Neutral Citation Number: [2023] EWHC 2152 (TCC)

Case No: HT-2023-000081

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

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

Date: 24/08/2023

Before :

NEIL MOODY KC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

BERKELEY HOMES (SOUTH EAST LONDON) LIMITED	**First Claimant**
- and -	
BERKELEY HOMES PLC	**Second Claimant**
-and-	
JOHN SISK AND SON LIMITED	**Defendant**

- -
- -

Thomas Lazur (instructed by **Howard Kennedy**) for the **Claimants**
Sarah Hannaford KC and Ben Graff (instructed by **Hawkswell Kilvington Limited**) for the **Defendant**

Hearing date: 5th July 2023

- -

APPROVED JUDGMENT

NEIL MOODY KC :

Introduction

1. This is a dispute between an employer and a contractor as to which party is liable for alleged omissions and errors in a design. The matter comes before the Court as a Part 8 claim. It is the Claimant employer's case that the dispute can be resolved as a matter of pure contractual construction. The Defendant contractor disputes the Claimant's construction of the contract and also takes a preliminary objection to the use of the Part 8 procedure on the basis that determining the proper construction of the contract necessitates considering substantial disputes of fact.

2. Thomas Lazur appeared for the Claimants; Sarah Hannaford KC and Ben Graff appeared for the Defendant. I have been greatly assisted by the written and oral submissions of counsel on both sides.

The Factual Background

3. The Claimants ("Berkeley") are two related companies who together acted as employer. The Defendant contractor is John Sisk and Son Limited ("Sisk"). The project involved the construction of three bridges over the Jubilee Line and Docklands Light Railway and a new station entrance at Twelve Trees Park, London ("the project").

4. In July 2017 Berkeley invited Sisk to tender for a Pre-Contract Services Agreement ("PCSA"), and this was formally executed on 24th August 2018. Thereafter the parties worked on the tender design, although the scope of Sisk's

involvement is contested. Putting it neutrally, during the PCSA period, the tender design was developed. The PCSA final account was agreed on 11th July 2019. A formal building contract was executed on 10th December 2020 ("the Contract"). On 29th July 2021 Berkeley and Sisk entered into two novation agreements, one with Atkins Limited ("Atkins"), the project engineers, and one with Hawkins Brown Design Limited ("Hawkins"), the project architects.

5. The parties have subsequently fallen in to dispute. It appears that there are errors and omissions in the tender design. I was told that Sisk seeks extensions of time and additional costs on the footing that Berkeley is liable for those errors under the Contract. Berkeley denies liability and argues that Sisk is liable because it assumed responsibility for the tender design.

6. Whilst there is a dispute between the parties, no proceedings (other than this Part 8 claim) have been issued. I was told that there have been no adjudications. Indeed, it appears that Sisk's claims have not yet been formally articulated or quantified. I was told that the likely value of the dispute is a "high seven figure sum".

7. Berkeley have served Particulars of Claim. There is no Defence, but Sisk served a "Summary of the Defendant's Position" ("SDP"). This objected to the use of Part 8 and then set out Sisk's case on construction in the alternative. Sisk also served a witness statement dated 18th April 2023 from Dominic Hodges, managing director of Sisk's civil engineering business unit. The bundles run to 1,800 pages.

CPR Part 8

8. As I have indicated, Sisk raises a preliminary objection that the matter is not suitable for resolution under the Part 8 procedure. This provides:

> Types of claim in which the Part 8 procedure is used
>
> 8.1 (1) The Part 8 procedure is the procedure set out in this Part.
>
> (2) A claimant may, unless any enactment, rule or practice direction states otherwise, use the Part 8 procedure where they seek the court's decision on a question which is unlikely to involve a substantial dispute of fact.
>
> …
>
> (4) The court may at any stage order the claim to continue as if the claimant had not used the Part 8 procedure and, if it does so, the court may give any directions it considers appropriate.
>
> …
>
> Contents of the claim form
>
> 8.2 Where the claimant uses the Part 8 procedure the claim form must state –
> (a) that this Part applies;
> (b) (i) the question which the claimant wants the court to decide; or
> (ii) the remedy which the claimant is seeking and the legal basis for the claim to that remedy;
> …

9. Where the Part 8 procedure is used, the Claimant must file any written evidence with the claim form (CPR 8.5(1)), and the Defendant must file any written evidence with their acknowledgment of service (CPR 8.5(3)). Where a Defendant contends that the Part 8 procedure should not be used, they must state their reasons when filing an acknowledgement of service (CPR 8.8(1)). A defence is not required (CPR 8.9(a)(iii)).

10. As the *White Book* states at 8.0.1:

> In essence, the Pt 8 procedure is designed for the determination of relevant claims without elaborate pleadings. If the procedure is misused, the defendant can object and equally the court on its own initiative, and as part of its function to manage claims, will order the claim to proceed under Pt 7 and give appropriate directions.

11. Thus, the power under CPR 8.1(4) is essentially a case management power to be exercised in accordance with the overriding objective. The Court's power to grant declarations is of course discretionary.

12. In *Merit Holdings Limited v. Michael J Lonsdale Limited* [2017] EWHC 2450 TCC), Jefford J sounded a note of caution against the over-liberal use of Part 8. She noted:

> [21] … It is, therefore, an express requirement of the use of the Part 8 procedure that the question for the Court is one that is unlikely to involve a substantial dispute of fact and it is, it seems to me, to be implied in the rules that the question should be framed with some degree of precision and/or be capable of a precise answer.
>
> [22] The experience of this court shows that there is a real risk of the Part 8 procedure being used too liberally and inappropriately with the risks both of prejudice to one or other of the parties in the presentation of their case and of the court being asked to reach ill formulated and ill-informed decisions.
>
> …

> [31] Had a Part 7 procedure been adopted, then on the face of the pleadings, the parties' positions would have been fully set out and, if not, further information could have been sought. If there were no need for factual evidence, there would have been mechanisms available (in the discretion of the court) to resolve the issue of the contractual relationship between the parties promptly - for example, by the hearing of a preliminary issue or an expedited hearing - and on a surer footing than is offered by the Part 8 procedure in circumstances such as this.
>
> [32] All these issues seem to me to illustrate why care should be taken by the parties and the Court in the deployment of the Part 8 procedure.

13. In *Cathay Pacific Airlines Ltd v. Lufthansa Technik* [20019] EWHC 484 (Ch) the Deputy Judge refused to adopt the Part 8 procedure where there were disputed issues of fact. He held:

> Wherever a party is contemplating commencing proceedings under CPR Part 8 in respect of a claim which could be started under CPR Part 7, the following steps ought generally to be taken:
>
> a) The proposed Defendant ought to be notified that the use of CPR Part 8 is being contemplated.
>
> b) A brief explanation ought to be provided as to why CPR Part 8 is considered to be more appropriate than under CPR Part 7 in the particular circumstances of the case.

c) A draft of the precise issue or question which the Claimant is proposing to ask the Court to decide ought to be supplied to the Defendant for comment.

d) Any agreed facts relevant to the issue or question ought to be identified.

14. I note that this is set out in the *White Book* and I consider it to be a statement of good practice which ought to be followed in the general run of cases. I drew this passage to the attention of counsel. I was told that Berkeley had informed Sisk of its intention to issue a Part 8 claim, and there had been some discussion about suitable declarations, but these could not be agreed. The fourth step had not been taken, and so the dispute on the facts only became apparent after Sisk's SDP was served.

15. In *Vitpol Building Services v. Michael Samen* [2008] EWHC 2283 (TCC) at [18], [19] Coulson J (as he then was) emphasised the flexibility of this Court's procedures such that a hybrid procedure which determined limited factual disputes could be accommodated under Part 8. In my judgment the adoption of such a procedure requires that the parties should agree the process for determining the facts (for example, on the documents or by way of oral evidence) or, in the absence of agreement, apply to the Court for directions.

16. In order to address Sisk's objection to the use of Part 8, I will next set out the key contractual provisions and the Court's approach to construction. I will then explain the parties' arguments so that the extent of any factual disputes may be assessed before I return to the question of the suitability of Part 8.

The Relevant Contractual Provisions

The Pre-Contract Services Agreement

17. The recitals recorded that Berkeley wished to procure the design and construction of the project and that Sisk was engaged to carry out the Pre-Construction Services which were then described in Appendix B (which I set out below). Atkins and Hawkins were also engaged as design consultants by Berkeley during the PCSA period.

18. The PCSA provided as follows:

> 2. Contractor's duties and obligations
>
> 2.1 The Contractor has represented to and hereby warrants to the Employer that it is fully experienced in the design development and construction of projects of the scope, complexity, size and technical sophistication of the Project and that it possesses the high level of skill and expertise commensurate with such experience…
>
> 2.2 The Contractor shall provide the expertise and resources to:-
>
> …
>
> 2.2.3 Contribute to and advise on the development of the design including assisting the Employer in procuring any Requisite Consents;
>
> …

2.4 Insofar as the Contractor carries out any design as part of the Pre-Construction Services, the Contractor warrants and undertakes to the Employer that:

2.4.1 it shall exercise all the reasonable skill, care and diligence as may be expected of a designer of the appropriate discipline for such design experienced in preparing designs for works of a similar size, scope and complexity as the Project.

…

2.7 The Contractor acknowledges that the Employer shall be relying upon the skill, judgement and expertise of the Contractor in the performance of the Pre- Construction Services.

…

2.11 The Contractor shall procure that the Pre-Construction Services are carried out:

(a) in accordance with the Employer's Requirements…

…

3 Employer's Duties and Obligations

3.1 The Employer shall provide the expertise and resources to:-

…

3.1.3 Progress the production of the design by the Design Consultants;

…

10 Building Contract

10.1 The Building Contract shall be substantially in the form set out in Appendix F…

10.3 On entering into a Building Contract the employment of the Contractor under this agreement shall forthwith automatically terminate and all the obligations performed by either party under this Agreement shall be deemed to have been performed under the Building Contract.

…

10A.2 During the Pre-Construction Period, the Employer shall develop the Employer's Requirements…

Appendix B

Pre-Construction Services

To be agreed with Contractors but will be based upon deliverables as follows:

i. Manage and lead design development to enable in advance of completing the Building Contract the confirmation of an agreed Guaranteed Maximum Price and Time for the Completion of the Works - it is recognised that there may be risks which the Employer may wish to retain at the end of the PCSA process, however the emphasis must remain on mitigating the whole of the risk register during the PCSA stage;

ii. Critique and report on Employer's Requirements.

19. The Employer's Requirements were attached at Appendix D. These included a document entitled "Stephenson Street – Bridge Package – Scope of Works – Rev 04". This provided:

> …
>
> 2.2. Design
>
> 2.2.1 The initial design of all the permanent works is currently partway through RIBA Stage 3. Over a target period of approx. 4 months this design will be developed to RIBA Stage 4 by Atkins Engineers [employed by BHSEL]…
>
> 2.2.2 Hawkins Brown Architects [employed by BHSEL] are the Bridge and Station Works Architects – as with point 2.2.1 they will also develop the design to RIBA Stage 4 during the PCSA period.
>
> 2.2.3 The design completed to RIBA Stage 4 will be considered as the reference design. The Contactor [sic] has the scope to both develop and alter this design during the PCSA.
>
> 2.2.4 Post PCSA it is envisaged that Atkins engineers will be Novated to the Contractor to fully complete the RIBA stages under the Contractor.
>
> …

> 2.2.6 Post PCSA it is also envisaged that Hawkins Brown will also be Novated to the Contractor to fully complete the RIBA stages under the Contractor.
>
> 2.2.7 When RIBA Stage 4 is achieved the Contractor will take full design responsibility for the whole of the works from both an Architectural and Engineering perspective.
>
> …
>
> The Contractor is responsible for
>
> …
>
> 2.2.12 All design responsibilities described within any of the tender specifications

The Building Contract

20. The Contract provided as follows:

> Definitions 1 (1)…
>
> (t) "Adopt" means to check, take over and assume responsibility for and "Adopted" shall be interpreted accordingly.
>
> Contractor's general obligations
>
> 8 (1) The Contractor shall subject to the provisions of the Contract and save in so far as it is legally or physically impossible:
>
> (a) Design construct and complete the Works and

…

Contractor's design responsibility

(2)…

(b) Where any part of the Works has been designed by or on behalf of the Employer the Contractor shall Adopt the design. Any reference to the design which the Contractor has prepared or shall prepare or issue for the Works shall be deemed to include a reference to any design prepared by or on behalf of the Employer and which the Contractor has Adopted or shall Adopt and any design the Contractor has prepared or issued or shall cause to be prepared or issued by others on his behalf.

(c) Subject always (as regards the Contractor's obligation in respect of the design of the works) to clauses 8(2)(a) and 8(2)(b), the Contractor warrants and undertakes to the Employer that the Works and each Section will when completed comply with the Employer's Requirements…

…

36(1) The Works shall be designed constructed and completed in accordance with the Contract and… shall be carried out, constructed and completed:

…

(oo) in accordance with the Employer's Requirements;

…

> Alterations and Additional Payments
>
> 51(1) The Employer's Representative shall have power to alter the Employer's Requirements …
>
> (3) The Contractor is encouraged to propose changes to the Works including…any other potential savings to designs and specifications…
>
> 52(1) If ordered by the Employer's Representative under clause 51(1) the contractor shall submit his quotation for the work as altered … and his estimate of any delay
>
> …
>
> 53(1) If the Contractor intends to claim any additional payment pursuant to [various clauses] he shall give notice in writing of his intention to the Employer's Representative…

21. The Employer's Requirements were appended to the Contract at Appendix 1Q. These had been developed since the version appended to the PCSA and provided as follows:

> …
>
> 2.2 Design
>
> 2.2.1 Atkins Engineers have carried out the Structural, MEP and Highways design to date. The Permanent works design is at Stage 4 for the Bridges. CAT III checks have been carried out to BR-1 & BR-2 only at this point.

2.2.2 Hawkins Brown Architects are the Bridge and Station Works Architects – as with point 2.2.1 they have developed the design to RIBA Stage 4.

2.2.3 The design completed to RIBA Stage 4 will be considered as the reference design. The Contractor has the scope to both develop and alter this design via contractor's proposals which should be noted below the line in the tender submission…

2.2.4 Post Stage 4 it is envisaged that Atkins Engineers will be novated to the Contractor to fully complete RIBA Stages under the Contractor.

…

2.2.6 It is also envisaged that Hawkins Brown will also be Novated to the Contractor to fully complete the RIBA stages under the Contractor…

2.2.7 When RIBA Stage 4 is achieved the Contractor will take full design responsibility for the whole of the works from both an Architectural and Engineering perspective.

…

The Contractor is responsible for

…

2.2.12 Subject to 2.2.7 all design including all design responsibilities described within the List of Documentation.

The Novation Agreements

22. The two novation agreements were in similar terms and provided as follows:

> …
>
> (A) The Client [Berkeley], Consultant [Atkins or Hawkins] and Contractor [Sisk] have agreed that from the date of this agreement the Contractor shall assume the obligations of the Client and that the Consultant shall perform its obligations under the Appointment in favour of the Contractor and that the Client and the Consultant shall subject to the terms of this agreement each release the other from any obligations owed by the other to them under the Appointment.
>
> …
>
> 1.1 The Client hereby releases and discharges the Consultant from any and all obligations and liabilities owed to the Client under the Appointment.
>
> 1.2 The Consultant undertakes to perform the Appointment and to be bound by its terms in every way as if the Contractor were, and had been from the inception, a party to the Appointment in lieu of the Client.
>
> …
>
> 1.4 Without prejudice to clause 1.2, the Consultant warrants to the Contractor that it shall be liable for any loss or damage suffered or incurred by the Contractor arising out of any negligent act, default or breach by the Consultant in the performance of its obligations under the Appointment (whether or not notified or complained of) prior to the date of this agreement…

Construction: Legal Principles

23. The Court's approach to the construction of a contract is well known and does not require extensive citation here. It was common ground between the parties that the correct approach was set out by Carr J (as she then was) sitting in this Court in *EE Limited v. Mundio Mobile Limited* [2016] EWHC 531 (TCC):

> [28] The law can be summarised un-controversially, the key principles emerging in a well-known series of high-level authorities including the following: *Investors Compensation Scheme Ltd v West Bromwich Building Society (No 1)* [1998] 1 WLR 896 (at 912-913); *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101; *Rainy Sky SA v Kookmin Bank Ltd* [2011] 1 WLR 2900; *Makdessi v Cavendish Square Holdings BV* [2015] 3 WLR 1373 and *Arnold v Britton* [2015] UKSC 36.
>
> [29] When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. The court does so essentially as one unitary exercise by focussing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the [contract], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.

> Commercial common sense and the surrounding circumstances should not be invoked to undervalue the importance of the language of the provision to be construed. A court will not readily accept that people have made linguistic mistakes, particularly in formal documents, but there may be cases where it is clear in context that something has gone wrong, but it requires a strong case to persuade a court that that is the case. Nor should a court reject the natural meaning of a provision simply because it appears to have been imprudent commercially or otherwise. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed.
>
> [30] Agreements should be read as a whole and construed so far as possible to avoid inconsistencies between different parts on the assumption that the parties had intended to express their intentions in a coherent and consistent way. One expects provisions to complement each other. Only in the case of a clear and irreconcilable discrepancy would it be necessary to resort to the contractual order of precedence to resolve it - see *RWE Npower Renewables Ltd v JN Bentley Ltd* [2014] EWCA Civ 150 (at paragraphs 15 and 17).

24. I adopt that summary of the law. In the context of this case and the suitability of Part 8, the salient point is that the meaning of the Contract has to be assessed in light of the facts and circumstances known or assumed by the parties at the time it was executed.

The Parties' Submissions

25. I turn next to consider the arguments which are raised on the question of construction.

26. Berkeley says that it seeks the Court's determination on a "simple point of contractual interpretation". Mr Lazur drew my attention to authorities for the proposition that – generally speaking – an employer does not impliedly warrant that a tender design will be buildable: *Alexander Thorn v. The Mayor and Commonalty of London* (1876) 1 App. Cas 120, *MT Hojgaard A/S v. E.ON Climate and Renewables UK Robin Rigg East Limited* [2017] UKSC 59. He accepted however that the point would turn on the terms of the particular contract.

27. He submitted that:

    i) The key terms setting out Sisk's entitlement to additional payment pursuant to the Contract were at clauses 51 to 53, and there was no express term providing a route to recovery for costs caused by an error or omission in the tender design.

    ii) Sisk took complete responsibility for the whole of the design without reservation: see in particular clauses 8(1)(a) and 8(2)(b) and (c). This occurred at the point of execution of the Contract.

    iii) Sisk's arguments (which relied on the Employer's Requirements – see paragraph 31 below) were to the effect that Sisk had no responsibility for the design until RIBA Stage 4 had been completed and/or that paragraphs 2.1.1 and 2.2.2 of the ERs contained warranties and/or representations that Atkins and/or Hawkins had completed the RIBA Stage 4 design and had done so with reasonable skill and care. But these arguments should be rejected because the ERs needed to be treated with caution and the Court should consider the function that the ERs

performed when incorporated in the Contract. The purpose of the ERs was to define the scope of Sisk's work. There was no contractual mechanism whereby the ERs could impose obligations on Berkeley; there was no language expressing any intention that Berkeley would warrant the accuracy of and/or take full responsibility for the RIBA Stage 4 design, and there was no wording which could support a warranty that the design was free of error or completed with reasonable care. The ERs were essentially a pre-contract document used for the purpose of tender and the paragraphs relied upon by Sisk simply described the process by which the contractor would consider the reference design and make proposals for changes as part of its tender.

iv) The process described by the ERs was concluded by Sisk entering into the Contract, and it was at that point that Sisk assumed full design responsibility.

v) Even if Sisk's scope of work was limited to developing the design from RIBA Stage 4, that would not affect Sisk's unambiguous assumption of responsibility for the tender design under the express terms of the Contract.

vi) Sisk's construction of the ERs directly contradicted the express assumption of responsibility under clause 8(2)(b).

vii) Sisk's approach would mean that there could be a dispute as to when RIBA Stage 4 was achieved. That would be an issue of fact, and the parties' intention must have been to provide contractual certainty.

viii) To the extent that it was necessary to do so, Mr Lazur relied upon the priority clause in the Contract which indicated that in any case of ambiguity the Contract terms were to take priority over the ERs.

28. Berkeley's primary case was that these matters could and should be resolved within the four corners of the Contract, but, to the extent that there was any ambiguity concerning the meaning and effect of clause 8(2)(b), then Berkeley relied on the following matters as factual matrix supporting its construction:

i) the fact that Sisk had ample opportunity to check the design before taking full responsibility for it under the Contract;

ii) the fact that the draft novation agreements appended to the Contract confirmed that the novation would cover design works both before and after the date of novation.

29. Berkeley then advanced an alternative construction of the Contract to the effect that Sisk could have taken on responsibility for the totality of the design pursuant to clause 8(2)(b) at the point when the novation agreements were executed.

30. A further argument was advanced in the Particulars of Claim that, if it was open to Sisk to refuse the adoption of the design after the Contract was agreed, then Sisk waived any right it may have had to claims against Berkeley arising from omissions or errors in the design by the execution of the deeds of novation. However, this argument was abandoned during the hearing.

31. For Sisk, Ms Hannaford submitted as follows:

i) The ERs set out the scope of Sisk's works.

ii) The scope of Sisk's design responsibility was set out in section 2.2 of the ERs.

iii) Sisk was to take on design responsibility only when RIBA Stage 4 was achieved. Accordingly Sisk had no responsibility to develop the design up to Stage 4; that was a matter for Berkeley and its consultants.

iv) Berkeley warranted (by way of paragraphs 2.2.1 and 2.2.2 of the ERs) that Atkins and Hawkins had developed the design to the completion of RIBA Stage 4 and had done so with reasonable skill and care.

v) Clause 8 of the Contract did not assist Berkeley since:

a) Clause 8(1) was expressly stated to be "subject to the provisions of the Contract" which included the ERs.

b) Clause 8(1)(b) provided that Sisk was to provide design services "so far as the necessity for providing the same is specified in or reasonably to be inferred from the Contract" which (again) included the ERs.

c) Clauses 8(2)(b) and (c) related to Sisk's ultimate design responsibility and obligation to ensure that the final design was compliant with the Contract.

d) Clause 8(2)(b) provided that Sisk was to adopt works that had been designed by or on behalf of Berkeley, but it did not concern the work that Sisk was to do and did not impose any obligations

on Sisk to do any work as that was governed by clause 8(1). The effect of this provision was that any part of the design prepared by or on behalf of Berkeley fell within the ambit of clause 8(2)(c) and as such Sisk would be liable in the event that the design (when finalised) did not comply with the ERs, performance specifications and other contractual requirements.

32. Sisk therefore submitted that clause 8 of the Contract and paragraph 2.2 of the ERs could and should be read together as:

i) Berkeley and its consultants developed the design to the completion of RIBA Stage 4; and

ii) After RIBA Stage 4 has been properly completed and the design has been finalised (by Berkeley and its consultants), Sisk will (a) assume responsibility for the design and will be liable in the event that it does not comply with the ERs, performance specifications and/or other contractual requirements; and (b) carry out all design work that is necessary during the remainder of the project.

33. Sisk submitted that Berkeley's approach:

i) ignored section 2.2 of the ERs;

ii) meant that Sisk accepted responsibility for the design without reservation notwithstanding the very clear reservations in section 2.2 of the ERs;

iii) meant that paragraphs 2.2.1 and 2.2.2 created no rights or obligations between the parties; and

iv) failed to offer any explanation as to the meaning of paragraphs 2.2.7 and 2.2.12.

34. In support of its construction, Sisk relied upon other contract documents including:

i) The contract price analysis which (Sisk said) showed that Sisk made allowance only for design work required in RIBA Stages 5 to 7;

ii) The contract programme which showed that Berkeley was to issue the RIBA Stage 4 drawings and specifications on the same day as the Contract was to be executed;

iii) The PCSA Final Account Agreement which provided in the Risk Register that "significant design changes" were noted as a Berkeley risk and "stage 4" was noted to be a "client design period".

35. Sisk submitted that these documents evidenced the parties' intention that Berkeley would issue the Stage 4 design by the time the parties entered into the Contract and that any failure to do this was Berkeley's risk and responsibility.

36. As to Berkeley's alternative case (to the effect that Sisk assumed responsibility for the design on the execution of the novation agreements), Sisk submitted that:

i) The novation agreements were executed more than six months after the Contract and so could not form part of the factual background against

which the Contract was agreed (and so could not serve as an aid to construction).

ii) Sisk was required by the terms of the Contract to enter the novation agreements and so in executing those agreements, Sisk was merely acting in accordance with its obligations under the Contract and not agreeing to vary it in any way.

37. As to Berkeley's case on waiver, Sisk submitted that Berkeley had failed to show a clear and unequivocal representation and/or that it relied on the same.

The Declarations Sought

38. In the Particulars of Claim Berkeley sought the following five declarations:

i) The Employer's Requirements do not provide a warranty that the design of the works will be complete to RIBA Stage 4 or otherwise free of error or omission at the date of the Building Contract and/or from the point at which Sisk assumed responsibility for the design.

ii) The Employer's Requirements cannot be relied on by Sisk as representations to form any cause of action.

iii) By the execution of the Building Contract, alternatively by the execution of the deeds of Novation, Sisk has adopted the whole of the design and in so doing has assumed responsibility for the whole of the design without qualification.

iv) Sisk is not entitled to any claim against Berkeley Homes pursuant to or for breach of the Building Contract arising from any error or omission in the design.

v) Such other declaratory relief that the court may consider appropriate having heard the submissions of both parties.

39. Sisk's SDP sought the following declarations:

i) On a true construction of the Building Contract, Sisk was not under any obligation to complete the RIBA Stage 4 design and/ or did not have any responsibility for the design until RIBA Stage 4 had been completed by or on behalf of Berkeley; and/or

ii) Paragraphs 2.2.1 and 2.2.2 of the ERs constituted warranties and/ or representations that Atkins and Hawkins Brown had completed the RIBA Stage 4 design and had done so with reasonable skill and care.

The suitability of Part 8: Analysis

40. Having outlined the arguments on construction, I return to consider whether this dispute is suitable for determination under Part 8.

41. In the Particulars of Claim, Berkeley makes a number of factual averments in support of its case on construction:

i) During the PCSA period, the parties developed the design (para 2).

ii) Sisk's involvement in and responsibility for the development of the RIBA Stage 4 design and the development of the Employer's

Requirements as a result of its performance of the PCSA is relied on as relevant factual background (para 15).

iii) The ERs were amended and agreed by both parties during the PCSA period (para 27).

iv) The ERs recorded the parties' common understanding of the status of the design at the time of the Contract (and therefore paragraphs 2.2.1 and 2.2.2 cannot have amounted to warranties) (para 37(1)).

v) During the pre-Contract period, Sisk satisfied itself that the design was sufficiently developed for it to accept responsibility for the totality of the design (para 37(2)).

vi) By the deeds of novation Sisk waived any right it may have had to claims against Berkeley arising from errors in the design (para 38(3)).

42. Perhaps recognising that these averments gave rise to factual disputes, Berkeley modified its position in submissions by conceding that it no longer relied upon the point that the ERs represented the parties "common understanding", and, as I have already indicated, the waiver point was not pursued. But Berkeley maintained that Sisk had "every opportunity" during the PCSA period to consider the design before executing the Contract.

43. Sisk's SDP made clear that it disputes Berkeley's case on the facts. Specifically, Sisk's case is that:

i) During the PCSA period, Berkeley's designers, Atkins and Hawkins, were developing the designs. Various iterations were issued to Sisk,

including after the execution of the Contract. Sisk had to make assumptions about risk and seek many clarifications about the ongoing design in order to assist with its pricing and proposals.

ii) Sisk certainly did not have every opportunity to assess the risks, as submitted by Berkeley. On the contrary, Sisk had only limited access to the designers prior to the execution of the Contract. (Sisk relied on some documentation evidencing this position.)

iii) Sisk provided comments on the ERs but ultimately this was a document which was drafted by Berkeley and recorded the scope of works. The ERs were not jointly developed.

iv) Sisk did not intend to or act in any way that suggested an intention to waive any of its rights under the Contract.

44. Sisk's case was supported by the witness evidence of Dominic Hodges. He said that the ERs were very much controlled by Berkeley; that Sisk were kept "at arm's length" during the PCSA period; that the design changed between the conclusion of Sisk's involvement under the PCSA and when Berkeley gave Sisk a design to be priced; and (whilst this would appear to amount only to his own subjective understanding) he disagreed as a matter of fact that Sisk was expected to develop the design to RIBA Stage 4. On the contrary, he said that Sisk expected the design to be developed to Stage 4 by Berkeley and therefore to be essentially ready for construction.

45. Ms Hannaford submitted that the parties' positions disclosed a substantial dispute of fact. I accept that submission.

46. Boiling down the parties' submissions, it may be seen that the key disputes between the parties on the question of construction are:

    i) the extent of Sisk's responsibility for the design before it reached RIBA Stage 4, and

    ii) whether Sisk is entitled to rely on paragraphs 2.2.1 and/or 2.2.2 of the ERs as representations or warranties.

47. The Contract was executed more than two years after the PCSA. It is clear that the parties worked on the design during the PCSA period, but it is equally clear that the circumstances under which the design was developed and the ERs drawn up are sharply disputed. In my judgment this goes directly to the circumstances known to the parties at the time the Contract was executed and the factual matrix and is hence relevant to the question of construction. This is not a short or narrow point, or something which can be determined on the basis of inferences drawn from the documents before the Court. There is no agreement between the parties as to how that dispute should be determined. Ms Hannaford made clear that she would wish to put in additional evidence, and I consider that it would be contrary to the overriding objective to shut that out at this stage. It also seems to me that disclosure may be required.

48. At the end of his reply, Mr Lazur submitted that the disputed facts would make no difference to the outcome. It seems to me that there are two answers to that submission. First, if Berkeley really felt that Sisk's account of the facts would not affect the outcome on construction, then it was open to Berkeley to agree those facts. The Court would then have a secure foundation of facts from which to approach the issue of construction. But Berkeley has not adopted that course.

Secondly, I do not agree that the disputed facts would or may make no difference to the outcome. In order to decide the construction issues on the present state of the evidence, I would have to decide the issues summarily, effectively concluding that Sisk's construction stood no reasonable prospects of success. I have not reached that conclusion.

49. There are additional reasons why in my judgment this claim is not suitable for Part 8 determination.

50. Sisk argues that paragraphs 2.2.1 and 2.2.2 of the ERs were representations. Ms Hannaford clarified this in submissions to mean that Sisk relied upon earlier draft versions of the ERs in deciding to enter the Contract. The question of reliance therefore arises. This is fundamentally a factual issue and there is no material before the Court on which I could decide it.

51. The paradigm Part 8 claim is a discrete issue of contractual construction which can be determined within the four corners of the contract. Standing back, this seems to me to be a long way from such a case. The PCSA, Contract and novation agreements are lengthy and technical contracts, and the relationship between the three is in issue. The declarations sought are wide-ranging. As I have indicated, the documents run to 1,800 pages.

52. The arguments deployed before me were detailed and sophisticated. In my judgment, the parties' cases need to be properly pleaded out.

53. All this suggests to me that the Court should proceed cautiously. Otherwise, as Jefford J warned in *Merit Holdings,* there is a risk of the Court reaching an ill formulated and ill informed decision, or – to adapt Lord Scarman when

discussing preliminary issues - it may turn out to be a "treacherous short cut": see *Tilling v. Whiteman* [1980] 1 AC at 25C. This is particularly so where – as here – the underlying claim has not even been formulated and quantified. As things stand the Court is asked to decide the contractual construction issues in a vacuum.

54. What should have happened in this case is that – once it was clear that there was a dispute on the facts – the parties should have co-operated so as either to agree the facts or alternatively agree the basis on which the disputed facts could be decided. If an agreement was not possible, then directions should have been sought from the Court.

Conclusion and Disposal

55. For the reasons I have given this claim is not suitable for determination under CPR Part 8, and I decline to make any declarations.

56. The Court has a discretion under CPR 8.1(4) to order a claim to continue under Part 7. I invite the parties to consider how this claim should proceed, and to agree an order and directions if appropriate. If that cannot be agreed, then short written submissions should be lodged and if necessary a hearing on consequential matters can be fixed.