereby beyond the relevant Completion Date,

then, save where these Conditions expressly provide otherwise, the Employer shall give an extension of time by fixing such later date as the Completion Date for the Works or Section as he then estimates to be fair and reasonable.

.2 Whether or not an extension is given, the Employer shall notify the Contractor of his decision in respect of any notice under clause 2.24 as soon as is reasonably practicable and in any event within 12 weeks of receipt of the required particulars. Where the period from receipt to the Completion Date is less than 12 weeks, he shall endeavour to do so prior to the Completion Date.

.3 The Employer shall in his decision state:

.1 the extension of time that he has attributed to each Relevant Event; and

.2 (in the case of a decision under clause 2.25.4 or 2.25.5) the reduction in time that he has attributed to each Relevant Omission."

14. Clause 2.28 addressed non-completion notices in these terms:

"If the Contractor fails to complete the Works or a Section by the relevant Completion Date, the Employer shall issue a notice to that effect (a quote Non-Completion Notice").

If a new Completion Date is fixed after the issue of such a notice, such fixing shall cancel that notice and the Employer shall where necessary issue a further notice."

15. Clause 2.29 provided for the payment or allowance of liquidated damages at the rates set out in the Contract Particulars. Sub-clause 2.29.2.3 is of note for present purposes and provided that:

> "If the Employer fixes a later Completion Date for the Works or a Section, the Employer shall pay or repaid to the Contractor any amounts recovered, allowed or paid under clause 2.29 for the period up to that later Completion Date."

16. Clause 2.30 provided for the taking of possession by the Claimant of a part of the Works or of a Section before the Completion Statement for the Works or the Section as a whole and defined the part taken into possession and the date of taking possession as the "Relevant Part" and the "Relevant Date" respectively.

17. Clause 2.34 provided that:

> "As from the Relevant Date, the rate of liquidated damages stated in the Contract Particulars in respect of the Works or Section containing the Relevant Part shall reduce by the same proportion as the value of the Relevant Part bears to the Contract Sum or to the relevant Section Sum, as shown in the Contract Particulars."

18. Clause 4.19 provided for the Defendant to be entitled to reimbursement of direct loss or expense suffered as a result of any deferment of giving possession of the site or part of it or because the regular progress of the Works had been materially affected by a Relevant Matter subject to the provisions for notification and ascertainment of relevant matters in clause 4.20.

19. The Contract Particulars identified the Date of Possession of Site as 4th December 2019 in respect of each of the four Sections of the Works for the purpose of clause 2.3. They set out the Section Sums for clause 2.34 and in respect of 2.29.2 the Contract Particulars stated the amounts for the liquidated damages thus:

> "Section 1:
>
> For the first week, £1;
>
> For each week thereafter, £100 per bed per day for bedrooms apartment corridors and associated living / kitchen areas within a student apartment.
>
> Section 2:
>
> At a rate of £100 per bed per day for bedrooms apartment corridors and associated living /kitchen areas within a student apartment.
>
> Section 3:
>
> At a rate of £100 per bed per day for bedrooms apartment corridors and associated living /kitchen areas within a student apartment.
>
> Section 4:
>
> £1,000 per week for all external areas."

20. Matthew Maunder is a Quantity Surveyor and a partner in BelGen Investco LLP ("BelGen") and in that capacity he acted as Employer's Agent on the Contract. Guy Higginbottom is the sole director of Guy Higginbottom Consultancy Ltd. He provides consultancy services to those in the construction industry and assisted the Defendant in its dealings with the Claimant.

21. The Defendant had undertaken some work under a pre-construction services agreement but the works under the Contract began in early February 2020. The Defendant says that shortly after the works began it became apparent that the works would take longer than anticipated. It had been expected that the Section 2 works would take about 7½ weeks but it is the Defendant's position that it became apparent that it would not be able to achieve this timetable because of the Claimant's failure to clear Section 2 of students until 29th June 2020. It is said that the presence of students in some of the bedrooms in Section 2 prevented the commencement of works on that Section. The Defendant said that this was combined with a failure to give possession of rooms adjacent to Section 3.

22. The Defendant sent a series of emails to BelGen and to the Claimant about these matters. Those of 5th May 2020, 22nd May 2020, and 2nd June 2020 were drafted by Mr. Kite albeit incorporating some advice provided by Mr. Higginbottom while that of 19th August 2020 was a more formal document sent by the Defendant but substantially drafted by Mr. Higginbottom. In these emails the Defendant complained predominantly of the fact that it had not been given possession of the bedrooms in Section 2 and asserted that under the Contract it should have been given possession of Sections 2 and 3 by 4th December 2019. The Defendant says that these operated as notices under clause 2.24. The earlier emails were in rather informal terms but that of 19th August 2020 said that not only was the Defendant entitled to an extension of time but that it was also entitled to compensation for the delay to which it had been subjected.

23. The Claimant did not and does not accept that it was responsible for the delay. Its position was that the reference to possession being given on 4th December 2019 was an obvious typographical error. It said that both sides had understood that the students in the existing rooms would only move out during the university summer break and that neither side had expected or intended possession to be given of those rooms until then. In the Claimant's view, a major factor in the delay was a design failure on the part of the Defendant necessitating a change in the steelwork to be installed.

24. It is apparent that the Claimant was concerned that action to protect its position against what it saw as delay on the part of the Defendant might backfire and result in a deliberate slowing down of progress by the Defendant or still more a withdrawal by the Defendant from the project either of which would cause further delay. The Claimant was clearly conscious that a failure to get the works completed in time for the students to move into the accommodation would cause considerable expense. Thus the notes of the Claimant's internal meeting on 13th August 2020 show that thought was being given as to when was the optimum time to make any claim for liquidated damages so as to minimise the prospect of such a claim causing the Defendant to become uncooperative.

25. On 18th August 2020 the Claimant alerted the Defendant to the possibility of a claim for liquidated damages. That led to the Defendant's response of 19th August 2020 setting out the basis of its extension of time claim and stating that the Defendant did not expect Section 2 to be completed until 28th October 2020. In his internal comment

about this, Fergal Leonard, the Claimant's Head of Project Management, referred to this as the Defendant going "nuclear" adding "Section 2 delayed until 28th October!". Similar concerns about the prospect of delay by the Defendant were expressed when thought was being given to the service of a pay less notice both before and after the notice was served. Thus on 29th September 2020 the Claimant's Daniel Radnor said that an extension of time request from the Defendant was anticipated but that the Claimant's solicitors had advised service of a pay less notice because of the liquidated damages due to the Claimant. Mr. Radnor said that such a notice was "unlikely to be taken well" by the Defendant. However, he believed the fact that there would nonetheless remain value in the works for the Defendant "should help the situation and avoid a situation whereby Fox slow down progress due to their discontentment".

26. On 29th September 2020 the Claimant sent the Defendant a Notice of Non-Completion in respect of Section 2. The Defendant responded to this with its letter of 2nd October 2020 reiterating its claim to be entitled to an extension of time and saying that if the Claimant deducted liquidated damages from the sums payable to the Defendant then the Defendant would regard that as a default and would move to termination of the Contract. Non-Completion Notices in respect of Sections 3 and 4 were sent on 6th October 2020.

27. The Claimant's internal correspondence after the sending of those notices again reflects its concerns about the reaction of the Defendant and the completion of the works.

28. Thus on 6th October 2020 Mr Radnor sent an email saying:

> "Fergal, Steve and I had a meeting with Shankar last Friday and I thought that the agreement… was that the capital pay capital less notice would wait until the valuation is raising this now would surely result in Fox slowing down their work and significantly risk and even later delivery.
>
> Has something changed since this discussion if so the bank needs to confirm that they are on board."

29. Mr. Leonard replied saying:

> "Since last Friday it has become increasingly apparent that Fox already have began (sic) a slow-down process – despite their correspondence to the contrary.
>
> We need to speak to the bank sooner rather than later and get them on board as the two remaining options are essentially to pay the full valuation and put ourselves in the bank at full at further risk, or issue the pay less notice and retain funds. Unfortunately given that Fox are such a fickle, gender – driven contractor, it's impossible to know what is for the best."

30. The Claimant then had discussions with its funders and that resulted in an email of 8th October 2020 from Mr. Pigram of the funders. In this he said that the funders were happy for the Claimant to proceed with whichever course of action it felt best having taken account of the advice of its solicitors. However, he added "we would recommend,

that where possible, all effort is made to maintain relationship with Fox as you are entering into a critical period of the development and clearly none of us want it to drift any further."

31. In considering both the stance of the Defendant and the concerns of the Claimant it is relevant to note that their dealings took place against the background of the Covid-19 pandemic. The national lockdown in response to that pandemic was imposed in March 2020 and it was not disputed that this and the pandemic had an impact on the construction industry although work was able to continue. In his email of 5th May 2020 to the Claimant Mr. Kite had said:

> "As I have discussed previously on every other contract we have running the client has offered us the opportunity of a mutual suspension/extension of the works. This basically removes the threat of LADS on the understanding that we do not push for an extension of time costs.
>
> This isn't the case at Nottingham so we have had no choice but to review the contract to see what provisions there are for Fox to protect ourselves in these challenging times."

32. In his oral evidence Mr. Kite said that the works had initially been disrupted by the pandemic and the national lockdown but that the Defendant had made significant adjustments and gone to considerable length to enable the works to continue and to minimise the effect on the works. However, it was not disputed that there remained a degree of uncertainty as to the effects which the pandemic would have throughout the period with which I am concerned.

33. It is apparent that Mr. Kite had become disillusioned with the project and with the relationship with the Claimant and also that he was contemplating foregoing any loss and expense claim in return for the abandonment of any liquidated damages claim from the Claimant. Thus on 2nd October 2020 he emailed Mr. Higginbottom saying "in all honesty if they were to knock any threat of LADs on the head I would happily not go for extra prelims I just want to finish the job and walk away" and reference to a similar approach had already been made in the email of 5th May 2020 as I have just noted.

34. It emerged in the course of oral evidence that Mr. Kite and Mr. Ramanathan had met on site on 7th October 2020. In that meeting there was discussion about the progress which had been made. None of the witnesses had referred to this meeting in their statements and both sides were agreed that it had no impact on the issues which I have to decide. However, it was followed by further progress in completing the works such that by 14th October 2020 the Section 2 work of converting existing bedrooms had been completed but there remained work to be done on the new extension which was Section 3.

35. On 14th October 2020 BelGen sent the Defendant a letter by email. This was a detailed letter assuring the Defendant that its request for an extension of time was being considered but saying that further information was needed before that request could be determined. As I will explain below Mr. Ramanathan initially said that letter had been

sent after a conversation between him and Mr. Maunder following Mr. Ramanathan's conversation with Mr. Kite. However, in fact the letter was sent at 2.33pm and so about 3½ hours before the latter conversation.

36. In the afternoon of the same day there was an exchange of text messages between Mr. Ramanathan and Mr. Kite initiated by the former with a view to fixing a time to speak. In response to Mr. Kite saying that he would be free to speak albeit driving (and offering a couple of alternatives to a phone call) Mr. Ramanathan responded saying "I will be driving too so will call you, it's nothing heavy, just want to agree a way forward without all the legal stances". The two gentlemen then spoke shortly after 6.00pm and I will address their competing accounts of that conversation below.

37. 14th October 2020 was a Wednesday. Shortly after 1.00pm on Monday 19th October 2020 Mr. Kite and Mr. Higginbottom spoke. Mr. Higginbottom says that in that conversation Mr. Kite told him that in a conversation a few days ago he and Mr. Ramanathan had agreed that the Claimant would abandon its claim for liquidated damages in return for the abandonment of the Defendant's loss and expense claim. Mr. Higginbottom sent an email to Mr. Kite following that conversation in which he said:

> "It's encouraging that Shankar called you, and hopefully, Mansion will be good to their word and want to conclude the project amicably. I think the site team have done very well to overcome the supplier challenges that Covid has thrown up, so it's good to hear that mansion appreciate your efforts."

38. On 22nd October 2020 Mr. Radnor emailed some of the Claimant's funders and other Mansion Group employees although it is to be noted that Mr. Ramanathan was not a recipient of this email. Mr. Radnor spoke of the financial consequences of the delay in completion of the works and said:

> "Once again, we are looking for these costs to be covered by the liquidated damages claim of £100 per bed per day that they are delivered late but still expect that there will be resistance from the contractor. At present, we have not issued a Pay Less Notice to recoup some of the costs as we expect that this could result in the contractor walking off site. The tactic being used is to try to work with them, all the while making sure that for the upcoming valuation we have the ability to issue the Pay Less Notice."

39. The Claimant says that this email was significant as indicating that it was still proceeding with the same tactics as before the conversation between Mr. Ramanathan and Mr. Kite and that certainly Mr. Radnor did not believe that the liquidated damages claim had been abandoned.

40. As already noted Interim Payment Application 10 was sent on 22nd October 2020. On 25th October 2020 Mr. Kite emailed Mr. and Mrs. Foxall the owners of the Defendant saying:

> "Hopefully Guy's confidence will prove to be right. He is sure we are in a strong position and Shankar was very conciliatory so hopefully there will be no LADS flagged up on this

latest interim valuation. We have issued the final completion program now so hopefully we can get this over the line as quickly as possible."

41. On 6th November 2020 Mr. Maunder sent a letter in which he said that the information which had been requested in his letter of 14th October with a view to considering an extension of time had not been provided. The letter set out the information which BelGen required in order to consider the potential extension of time and said that the claim for such an extension would be considered on receipt of that information.

42. Mr. Kite forwarded Mr. Maunder's email to Mr. Higginbottom and the latter replied by email on 9th November 2020. In that reply Mr. Higginbottom said:

> "What is a little surprising, is that his letter seems to be written without considering the conversation that you had with Mansion's Shankar Ramanathan on (or around) 19 October 2020. My understanding of that conversation was that after both sides had written some "posturing" letters, Mr Ramanathan expressed his gratitude to Fox for their efforts in minimising delay. It also sounded like he agreed not to levy any liquidated damages against Fox, and I understand that you reciprocated his gesture, by saying that you wouldn't seek any additional preliminaries for the overrun period. There may have been other tacit agreements to complete the works by a particular date, and / or finalise the account.
>
> Matt's letter seems to be at odds with that conversation, but he may just be protecting himself. Until such time as any further agreement over liquidated damages or loss and expense is formalised, it's highly likely that Matt will have to continue with the relevant duties. However, it's concerning that all we have is Mr Ramanathan's words to you and the non-completion notices remain without any extensions being granted. Matt Maunder either seems unwilling, or perhaps believes he is unable, to make any decision over an extension of time. Clearly, the risk of liquidated damages remains."

43. Mr. Higginbottom then said that the better course would be to write to Mr. Ramanathan rather than to Mr. Maunder and added:

> "I can draft a suitable letter that reflects the cordial tone of your conversation with him, and could include the following points:
>
> - As per your conversation, Fox remain committed to completing the project. From my visit last Thursday, this is clearly evident by the works' progress and the number of finishing trades on site, so hopefully, Mansion's Fergal Leonard (who was seen on site) can confirm this. It would be helpful if you could let me have a firm date or dates when the works are likely to be completed, as Mansion will want to organise things for their side.
> - Express your disappointment with Matt Maunder's letter. Unless I'm stretching things a bit too far, we could say that during the conversation on (or around) 19 October 2020; the following was agreed:
>
> - No liquidated damages would be levied by Mansion; and
>
> - Fox would not seek any additional preliminaries provided that (i) Mansion kept to the LAD agreement, and (ii) the account and payments were dealt with fairly.

Fox are keeping to their side of the agreement, but Matt Maunder's letter suggests that Mansion may not want to keep to their side.

- Notwithstanding the above, Fox remain prepared to take both the extension of time, loss and expense, and now the under-certification of their Payment Application 10 further. Fox would prefer not to do this, as an adjudication and / or termination would not only subject both sides to additional costs, sour the relationship they enjoy with Mansion, and on a more personal level, it would seem that we've both failed to achieve what we agreed on 19 Oct 2020.
- Fox appreciate that Matt Maunder has a job to do, but he's not helping either Fox or Mansion. Fox can easily show he's completely wrong regarding the extension of time position he's taken, and with his latest valuation. Suggest that Mr Ramanathan have a polite word with Matt Maunder, and rein him in a bit. If you've sent the draft letter regarding Payment Application 10 to Matt Maunder (my email on Friday 6 November refers), you could echo this, but in terms of aiming to conclude the final account by the end of December."

44. On Friday 13th November 2020 the Defendant's Mr. Leonard sent by email a Pay Less Notice and a series of Notices of Intention to Claim Liquidated Damages.

45. On receipt of the Defendant's email Mr. Kite emailed Mr. and Mrs. Foxall saying that he was going to meet Mr. Higginbottom the following Monday and that "as far as I am concerned now we just go for our full claim including costs". He replied to Mr Leonard saying:

> "We will respond accordingly.
>
> This is quite disappointing following my previous conversation with Shankar.
>
> We will however now pass this over to our legal team and will pursue our extension of time claim including all costs associated with it.
>
> …
>
> It looks like we will have to prepare for this to be decided through adjudication.
>
> This is particularly disappointing as I was on (sic) the understanding that you wanted to try and resolve this amicably and without the need for further legal costs on both parties."

46. Mr. Kite followed that up on Monday 16th November 2020 with a letter. The letter was sent under cover of an email to Mr. Ramanathan in which Mr. Kite began by saying:

> "In response to your emails on Friday please see attached our formal response.
>
> As with your correspondence this is written to protect our current standpoint and I hope that we can meet up as soon as possible to agree a final account figure and prevent the need for further contractual correspondence or actions".

47. The accompanying letter was based on a draft prepared by Mr. Higginbottom and said as follows in part:

> "After our conversation on Wednesday 14th October, I am understandably disappointed to receive the pay-less notice. However, your letter provides some encouragement that you

> remain open to resolving matters amicably. Returning to our conversation, it was clearly agreed that in return for Fox waiving its loss and expense claims for (amongst other things) the overrun period, Mansion Place Ltd would not deduct liquidated damages. As I am sure you're aware from our recent Payment Application No. 10, we have kept to our side of that agreement, as no such loss and expense was claimed.
>
> I can understand your desire to "protect your legal position" (as you say in your letter), but this, and the pay-less notice seem to go against what we agreed in October. In the same vein, we must also protect our legal position, so to that end, I require you to provide me with a copy of your panel of Adjudicators by no later than 5pm on Tuesday 17th November 2020. According to the "Contract Particulars", you are obliged to provide this "on request".
>
> …
>
> That's my "unpleasant" part of the letter out of the way, so I'd like to re-focus on resolving matters amicably. I was very grateful for your call on Wednesday 14th October, as you acknowledged the difficulties we have overcome, and have almost completed the project. As you've done in your letter, I'd like to reaffirm our intention to arrive at a negotiated settlement of the current disputes (deduction of liquidated damages, and undervaluation of our works), and if possible, the project's final account as well.
>
> I believe that negotiations would be more productive if kept between ourselves, although I do accept that we'll both need input from our advisors. I'd welcome your thoughts on this point, but I've often found that achieving a settlement".

48. Mr. Ramanathan acknowledged receipt of that letter in a short email of 16th November 2020. In this he said:

> "Thanks for your letter and email.
>
> The focus this week needs to be on completing on site and handing it over by this Friday."

49. Mr. Ramanathan concluded his response by offering a meeting on 23rd or 25th November. A meeting was held on 25th November but it did not achieve any resolution. After the meeting Mr. Kite emailed Mr. Higginbottom saying:

> "Their approach today was really disappointing so I think we really need to press ahead as aggressively as we can.
>
> We had a `gentleman's agreement' that they are all off the table now so if there is any possibility of getting prelims, management costs, possible acceleration costs etc then I think we need to pursue them"

50. The Defendant served notice of adjudication on 25th November 2020. The following day Mr. Higginbottom wrote to Mr. Kite referring in his letter to the "14th October agreement'".

51. As I have already noted the adjudicator decided that there had been a concluded agreement on 14th October 2020 and that decision triggered these proceedings.

The Conversation of 14th October 2020 and its Effect.

52. The outcome of the dispute about the conversation between Mr. Kite and Mr. Ramanathan on 14th October 2020 is of central importance in this case. It is agreed that there was a conversation shortly after 6.00pm on that day and that both men were driving at the time and were using hands-free mobile phones to conduct the conversation. It is also common ground that the conversation was short lasting less than ten minutes and that it was cordial. For obvious reasons neither man took a note during the course of the conversation and neither sought to make a written record in its immediate aftermath.

53. There the common ground ends and the accounts of Mr. Kite and Mr. Ramanathan as to what was said were markedly different. I am satisfied that in his evidence to me each man was seeking to give his honest recollection of what had been said and that neither of them was deliberately seeking to mislead me.

54. In assessing those competing accounts, I will have some regard to the demeanour of the witnesses and the impression I formed having seen them in the witness box. However, in doing so I remind myself that by itself demeanour can be an unreliable guide to the reliability of a witness's evidence. In part this is because of the inherent unreliability of any judicial assessment of demeanour. What might appear to one judge to be evasion and a reluctance to answer questions indicative of unreliability in the evidence of a particular witness might to another judge be seen as commendable caution and care in giving evidence indicative of the reliability of the same witness's evidence. It is also because of the capacity for a person to persuade him or herself of the truth of a recollection which turns out to be mistaken. That is compounded by the natural tendency for a witness to recall past events from a particular viewpoint and genuinely but mistakenly to recollect those events as having actually happened in the way in which the witness now with hindsight believes they would, or indeed should, have happened. A witness can be completely honest but also completely mistaken and it follows that the strength of a witness's belief in the truth of the account which he or she is giving is of no assistance in assessing the reliability of that belief.

55. I have already set out the circumstances of the conversation and clearly those were not conducive to full attention being paid during its course nor to detailed recollection afterwards. In the light of that and in the light of the matters I have just stated, although I will have regard to the impression derived from the demeanour of Mr. Kite or of Mr. Ramanathan when giving oral evidence I will take care not to place undue weight on that impression. Rather I must look at the witnesses' evidence through the prism of the contemporaneous documents; of their subsequent actions; of those events which are accepted or clearly demonstrated to have happened; and of inherent likelihood. The impression made by the demeanour of a witness must be set against those matters and to the extent that the contemporaneous documents in particular show a picture different from that depicted by a particular witness it is the former and not the latter which I should regard as more likely to be an accurate account of what happened.

56. Mr. Ramanathan explained that the conversation took place on his initiative. His purpose was to thank Mr. Kite for the progress which had been made since the meeting on 7th October 2020 and to encourage the Defendant get on with the other works so as to complete the project while bypassing the legal stances which each side had taken in correspondence. Mr. Ramanathan explained that his reference to bypassing the legal stances was to putting those on one side for the time being with a view to resolving those issues amicably once the works had been completed. That purpose was, Mr. Ramanathan says, achieved in the conversation. He says that he thanked Mr. Kite for the work done; emphasised the need to move on with the remaining works; and said that when everything had been completed the Claimant would be seeking to achieve an amicable resolution of the outstanding matters. Mr. Kite agreed that the Defendant would concentrate on getting the works completed. Mr. Ramanathan did not suggest that he was recalling the conversation verbatim but he was clear in saying that there had been no suggestion let alone any agreement that the Claimant would drop its claim for liquidated damages. Mr. Ramanathan says that there was no express reference to the Claimant's liquidated damages claim or to the Defendant's potential claim for an extension of time and/or payment in respect of loss and expense. Mr. Ramanathan's account of the conversation was short but that is consistent with his assertion that it was a short conversation with a simple structure.

57. Mr. Kite gave evidence of a very different conversation. He accepted that he could not recall the precise words used but said that he was clear as to the gist of the conversation. He accepted that it began with Mr. Ramanathan thanking him for the Defendant's recent efforts and emphasising the need for completion of the works. In return Mr. Kite said that the Defendant was doing all it could to get the works completed quickly. Mr. Ramanathan then said it would be better if both sides dropped their legal claims and moved forward to get the project completed. Mr. Kite says that he responded to that by saying that the Defendant "was not a contractual company" and that the Defendant would be happy to drop its claim for an extension of time and for payment for loss and expense if the Claimant were to drop its liquidated damages claim. He says that Mr. Ramanathan then agreed to that mutual abandonment of the competing claims. At points in his evidence Mr. Kite used different wording referring both to "legal claims" and to "legal posturing" but he was consistent in saying that the two potential claims were in issue and were mentioned namely the Defendant's extension of time claim and the Claimant's liquidated damages claim. He was also consistent in saying that both those claims were dropped and that by the end of the conversation he believed that an agreement had been reached between the Claimant and the Defendant with each permanently abandoning its claims.

58. Both Mr. Ramanathan and Mr. Kite had made witness statements for use in the adjudication (on 11th and 18th December 2020 respectively). Those statements substantially accorded with the evidence which those gentlemen have given in these proceedings. It follows that each has been consistent in the substance of his account of

the conversation since at the latest December 2020 (and so within two months of the conversation).

59. There was some debate as to where the burden of proof lay on the issue of the existence or otherwise of the alleged agreement. Miss. Slow said that I should proceed on the footing that the adjudicator's conclusion that there was an agreement carried no weight and that the Defendant as the party asserting the existence of the agreement had the burden of proving it. She said that the approach of Lord Macfadyen in *City Inn Ltd v Shepherd Construction Ltd* (2002) SLT 781 was to be preferred to the approach enunciated by Gloster LJ in *Walker Construction (UK) Ltd v Quayside Homes Ltd* [2014] EWCA Civ 93 at [51]. Miss. Slow said that Gloster LJ's comments were obiter and that doubt has been cast on them by the Supreme Court decision in *Aspect Contracts (Asbestos) Ltd v Higgins Construction plc* [2015] UKSC 38, [2015] 1 WLR 2961. Miss. Lee submitted that the approach in *Walker Construction* was to be preferred. She drew a distinction between the content of the adjudicator's decision and the ultimate decision; and said that the starting point was the adjudicator's finding that there had been an agreement. As will be seen I have been able to reach a conclusion as to the effect of the conversation on 14th October 2020 without having regard to the burden of proof and so need not address this debate.

60. The objective factors which support the Claimant's account of the dealings and which operate in favour of acceptance of Mr. Ramanathan's evidence can be grouped under three general heads.

61. The first is the conduct of the Claimant after the conversation on 14th October 2020. The alleged agreement was not mentioned in the conversation which Mr. Ramanathan said that he had with Mr. Maunder on 14th October 2020 at some point after the conversation with Mr. Kite. If an agreement such as alleged by the Defendant had been made it would have been expected that Mr. Ramanathan would have told Mr. Maunder when speaking to him shortly afterwards. However, the force of that point is markedly weakened by the fact that neither Mr. Ramanathan nor Mr. Maunder mentioned such a conversation in their witness statements and Mr. Ramanathan accepted that his recollection as to the sending of Mr. Maunder's email of that date was mistaken. More significant support from the Claimant's position comes from the facts that none of the Claimant's internal documentation made reference to such an agreement and that the Claimant continued with preparation of its liquidated damages claim. If Mr. Ramanathan had believed that he had agreed that the Claimant should drop that claim he would have been expected to have told his colleagues and to have ensured that further effort was not expended in dealing with the preparation of the claim.

62. Second, Miss. Slow in her submissions and Mr. Ramanathan in his evidence placed considerable stress on what was said to have been the commercial unreality of the alleged agreement. The first element in the argument is that it would have been strange for the Claimant to abandon a substantial claim for liquidated damages in the face of a poorly articulated argument for an extension of time which the Claimant did not accept

and which was likely to involve markedly smaller sums than the liquidated damages claim. Next, it is said that such a course would have had a perverse effect in the circumstances here. The Claimant accepts that it was anxious that the works be completed and be completed quickly. The threat of liquidated damages was a powerful weapon in persuading the Defendant to progress the works quickly and it would lack commercial sense for the Claimant to abandon that weapon. That point has considerable force but the strength of the argument is reduced when the context which I have set out at [24] – [31] above is considered. The parties' dealings were against the background of the Covid-19 pandemic and the impact which that had on construction work generally. More significantly the Claimant's internal documents show that it was concerned that the Defendant would either leave the site or deliberately delay the works and was very anxious to avoid that consequence. Indeed, Mr. Ramanathan says that his purpose in speaking to Mr. Kite had been to encourage further progress on the footing of putting the legal claims to one side (he says so that they could be resolved later). In those circumstances the dropping of the liquidated damages claim is not necessarily as surprising an act as it might be in other circumstances and could be seen as having been regarded by the Claimant as a price worth paying to ensure the project continued to move to completion.

63. Finally, my attention is drawn to the Defendant's correspondence and internal exchanges after the conversation. Mr. Higginbottom's email to Mr. Kite on 19th October 2020 did not expressly refer to a definitive agreement having been reached but instead referred to the Claimant wanting "to conclude the project amicably". Similarly, Mr. Kite's email of 13th November 2020 responding to service of the liquidated damages claim simply said that "this is quite disappointing following my previous conversation with Shankar". It was not until 16th November 2020 that the Defendant said clearly to the Claimant that there had been an agreement of the kind now alleged. The Claimant contends that if there had been an agreement the Defendant could have been expected to say so early and clearly.

64. Miss. Slow drew attention to the Defendant's internal exchanges on 25th and 26th November 2020 in which Mr. Higginbottom talked of the "agreement" using quotation marks and Mr. Kite referred to a "gentleman's agreement". She says those references indicated an uncertainty on the Defendant's part as to whether a binding agreement had been made and also raising a question as to whether the discussions had been conducted with the intent to enter legal relations. These points are unpersuasive. Mr. Kite's reference to a "gentleman's agreement" indicates that he believed that he had reached an agreement with Mr. Ramanathan. The legal effect of that agreement and whether there was an intention to enter legal relations are matters to be assessed objectively. I am satisfied that Mr. Kite's description of the agreement as a "gentleman's agreement" was a reference to the fact that it was not in writing and not a suggestion that the arrangement was in some way not binding or that it was not intended to have legal effect. Mr. Higginbottom's use of quotation marks was in the context of him explaining to Mr. Kite that the existence and effect of the agreement were matters which the

adjudicator was to decide. It does not without more undermine his account that he had been told that an agreement had been reached.

65. The first external or objective factor in support of the Defendant's case as to the conversation is the understanding which Mr. Higginbottom had and which was shown by the contemporaneous documents. The conversation took place on the evening of Wednesday 14th October 2020. Mr. Higginbottom and Mr. Kite spoke shortly after midday on Monday 19th October 2020. The email which Mr. Higginbottom sent after the conversation did not refer to an agreement in unequivocal terms although it did talk of the Claimant being "good to their word". However, on 9th November 2020 Mr. Higginbottom wrote to Mr. Kite in the context of preparing a response to the Claimant's letter of 6th November 2020. In his email Mr. Higginbottom set out his understanding of the 14th October conversation. That understanding was to the effect of the agreement on which the Defendant now relies. I am satisfied that the email set out Mr. Higginbottom's genuine understanding as to what he had been told by Mr. Kite. The email was an internal document in which Mr. Higginbottom was advising Mr. Kite on how to put forward the Defendant's position as strongly as possible. I am satisfied that Mr. Higginbottom was not seeking to fabricate a line of argument for the Defendant nor to put forward a fundamentally false position (though he was preparing to put the best gloss possible on the Defendant's position). The tenor of the email indicates that Mr. Higginbottom was seeking confirmation that his understanding was correct. This has the important consequence that as at 9th November 2020 Mr. Higginbottom believed that an agreement for the mutual abandonment of the claims had been reached in the 14th October conversation. How had he come to that understanding? It is possible that Mr. Higginbottom had fundamentally misunderstood what Mr. Kite had told him or had read too much into it or had in some other mistaken way come to an erroneous view of what he had been told. However, I find that it is far more likely that he came to that belief as a result of what Mr. Kite had told him and, moreover, of a correct interpretation of what he had been told. That is intrinsically the most likely explanation of how that belief developed. It is also significant that Mr. Kite did not contradict the understanding which Mr. Higginbottom set out on 9th November 2020. I reject the suggestion that Mr. Kite adopted an account which he knew to be false and in my judgement Mr. Kite's adoption of the account of the conversation set out by Mr. Higginbottom indicates that it was also his understanding of it at that time. None of this necessarily means that Mr. Kite's understanding and recollection of the conversation were correct but it does indicate that the account which he now gives is essentially that which he had given to Mr. Higginbottom within days of the conversation with Mr. Ramanathan.

66. After an earlier draft of this judgment had been circulated to the parties the Defendant's solicitors informed the court and the Claimant that Mr. Higginbottom had been paid by the Defendant for attending court and producing his evidence. It appears that Mr. Higginbottom had invoiced the Defendant for the time spent on these matters doing so under the terms of the consultancy agreement he had with the Defendant and being paid at the hourly rate applicable under that agreement. The Defendant's solicitors first learnt

of this when they were engaged in preparing a costs schedule after the hearing and they properly informed the court and the Claimant on making that discovery. They have confirmed that the payments were not made under a separate agreement for the provision of evidence nor were they contingent on the outcome of the proceedings.

67. In the light of that information I invited submissions from the Claimant. Its solicitors expressed the view that it was unacceptable that this arrangement had not been disclosed earlier and said that the absence of any reference to these payments in Mr. Higginbottom's statements meant that his evidence was incomplete. However, they did not seek to reopen the evidence. Nor did they seek to make any submissions (other than as to costs) save to say that the impact of these matters on the conclusions reached and on the veracity of Mr. Higginbottom's evidence were matters for me.

68. It is regrettable that this arrangement was not explained in advance of Mr. Higginbottom giving evidence but the court can understand how the payments came to be made without any improper motive. In any event, I am satisfied that knowledge of the arrangement has no impact on my assessment of the reliability of Mr. Higginbottom's evidence or on the conclusions I have reached. The relevance of Mr. Higginbottom's evidence to those conclusions is principally through the light that his contemporaneous correspondence throws on his understanding and state of mind and so on what Mr. Kite told him about the conversation with Mr. Ramanathan. The fact that the subsequent preparation of his witness statements and his attendance at court were treated as part of his consultancy duties and paid as such has no impact on those matters.

69. I have already noted that the Defendant's internal correspondence after 14th October 2020 did not, at least initially, refer to a definitive agreement of the kind now alleged. It did, however, indicate a belief that the 14th October 2020 conversation had brought about a change and that the change was good news. The Defendant says that a mere indication that the legal dispute would be resolved at the end of the project with a view to resolving matters amicably then would not have been regarded in this light. There is considerable force in this point particularly when it is coupled with the earlier exchanges in which Mr. Kite had expressed his disillusion with the project and with working with the Claimant combining that with reference to being willing to agree to an abandonment of the competing claims such as he now says was achieved. I will have to consider whether those latter matters caused Mr. Kite to read too much into what was said and/or to reach an understanding which was the result of wishful thinking. They do, however, provide an explanation of why Mr. Kite would have regarded an agreement of the kind which he says was made as being good news.

70. As I have noted above the Defendant set out its case that there had been an agreement for mutual abandonment of the claims in its letter of 16th November 2020. Mr. Ramanathan responded by his email of the same day in which he proposed a meeting but neither in that email nor in a further email sent the next day did he suggest that the Defendant's account of what had been said on 14th October 2020 was wrong. The

adjudicator regarded the Claimant's failure to deny the agreement as "telling". I found Mr. Ramanathan's explanation for this failure namely that he did not wish to antagonise the Defendant as unpersuasive. The Defendant's letter had been a response to the Claimant's service of a pay less notice and it was apparent that positions had become entrenched at that stage. However, the absence of a rebuttal does not carry the force in my assessment of the case which it did for the adjudicator. It does mean that the Claimant cannot pray in aid the making of a detailed and forceful response to the Defendant's contention at an early stage and to that extent its position is weakened but the absence of a rebuttal is not, in the context here equivalent to an admission of the truth of the Defendant's assertion.

71. I am satisfied that by the end of the conversation Mr. Kite believed that an agreement had been reached whereby the Claimant was to drop the liquidated damages claim in return for the Defendant abandoning any claim for loss and expense following from an extension of time. Against the background of the previous dealings and the views which Mr. Kite had expressed about the project such a belief is the only realistic explanation not only of Mr. Kite's evidence but, more important, of his actions thereafter including particularly his comments to Mr. Higginbottom.

72. How did Mr. Kite come to have that belief? In particular I have to consider whether it arose from a misinterpretation of what was said coupled with wishful thinking on Mr. Kite's part. I am satisfied that the belief derived from things said by Mr. Ramanathan and that Mr. Ramanathan's comments went beyond saying that the parties should get on with the works with a view to having an amicable resolution of the legal issues at the end of the project. I have reflected whether Mr. Kite's belief was the result of him reading too much into something along those lines said by Mr. Ramanathan. I am satisfied that is not a realistic explanation in the light of the level of distrust of the Claimant expressed by Mr. Kite in the period leading up to the conversation. An indication simply of an intention to resolve matters amicably at the end of the project would not have assuaged those concerns. Moreover, for Mr. Kite to have derived that belief solely from comments of the kind now recalled by Mr. Ramanathan would have involved a fundamental misunderstanding on the part of Mr. Kite. Misunderstanding and misinterpretation are risks in any conversation and those risks are particularly present in a conversation conducted as that of 14th October 2020 was by parties on mobile phones while driving. Nonetheless, the level of misunderstanding in respect of such an important matter which would be required for Mr. Kite's belief to have resulted from a misunderstanding is unlikely.

73. I am also influenced by the fact that I find Mr. Kite's recollection of the conversation to be more reliable than that of Mr. Ramanathan. I formed the clear impression that Mr. Kite's evidence of the conversation was the result of an actual recollection of what was said. I remind myself of the need for considerable caution in placing weight on a judicial assessment of demeanour and of the reasons I have set out above for such caution. Nonetheless, it is an element in my assessment of the evidence as a whole. In particular

I am satisfied that Mr. Kite's evidence that he said that the Defendant was "not a contractual company" was a recollection of an expression used in the conversation rather than a subsequent invention (whether deliberate or unconscious). The facts that Mr. Ramanathan did not recall that term being used and, indeed, went so far as to say that the phrase had not been said indicate that his recollection was less reliable.

74. Another matter casting doubt on the reliability of Mr. Ramanathan's recollection as to the events of 14th October 2020 was his evidence as to the sending of Mr. Maunder's email of that date to the Defendant. Mr. Ramanathan said that email had been sent after his conversation with Mr. Kite and after a further conversation between Mr. Maunder and Mr. Ramanathan in which the latter had authorised the despatch of the email. Mr. Ramanathan said that in terms before the luncheon adjournment on the second day of the trial. However, the email chain was produced in the course of that adjournment. This showed that the email had been sent earlier in the day and in particular that it had been sent before Mr. Ramanathan's conversations with Mr. Kite or Mr. Maunder. Mr. Ramanathan accepted that his recollection was mistaken in that regard. I am entirely satisfied that Mr. Ramanathan was not deliberately seeking to mislead me but this error was of note. It shows that Mr. Ramanathan's recollection was mistaken in at least some respects. However, it goes further than that. Although he was not trying to mislead me I am satisfied that Mr. Ramanathan was well aware of the significant support for the Claimant's case that would result from a finding that following his conversation with Mr. Kite he had spoken to Mr. Maunder and had authorised the despatch of an email making no reference to any agreement and treating the extension of time issue as still live. Mr. Ramanathan's ability to persuade himself of the truth of an error which supported the Claimant's case in this way is of note and must give me pause for thought in assessing the balance of his evidence.

75. It follows that I find that something said by Mr. Ramanathan caused Mr. Kite to believe that there was an agreement to drop the claims. As already stated I find that the thing stated by Mr. Ramanathan went beyond an indication that the Claimant would seek to resolve the legal disputes amicably at the end of the project.

76. I accept that Mr. Ramanathan did not propose the conversation with the intention of making such an agreement and that his intention had been to press the Defendant to complete the project. I reject Miss. Lee's suggestion that Mr. Ramanathan made the agreement with the deliberate intention of reneging on it once further progress on the works had been achieved. There is no basis for a finding that deliberate deception of that kind was present here. However, the intention with which a meeting is held or a conversation arranged is a starting point and not necessarily the end point. In the light of my findings as to the contents of the conversation against Mr. Ramanathan's initial intention I have to consider whether an agreement was actually reached and whether the parties were in fact *ad idem*. The test is an objective one and the question is whether viewed objectively having regard to the surrounding circumstances but without reference to undisclosed subjective intentions or beliefs there was a correspondence of

offer and acceptance in circumstances where the parties were intending to enter legal relations.

77. At one point Miss. Slow appeared to submit that in order to conclude that an agreement had been reached I would have to be in a position to make a finding as to the actual words used and then to consider whether they amounted to an agreement made with the requisite intention. Rightly she drew back from that contention and accepted that such a finding is not necessary. Where there was a short conversation with no contemporaneous or nearly contemporaneous record it will be rare that a court can safely make a finding as to the precise words used and I do not do so in this case. However, Miss. Slow did contend that the lack of clarity as to what was said meant that I would not be able to make a sufficiently clear finding as to the gist of the conversation so as to be satisfied that a binding agreement was made. In my judgement that is a not an accurate statement of the task in which I am to engage. I am to consider whether I can make a finding as to the gist of the conversation on the balance of probabilities. I am satisfied that I can and having made that finding I am then to consider the effect of the gist of the conversation when viewed objectively.

78. The fact that I have found that Mr. Kite's recollection better accords with the truth of the conversation than does that of Mr. Ramanathan is significant. That is because it leads to the conclusion that the conversation was in substance along the lines set out by Mr. Kite rather than the version set out by Mr. Ramanathan. In turn I am satisfied that there was an exchange in the context of both parties wishing to move forward to a rapid completion of the project in which the Claimant agreed to drop its potential claim for liquidated damages in return for the Defendant agreeing that it would not seek to claim loss and expenses consequent upon an extension of time. I am satisfied that the abandonment of the respective claims was on a final and not a provisional basis. Both sides were agreeing to draw a line under their respective legal claims and to progress the works without regard to those rights. That may very well be further than Mr. Ramanathan had intended to go when he set up the conversation and possibly further than he believed he had gone but I am satisfied that was the effect of the conversation when seen objectively having regard to the words used and putting aside the undisclosed subjective intentions.

79. It follows that the Claimant and the Defendant reached a binding agreement whereby the Claimant agreed to forego its right to liquidated damages under the Contract. I am satisfied that the agreement was a final abandonment of those rights by the Claimant. In those circumstances I need not address the effects of the alternative analysis that there was some form of waiver requiring consideration of whether the waiver could or could not be rescinded or revoked. Accordingly, the Claimant is not entitled to the declarations sought in its claim while the Defendant is entitled to a declaration as to the existence and effect of the agreement which I have found was reached.

80. The other declarations sought by the Defendant are in reality alternatives to the Defendant's case that there was an agreement precluding the liquidated damages claim.

The competing contentions in respect of those declarations are academic in the light of the conclusion I have reached as to the agreement. However, they were fully argued and were the subject of evidence and so I will set out my conclusions on them in short terms.

Was the Claimant precluded from serving a Non-Completion Notice and seeking Liquidated Damages under the Terms of the Contract?

81. The Contract provided separate dates for completion of each section of the works. Clause 2.28 provided that the Claimant should serve a Non-Completion Notice in the event of a failure to complete by the relevant Completion Date. The Claimant was then entitled to follow such a notice by notification under clause 2.29.2 for the Defendant to pay liquidated damages (that notice and the requisite pay less notice could be in the same document if notice was given before the date for final payment).

82. The Claimant says that it complied with those provisions and served effective notices requiring the payment of liquidated damages. The Defendant says that the Claimant was not entitled to serve such notices and the purported notices were ineffective. The Defendant's contention is that the Claimant was in breach of its obligation under clause 2.25 to grant an extension of time. Such a grant would have extended the Completion Date and would have meant that there had not been a failure to complete by that date with the further consequences that a Non-Completion Notice could not be served and nor could liquidated damages be claimed. The Defendant says that the Claimant's breach precluded the service of a Non-Completion Notice on which the entitlement to serve a clause 2.29 notice depended. This was, the Defendant says, the consequence of the proper construction of the Contract to the effect that if notice has been given by the Defendant under clause 2.24 then the Claimant cannot serve a Non-Completion Notice until it has notified the Defendant of its decision under clause 2.25. Alternatively the conclusion is said to follow from the application of the principle that a party is not entitled to take the benefit of his own wrong where service of the Non Completion Notice and the subsequent claim for liquidated damages were only possible because of the Claimant's wrongful failure to extend the Completion Date.

83. If I were to find the Defendant's argument correct as a matter of construction or of general principle it would be necessary to address the question of whether any or all of the Defendant's correspondence in respect of delay constituted effective notice under clause 2.24. However, I need not do so because I am satisfied that the Defendant's arguments fail and that if it had not been for the agreement made by Mr. Ramanathan and Mr. Kite the Claimant would have been entitled to serve notices under clauses 2.28 and 2.29 even if valid notice had been given under clause 2.24 and even if the Claimant should have responded by granting an extension of the Completion Dates.

84. That conclusion flows from the combination of the following matters:

i) The Completion Date in respect of each Section was a defined date.

ii) Clause 2.28 required the issue of a Non-Completion Notice if there was not completion of the works by the relevant Completion Date. The contrast between the provision in clause 2.28 that the Claimant "shall" issue a Non-Completion Notice and that in clause 2.29 providing that it "may" issue notices under that clause is significant. It is readily understandable that the Claimant is required to issue a Non-Completion Notice so that its assessment of whether the works have been completed is clearly expressed.

iii) Clause 2.28 also envisages the fixing of a new Completion Date after the passing of the old Completion Date and after the issuing of a Non-Completion Notice. It provides that such fixing will cancel any Non-Completion Notice previously issued on the footing of the former date. However, it is inherent in this that until a new date has been fixed the former Completion Date remains in being; that the obligation to issue a Non-Completion Notice remains in force; and that the entitlement to claim liquidated damages remained.

iv) Clause 2.29.3 provides for the repayment of liquidated damages or an increase of payment by the Claimant (where sums have been withheld) where a new Completion Date has been fixed. This clearly contemplates that a new Completion Date will be fixed not only after a former Completion Date has passed but after a Non-Completion Notice has been served under clause 2.28 followed by notice under clause 2.29 and, indeed, payment of the liquidated damages sought by such a notice.

v) Similarly, clauses 2.25.2 and 2.25.5 contemplate a new Completion Date being fixed after a former Completion Date has passed. This is incompatible with the Defendant's contention that the service of a notice under clause 2.24 precludes the issue of a Non-Completion Notice until after a decision as to an extension of time has been made under clause 2.25.

85. The effect of those matters is that the Contract properly interpreted provides for the Completion Date to remain as defined with the consequences which follow from failure to complete the works by that date until a new Completion Date is actually fixed. A failure to fix a new Completion Date in response to a notice under clause 2.24 and/or a failure to do so timeously may be a breach of the Claimant's obligations under clause 2.25. It may entitle the Defendant to seek a declaration and to refer the dispute to adjudication but it does not mean that the Completion Date is to be treated as if it has been replaced. Allowing the Claimant to proceed on the footing of the Completion Dates as defined in the Contract and to claim liquidated damages for non-completion would not be allowing the Claimant to take advantage of its own wrong but would be allowing the Contract to operate on the basis of the Completion Dates which had not yet been altered.

Was the Contractual Provision for Liquidated Damages void or unenforceable as a Penalty Clause?

86. The Contract made provision for liquidated damages at clause 2.29 and in the Contract Particulars as set out above.

87. There was no dispute as to the applicable law as set out in *Cavendish Square Holding v Makdessi* [2015] UKSC 67, [2016] AC 1172. I have been referred to the summaries of the principles derived from that case as set out in *ZCCM Investments Holdings plc v Konkola Copper Mines plc* [2017] EWHC 3288 (Comm) at [32] and in *Eco World-Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd* [2021] EWHC 2207 (TCC) at [50] – [54] with O'Farrell J noting in the latter case the commercial benefits which the parties to a contract can derive from an effective liquidated damages clause as set out in *Triple Point Technology Inc v PTT Public Company Ltd* [2021] UKSC 29. In short the contract in question has to be construed in accordance with the established principles of construction having regard to the circumstances at the time the contract was agreed. Having done that the court has, first, to consider the interest of the innocent party in enforcement of the contract and the level of loss which it could suffer in the event of a breach. That having been done the question becomes one of whether the damages payable under the clause in issue are out of all proportion to that interest or loss such as to be exorbitant or unconscionable.

88. Here the Defendant says that the liquidated damages provision was penal in part because it was not the result of a bespoke assessment of the loss which might be suffered by reason of a breach of the Contract. Rather the figures were standard figures which other Mansion companies had used on different projects; there was no bespoke negotiation with the figures being imposed on the Defendant; the same sum was payable regardless of room type even though different rooms would be let at different rates; and the figures did not reflect the actual loss which would be suffered by the Claimant.

89. The Claimant says that there was in fact negotiation about the figures. That contention was correct and the Defendant did obtain a modest revision of the liquidated damages provision which had been proposed by the Claimant. Mr. Maunder had said on 18th December 2019 that the figures were fixed because they were a requirement of those providing funding to the Claimant. The Defendant had responded by calling for the removal of the reference to a sum of £1,000 per week for communal areas and had been successful in that request with that element not appearing in the Contract.

90. The Claimant also says that the sums are not disproportionate when seen in the context of the consequences of a breach. I accept that delay in completing the accommodation would mean that the Claimant would not only lose rental for the period of the delay but would also be likely to have to incur the cost of providing alternative accommodation for those students who would have been accommodated in the units if they had been completed. It is of note that in her cross-examination of the Claimant's witnesses Miss. Lee had referred to this as a "double whammy" when pointing to the benefits to the Claimant of doing a deal with the Defendant. Indeed, in his email of 19th December 2019 calling for a variation of the figures Mr. Kite had said that the Defendant was not challenging the figure of £100 per week per room because the Defendant understood

and agreed that this was "to relocate students". In addition I accept the point made by Miss. Slow as to the importance of timing in light of the type of accommodation and the time when the building and refurbishment works were being undertaken. If a room was not available at the start of the academic year then the Claimant would be at risk of being unable to let it at all during that year.

91. I am satisfied that the Claimant's interest in the completion of the units on time was a very significant one. It is also of note that the Defendant was in a sufficiently strong negotiating position to obtain a variation in the terms initially proposed by the Claimant. The rates which finally remained were accepted by the Defendant at the outset as being appropriate and assessing the position as at the making of the Contract. In those circumstances the effect of the liquidated damages provision cannot be said to have been wholly disproportionate. It follows that the provision would not fall to be struck down as a penalty.

Was the Provision for Liquidated Damages inoperative and unenforceable by Application of the Approach in *Bramall & Ogden v Sheffield City Council?*

92. The Defendant said that clause 2.29 was inoperable by application of the approach in *Bramall & Ogden v Sheffield City Council.* This was because of an alleged incompatibility between, on the one hand, the provision for the taking of partial possession in clause 2.30 combined with the mechanism in clause 2.34 for reducing liquidated damages and, on the other, the provisions of clause 2.29 and the Contract Particulars. In essence the contention was that it was not possible to apply a proportionate reduction to the figures in the Contract Particulars because a Relevant Part may contain areas other than bedrooms.

93. The Claimant said that here there had been no taking of partial possession so that even if the clause would be inoperable in such circumstances it was operable and enforceable in the circumstances which had in fact taken place. In any event the Claimant said that the clause was capable of being operated effectively because the reference to a rate per room in the Contract Particulars was simply a mechanism for quantifying the damages for each section and the reduction provided for in clause 2.34 could be applied to those figures as a matter of arithmetic.

94. The approach to be taken was explained by O'Farrell J in *Eco World-Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd* at [68] where having referred to textbook passages expressed in general terms she said:

> "It is important not to elevate statements of general principle into an inflexible rule of law. The above extracts do not state that liquidated damages provisions will never be enforceable where sectional completion or partial possession is used without any related reduction in the liquidated damages payable; they identify the potential danger of failing to draft effective provisions to respond in such circumstances. In each case, it is necessary to construe the relevant provisions of the contract in question, adopting the established

> rules of contractual interpretation, to determine whether they give rise to a liquidated damages regime that is certain and enforceable."

95. Applying that approach neither *Bramall & Ogden v Sheffield City Council* nor the subsequent case of *Taylor Woodrow Holdings Ltd v Barnes & Elliot Ltd* [2004] EWHC 3319 (TCC) were setting out matters of generally applicable principle. As O'Farrell J said at [74], in those cases:

> "…the courts did not reject, as automatically fatal, the concept of one rate of liquidated damages for late completion of the works where there is sectional completion or partial possession; rather, the express provisions in each case simply did not work because of errors in drafting."

96. In the particular case before her, O'Farrell J held that the provisions were clear and enforceable notwithstanding the absence of any provision for reduction in the event of partial possession.

97. Here clause 2.34 did provide for a reduction in the rate of liquidated damages. The question for me is whether on a proper construction the provisions of clauses 2.29 and 2.34 when read together with the balance of the Contract are clear and capable of being applied. I have regard to the fact that in *Bramall & Ogden v Sheffield City Council* HH Judge Hawser QC found particular terms inoperable. The terms in question were not identical to those here and so I have to consider whether the difficulties which were present in that case and which prevented operation of the provisions are present here. I have to do so in the light of the circumstances as they were at the commencement of the Contract and I do not accept the Claimant's argument that whether a particular term is operable or not is to be judged in the light of the circumstances as they happen to have turned out in the course of the performance of the Contract.

98. I do, however, agree with the Claimant that the Contract sets out a mechanism which is clear and which can be operated effectively. The Contract Particulars set out a value to be attributed to each Section. The liquidated damages are to be paid at a rate calculated by reference to the number of bedrooms and so forth but that is not a rate per unoccupied bedroom but per bedroom, kitchen and so forth in each section. That is a matter which is capable of being determined. Clause 2.34 provides a mechanism for calculating the reduction to be applied to that rate and that reduction can then be calculated and applied. The position stated shortly is that clause 2.29.2.1 provides for liquidated damages at the rate set out in the Contract Particulars and clause 2.34 in turn provides for a proportionate reduction in that rate together with a means of calculating that proportion. At worst the mechanism might be thought somewhat cumbersome but it is capable of being operated.

Conclusion.

99. In the light of those findings the Claimant is not entitled to the relief sought in the Particulars of Claim. The Defendant is entitled to a declaration that there was an agreement whereby the Claimant agreed to abandon its entitlement to liquidated

damages in exchange for the Defendant's abandonment of any loss and expense claim but the other declarations sought by the Defendant fall away.