Neutral Citation Number: [2024] EWHC 194 (TCC)

Case No: HT-2023-000052

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: 2 February 2024

Before :

NEIL MOODY KC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

- -

Between :

CLS CIVIL ENGINEERING LIMITED	**Claimant**
- and -	
WJG EVANS AND SONS (A PARTNERSHIP)	**Defendant**

- -
- -

Hannah McCarthy (instructed by **Gateley PLC**) for the **Claimant**
Rob Dawson (instructed by **Direct Access**) for the **Defendant**

Hearing date: 14th December 2023

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on Friday 2nd February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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DEPUTY HIGH COURT JUDGE NEIL MOODY KC

NEIL MOODY KC:

Introduction

1. This is an application brought under Part 8 of the CPR. It raises issues as to the proper scope of Part 8 claims and the correct approach where there are alleged to be disputed facts.

2. The Claimant, CLS Civil Engineering Limited ("CLS") is a developer. The Defendant, WJG Evans and Sons ("WJGE") is a building contractor[1]. CLS acted mostly through its director, Charles Salmon. WJGE acted mostly through Matthew Evans and Mark Evans. In 2021 CLS engaged WJGE to carry out construction works on a development at Narbeth, Pembrokeshire. The terms on which WJGE were engaged are disputed and are at the heart of these proceedings. In short, CLS says that WJGE was engaged subject to a letter of intent ("LOI"), that the LOI and its revisions governed the relationship between the parties, and that this limited CLS's liability to £1.1 million. CLS submits that this is a short point of contractual construction and is thus suitable for determination under Part 8. WJGE's primary submission is that the proceedings involve substantial disputes of fact and so the matter is not suitable for Part 8. WJGE submits that directions should now be given under Part 7. Alternatively WJGE says that the construction contract ("the Contract") was governed by JCT terms and/or that CLS is estopped from denying this, and that in any event CLS's liability was not capped at £1.1 million and/or that CLS is estopped from relying on the cap.

3. By its Particulars of Claim CLS seeks declaratory relief as follows:

    a. That there is no construction contract between the parties and that any legal relationship between the parties is solely governed by the agreed terms set out in the LoI dated 14th August 2021 and its revisions thereafter;

    b. That the Claimant's maximum liability under the LoI and its revisions is £1,100,000.

4. CLS was represented by Hannah McCarthy and WJGE by Rob Dawson. I am grateful to them both for their succinct written and oral submissions.

The Procedural Background

5. CLS's claim form stated that the application was brought pursuant to paragraph 9.4.3 of the TCC Guide, alternatively the Court's jurisdiction as explained in *Hutton Construction v. Wilson Properties (London) Ltd* [2017] EWHC 517. That paragraph of the TCC Guide and the guidance in *Hutton* address Part 8 applications which arise from adjudications. There have been no adjudications in this case and so – as CLS admitted – that approach was erroneous. It is important that claim forms should not be wrongly endorsed as adjudication business because such cases are listed for expedited hearings.

[1] The Defendant is named in the claim form as WJG Evans Limited but it was common ground that the correct Defendant is WJG Evans and Sons (a partnership). WJGE noted the error and pointed out that no application for substitution has been made but I did not understand WJGE to take a substantive objection on this point. Insofar as it is necessary to do so, I give permission for the partnership to be substituted for the limited company.

6. WJGE's Acknowledgement of Service objected to the use of the Part 8 procedure on the basis that the proceedings do not arise from an adjudication and because there are substantial disputes of fact. The Acknowledgement of Service further stated that:

> The construction contract is formed by the 'Letter of Intent' dated 14 August 2021, incorporating the documents referred to in it, and the conduct of the parties in substantially performing the contract on the basis of the JCT Intermediate Building Contract 2016 applying.
>
> The Defendant agrees the maximum liability under the Letter of Intent (the contract) is £1,100,000.

7. In support of its position, CLS served a witness statement dated 21st February from Piet van Gelder, a partner at Gateley PLC, CLS's solicitor. In response, WJGE served a witness statement dated 23rd March 2023 from Matthew Evans, a partner in WJGE, and a witness statement dated 22nd March 2023 from Gareth Rees, a quantity surveyor. In reply CLS served a witness statement dated 11 April 2023 from Charles Salmon and a statement also dated 11th April 2023 from Linda Jones of Acanthus Holden Architects (the employer's agent). Both parties have exhibited the documents on which they rely.

8. It became clear during the hearing that the real dispute between the parties is whether CLS's liability to WJGE was limited to £1,100,000 in circumstances where WJGE had lodged a final valuation for £1,413,669.24.

The Facts

9. The project involved the construction of a library, retail provision and three apartments at Moorfield Road, Narberth ("the Works"). CLS sent out an invitation to tender for the Works on 15th June 2021. On 22nd July 2021 WJGE supplied a completed tender in the total sum of £945,641.33. A meeting took place between the parties on 29th July. Mr Rees says:

> The meeting concluded with a discussion about the proposed form of contract. It was highlighted that there were three versions of contract particulars within the tender documents provided. Matthew Evans made it clear that should we be successful, the form of contract would be the JCT Intermediate Form of Contract 2016 with no contractor's design and with no liquidated damages, in line with the tender documents and it was on this basis of which the tender submission was priced against and following this pre contract discussion.

10. Emails from WJGE on 2nd and 5th August dealt with specific queries in relation to the of cost of fencing, walls and windows. By an email dated 16th August 2021, CLS sent WJGE the Letter of Intent which is at the heart of the present dispute. The email provided as follows:

> **Library, Retail and apartments – Letter of Intent**

Please see attached Letter of Intent to set the Contract in motion. We can discuss in more detail tomorrow in our Pre-start meeting.

Please can you forward through your CDM information and initial Contract programme so that we can discuss with other interested parties i.e. PCC Library Committee.

We look forward to working with you and achieving a mutually successful contract between our two Companies.

11. The LOI was written on CLS headed paper and I set it out in full:

Library, Retail and 3 No apartments development, Moorfield Rd, Narberth SA67 7AG

Further to the submission of your Tender document, activity schedule and Form of tender for the proposed contract relating to the above, we write to inform you that we propose to enter into a formal Contract with you for the works. In the meantime we list below the following documents in this Letter of Intent which we will refer to as the "Proposed Contract":

1. Tender Return e mail dated 22nd July 2021

2. Additional breakdown of Item 6.4 External works - fencing & walls dated 2nd Aug 2021

3. An understanding that the **initial** Contract Sum based upon the information available at the time of Tender submission and post submission discussions will be £910,000.00 nett as agreed between Matthew Evans and Charles Salmon 12th August 2021. Payment is to be on the basis of monthly valuations with a 28 day payment period and that work will commence on site week commencing 23rd August 2021.

4. The Contract to be procured under the terms of a JCT Form of Contract with activity schedule (Re-measurable Contract) with both parties addressing Value Engineering proposals to reduce the initial Contract sum.

We confirm that we will pay you in accordance with the Proposed Contract for all work properly carried out by you in accordance with the Proposed Contract including the placing of orders for materials, etc. Where the Proposed Contract does not contain relevant prices we will pay you a fair and reasonable sum in respect of the items in question.

Under no circumstances will be will we be liable under this **Letter of Intent** to pay you more than

£150,000 plus VAT applicable in total

> You will notify us in writing at least one week before you incur expenses or liabilities which would result in that figure being inadequate to compensate you for work done and orders placed in accordance with this letter.
>
> Until a formal contract is entered into between us based on the Proposed Contract then any payments made by us under this letter will be treated as payments made under that contract.
>
> Please confirm your acceptance of the above arrangements by counter signing and returning it to us by e mail and/ or post.
>
> Yours faithfully
>
> *Charles L Salmon*
>
> For and on behalf of **CLS Civil Engineering Ltd**
>
> We confirm our agreement to the above arrangements and that we will commence work on the basis of them.
>
> *(Signed)….* *(Date)…*
>
> For and on behalf of **WJG Evans & Sons**
>
> [bold in original]

12. It is common ground that WJGE did not in fact sign the letter. Mark Evans responded on 18th August as follows:

> … Matthew has asked me to look at the LOI and comment as follows:
>
> I understand that the works will be delivered under a JCT Intermediate Form of Contract 2016 edition and so the LOI will need to be amended to reflect this.
> …

13. The works commenced on about 28th August. On 1st October, Mark Evans emailed CLS saying:

> … I would be grateful if you could update me as to when JCT contracts will be issued for signature. The reason for my question is driven by a valuation progress to date as Valuation No1 and other financial commitments for sub-contractors appointed and payments made to secure those orders, bringing us ever closer to the £150k cap as set out in the draft letter of intent circulated 16 August.

14. Charles Salmon of CLS responded five minutes later saying:

> … I have chased up our Solicitors on the JCT Contract and confirm that this will be in place early next week as explained on site at 8 am this morning.

15. Mark Evans replied 15 minutes later saying:

> …Just didn't want to exceed the initial LOI value and it come as a shock.

16. CLS sent proposed JCT contract documents to WJGE under cover of an e-mail dated 26th October 2021. (The attached documents are not in evidence.) Mark Evans replied later that day saying:

> Thanks for the draft contract. Following a very quick review it looks different to what we tendered on and would be grateful if you can set up a meeting next week for you Matthew, Gareth and I to run through this in finer detail.
>
> Some of the items that have been included in the draft that were not provided at tender stage are as follows;
>
> - LADs at 3K per week
> - Introduction of Contractors Design portion
> - A large schedule of amendments proposed to the standard JCT contract, none of which that I can see were provided in the tender documentation.
>
> We were expecting a simple JCT Intermediate Contract with completed articles of agreement in line with the tender documentation provided…

17. It appears that there was then a meeting between the parties. There is next a further email from Mark Evans dated 27th October which says:

> … The draft contract needs to be simplified to reflect the items contained within these two MS Word documents attached, these were received as part of the tender documentation…
> I don't intend to pick the contract apart line for line but it needs to be redrafted and simplified to reflect what was tendered.

18. On 30th October Mr Salmon proposed a Teams meeting to "finalize the differences." Mark Evans responded on 2nd November saying "this is going to absorb time and effort better spent on site progress." He proposed that CLS should review his comments and provide "a simple JCT contract with completed contract particulars."

19. On 20th November 2021 Mr Salmon emailed Mark Evans:

> Further to your e-mail below and our subsequent conversations regarding the JCT Contract please find attached our REVISED Letter of Intent for the above project **increased to a cap of £300,000.00 plus VAT.** We have increased this figure to allow you to continue works as planned and procure the necessary specialist materials required…
>
> [bold in original]

20. The revised Letter of Intent appears to be a letter dated 19th November 2021 from Narberth Old School Developments Ltd ("Narberth") to WJGE. Narberth appears to be related to CLS inasmuch as Mr Salmon is named as a relevant contact for both companies. The letter provided:

> Further to the submission of your tender return letter, activity schedule and form of tender sent by e mail on 22 July 2021 and the subsequent breakdown for item 6.4 fencing, railings and walls received by e-mail on 2 August 2021, it is our intention, subject to contract, to enter into a formal contract with you for the carrying out and completion of the construction of the new Library, Retail and 3 apartment blocks (the Works) at the Site….
>
> 1.1 It is intended that the contract… will be in the form of the JCT Intermediate Building Contract with contractor's design 2016 edition as amended by a schedule of amendments to be provided to you…
>
> 2.1 Upon and subject to the terms of this letter, we instruct you to carry out the advance works. [Certain works including the foundations were set out.]
>
> 2.2 Whilst we have yet to formally enter into the Building Contract, subject to paragraph 1.2 and 11.3, the terms of the Building Contract will apply and you shall carry out the Advance Works in accordance with and subject to the Building Contract.
>
> 3. PAYMENT
>
> 3.1 In consideration of you commencing and carrying out the Advance Works in accordance with our instruction, we agree to reimburse you in respect of the costs which you reasonably incur or to which you are reasonably committed as the result of complying with our instruction to a limit of £300,000.00… (**Maximum Amount**)
>
> 11.3 Before the execution and completion of the Building Contract, our mutual rights and obligations in relation to the Advance Works and the Works are governed by this letter as supplemented by the Building Contract as provided in this letter. If there is any conflict or difference between the terms of this letter and of the Building Contract, the terms of this letter prevail.

21. On 23rd November Mark Evans responded:

> We have taken some advice on [the] draft LOI as presented. We will only sign an LOI on the basis of a standard JCT Intermediate contract as tendered contract particulars, we are therefore unable to agree to these terms as drafted and would welcome a meeting with you this week to discuss further as the goal posts keep moving. I attach again the draft contract particulars provided at tender stage which is what we based our final tender on.

22. In a further email on the same day he commented:

> …The wording of the LOI is slightly concerning with clauses written with ***if and when a building contract is executed.***
>
> …We will not be signing any building contract other than a contract that is formulated based [on] the tender information provided. We fail to understand why a JCT contract cannot be drawn up to include the tender information provided at tender stage. For the avoidance of doubt and any misunderstanding we will not be signing a contract other than one that is based on the tender documentation and value that we work hard to reach a negotiated value with you on…
>
> [bold in original]

23. There is then a gap in the correspondence available to the Court. On 15th March 2022 Mark Evans emailed saying:

> Following our meeting on Monday 7 March you tabled a revised Letter of Intent (LOI) with an increased limit of £500K… Whilst we are happy to accept the increased value of work, we cannot accept the terms provided which include the introduction of liquidated damages [etc]…
>
> Following our conversation this morning I understand that you will get a standard JCT intermediate Contract drafted and circulated for signature this week on the basis of the tendered scheme design, agreed contract sum and contract programme…

24. On 11th May 2022 Mark Evans gave notice of a delay and sought an extension of time of 13.86 weeks. The application was expressed as being made pursuant to "clause 2.19 of the Conditions of Contract under JCT Intermediate Building Contract" and was referable to an original and revised completion date. On 14th June, Linda Jones of Acanthus Holden, acting as the employer's agent, granted an extension of time of 56 days. She did not refer to JCT terms.

25. At 12:47 on 4th July 2022 Matthew Evans emailed saying:

> I note our most recent valuation No 9... was in the sum of £511,027.99 net. Since the date of this Valuation up until today's date a considerable amount of work has been completed...
>
> In total this now exceeds the current LOI limit of £500K.
>
> Whilst waiting for the "Official Contract" to be issued for review and signing as promised in the last progress meeting and in order to maintain momentum and progress on site I request this be reviewed and increased today without delay - I trust you will give this your immediate courtesy.

26. At 13:26 on the same day Matthew Evans emailed:

> LOI – URGENT ATTENTION REQUIRED

> As you're aware we're currently operating beyond the scope of the LOI and this now has fundamental implications not only with us acting as Principal Contractor from a Health and Safety/ CDM point of view but also with our insurance cover and liabilities. Also some serious consequences for you both as clients should something happen on site!
>
> The advice I have just received is that **all works should stop with immediate effect!**
>
> [bold in original]

27. At 15:07 Mr Salmon replied:

> Further to your e-mail below and our subsequent conversations regarding the outstanding JCT Contract please find attached our Letter of Intent for the above project increase to a cap of **£800,000.00 + VAT…**
> We confirm that we are currently in discussion with the CA and our solicitors to draw up the JCT contract documents that will hopefully be acceptable by all parties.

28. On the following day Matthew Evans emailed:

> … in order to maintain momentum and progress on site I confirm receipt and accept your increased capped order value in the sum £800,000 plus VAT as described in your e-mail below and will therefore continue to work to our best endeavours up to this limit based on the contract particulars, standard JCT Intermediate Contract with no L&A damages applied as originally tendered against. If this is not acceptable then please inform me immediately.

29. It is clear that this was not accepted because a few minutes later, Mr Salmon emailed saying:

> Re: Naberth Old School – Development – Contract LOI – increased to £800k
>
> I acknowledge receipt of your e-mail below and am pleased to note that you accept our increased capped LOI to £800k + Vat and you are happy to continue working on site at the current momentum. I … would suggest that we meet up… to discuss and hopefully finalize the Contract conditions in more detail face to face.

30. The next email available to me is from 18th October 2022 where Matthew Evans said:

> As you are aware we have still not received an official JCT intermediate contract and we again find ourselves operating beyond the scope of the £800,000.00 LOI/order value which is unacceptable…
>
> The advice previously given, as noted in my e-mail 4/7 (below) was that we should not exceed the current LOI value in any circumstances whatsoever and should we find ourselves in a position where we find ourselves exceeding then I (WJGE) have an obligation to officially write to you both to inform you of the

> situation that all work should stop with immediate effect until a new LOI/ increased order value be issued.

31. Mr Salmon responded within the hour saying:

> …In lieu of your urgent requests, we will increase the LOI to £1,100,000.00 with immediate effect to give you confidence to continue without further delay.

32. On 26th October 2022 WJGE sent an email in relation to a loss and expense claim, referring to paragraph 4.17 of a JCT contract. In an email on 10th January 2023 Acanthus supplied WJGE with Interim Certificate No 15. The interim certificates do not refer to JCT terms.

33. On 2nd February 2023 Mr Evans emailed noting once again the absence of the JCT Intermediate Contract and noting that the most recent payment application exceeded the current LOI order of £1,100,000. He continued:

> The advice previously given remains... we should not exceed in any circumstance, the current LOI order value…
> I therefore officially write to you all this morning… informing you of this situation and request that you give this your immediate attention as we're now **all** running at risk and the implications for us **all** could be catastrophic!
>
> [Bold in original]

34. On the following day he emailed saying:

> … I confirm that no LOI increasing the order value, irrespective of the difference of opinion in the value of works completed to date… and therefore to manage our responsibilities and liabilities… the site is being scaled back to a skeleton staff with continuation of demobilisation…

35. On 6th February 2023 Matthew Evans emailed to confirm they were demobilising and noted:

> [We] still currently await an increase to the order value, as previously advised, or the presentation of the JCT Intermediate Contract as promised since August 2021 and request an update on the current status at your earliest opportunity.

36. On 15th February 2023, CLS wrote to WJGE saying:

> We refer to recent correspondence received from you and our Letter of Intent dated 14 August 2021 and its subsequent revisions the last being set out in our e-mail to you of 18 October 2022. Our maximum liability under the Letter of Intent and its provisions is £1,100,000.
>
> It appears to us that there will never be any resolution to the fundamental issues as to the Contract Sum and liquidated damages. As such we consider that we will be unable to award a contract to WJG Evans and Sons in respect of the above works.

> We note from your e-mail of 2 February 2023 that you are demanding an increase in the letter of intent as you say that you have exceeded the maximum amount and are therefore working at risk…
>
> … [P]lease treat this letter as formally removing your licence to remain on site. We require you to demobilise immediately…

37. On the same day Gracia Consult (claims consultants) acting on behalf of WJGE sent a letter to CLS alleging a repudiatory breach of contract. CLS issued the Part 8 claim form a week later on 22nd February 2023.

38. WJGE subsequently issued a final valuation (No 17) in the sum of £1,413,669.24.

39. A number of interim certificates have been exhibited. In each case they provide for 5% retention. The contract date is left blank. There is no reference to JCT terms.

40. Finally, in this review of the evidence I note the witness evidence of Matthew Evans. At paragraph 7.2 he says:

> We agree the cap was finally set at £1.1m before WJGE was told to vacate the site…

And at paragraph 9 he says this:

> **Apart from the increase in spending cap we did not agree to the revised contents of the updated LOIs** which were provided on:
> 1) £300,000 limit – provided 20/11/21, dated 19/11/21
> 2) £500,000 limit – provided 07/03/22, dated 01/09/21
> 3) £800,000 limit – provided 04/07/22, dated 19/11/21
> 4) £1,100,000 limit – confirmed by email only dated 18th October 2022
>
> **The only parts of the updated LOIs that WJGE accepted were the increased works value cap** as CLS tried to introduce new terms with every version it sent apart from LOI 1, none of them represented what was discussed or issued at tender stage.
>
> [bold added]

The Parties' Submissions

41. For CLS, Ms McCarthy submitted that the position was clear on the evidence. The parties had never agreed JCT terms. The LOI and its revisions were clearly accepted by WJGE and governed the parties' relationship. Accordingly WJGE was bound by the limit of £1,100,000. She submitted that the issue was suitable for determination under Part 8 because it was a short point of construction. She further submitted that the only dispute of fact was whether the JCT terms were incorporated and there was a clear precedent for deciding such a dispute under Part 8: see *OD Developments v Oak Dry Lining Limited* [2020] EWHC 2854 (TCC).

42. In its acknowledgement of service, WJGE took the point that the case is unsuitable for Part 8 determination because it involves substantial disputes of fact. The acknowledgement of service and witness statement of Matthew Evans also stated that the JCT terms had been incorporated into the Contract. However, Mr Evans accepted at paragraph 9 that the cap limits had been agreed: see [40] above.

43. At the hearing, Mr Dawson deployed additional arguments on behalf of WJGE. He submitted that CLS had failed to comply with the guidelines relating to Part 8 claims in *Cathay Pacific Airlines Ltd v. Lufthansa Technik* [2019] EWHC 484. On the substantive claim he accepted that a contract had come into existence and submitted that there were four possible bases for it: (a) a contract based on correspondence and communications between the parties before works commenced; (b) a contract based on the LOI; (c) a contract based on the LOI "as purportedly varied"; and (d) a contract based on the formal contract that the parties presupposed would be executed as at the week of 4th October 2021. His key submissions, as I understood them, were (a) that as at 4th October 2021 all essential terms were agreed between the parties such that a contract was formed on the basis of the JCT Intermediate Contract 2016 conditions; and (b) the parties agreed that the cap should be removed. This was on the basis that they agreed that WJGE would continue to be paid in excess of the cap as that was commercially sensible.

44. Mr Dawson further submitted that WJGE was entitled to rely upon an estoppel. He contended that since there were grounds for arguing estoppel, this was sufficient to prevent CLS proceeding under Part 8 because this would inevitably involve an examination of disputed facts. He relied upon *ING Bank NV v Ros Roca SA* [2012] 1 WLR 472 where Stanley Burton LJ noted that: "part 8 proceedings are wholly unsuitable for a trial on the issue of estoppel"… and a "disputed claim of estoppel should be carefully pleaded." Stanley Burton LJ endorsed the comments in the *White Book* (now at paragraph 8.0.2) to this effect.

45. At the beginning of the hearing Ms McCarthy objected to WJGE relying on new arguments that were not foreshadowed in the witness evidence. She complained that CLS had approached the hearing assuming that the key issues in dispute were the validity of the cap and the incorporation of JCT terms. She submitted that WJGE should be confined to the position set out in their witness evidence. At the hearing I ruled against CLS on this point for the following reasons: (a) this is a problem which can arise in Part 8 proceedings where the issues are not demarcated by pleadings; (b) CLS did not first establish that this case was suitable for Part 8 by complying with the *Cathay Pacific* guidelines; (c) if CLS had followed those guidelines, the real issues would have become clear much earlier; (d) even without these new points, it would have been open to WJGE to argue that the claim was unsuitable for Part 8; (e) it would be contrary to the overriding objective to prevent WJGE from defending the claim as it sees fit; and (e) any prejudice caused to CLS could be compensated by an award of costs.

Preliminary Observations

46. Before engaging with the parties' submissions, I make these preliminary points.

47. First, as I have indicated, it transpired in the course of argument that the real dispute between the parties is as to the validity of WJGE's final valuation of £1,413,669 and whether WJGE should be held to the cap of £1.1m. In other words, the value of the dispute between the parties is £313,669. Thus, whilst a great deal of the argument was directed to the overall contractual relationship between the parties and whether JCT terms applied, the key issue is whether the cap was agreed.

48. Second, the value of the dispute is therefore modest by the standards of this Court. If the key dispute as to the cap cannot be determined in these Part 8 proceedings, then the parties will be back to square one, Part 7 proceedings will be required and, having regard to the value of the claim, it will probably have to be transferred out of this Court. This will lead to delay and additional expense and militates in favour of the Court looking carefully to see whether the dispute can indeed be determined in accordance with the Overriding Objective within the limitations of the Part 8 procedure. This is because a decision on the applicability of the cap is likely to be of real utility to the parties in resolving their dispute.

49. Third, I addressed the correct approach to Part 8 proceedings in *Berkeley Homes (South East London) Limited v John Sisk and Son Limited* [2023] EWHC 2152 (TCC) at [8]-[16] and [54], and I do not repeat those points here save to say that where Part 8 proceedings are being contemplated the claimant should follow the procedure in *Cathay Pacific* in the general run of cases. If that is done, it should mean that the parties approach the hearing having agreed the scope of the dispute and the manner in which any disputed questions of fact should be determined. That was not done in this case with the inevitable result that the parties were not agreed as to the issues in dispute or the way in which they should be determined.

50. Fourth, where there are substantial disputes of fact, it will usually be the case that the proceedings are unsuitable for Part 8. *Berkeley Homes* was such a case. However, it was common ground before me that it was open to the Court to consider disputed matters against a summary judgment test. In other words, the Court is entitled to scrutinise the disputed facts and arguments and assess whether they surmount the Part 24 threshold, i.e. in this case consider whether WJGE has a real prospect of success on the relevant issue. That was the approach taken in *Gavriel v Hope* [2019] EWHC 2446 at [6], and I note that it is cited in the *White Book* at 8.0.9. Mr Dawson reminded me – and I accept – that, if adopting that approach, it is important for the Court to bear in mind not only the evidence currently available but also the evidence that could reasonably be expected to be available at trial.

51. Fifth, when considering the evidence available to the Court now, and the evidence that could become available at a trial, I bear in mind that this is a dispute about the construction of a contract. Both parties have had the opportunity to put in witness evidence and the documents on which they rely. Since the issues relate to whether and, if so, on what terms the parties struck an agreement, the key documents are likely to be those that passed between them (and are hence available to both parties) rather than documents held by one side.

52. Sixth, when construing the correspondence between the parties in order to determine whether they have reached agreement, the communications are to be construed objectively: see for example *Smith v Hughes* (1870-71) LR 6 QB 597 at 607.

Are there substantial disputes of fact?

53. I turn next to consider whether this claim is suitable for Part 8 determination in light of WJGE's submissions on disputes of fact. Mr Dawson argued that there were substantial disputes of fact in three areas: "the negotiations pre-LOI", "construing the LOI and any revisions", and "continuing negotiations". I address these arguments in turn.

Negotiations pre-LOI

54. First, it was submitted that there is an issue as to which contract conditions were provided by WJGE with its tender return. Mr Salmon's witness statement says that three different contract particulars were included. WJGE's position is that its tender was based on the JCT Intermediate Contract 2016 conditions. In my judgment this dispute is not material to the question of the applicability of the cap, and nor is it likely to be material to the question of which terms ultimately governed the contract. But in any event, I am prepared to assume for the purposes of these proceedings that WJGE's position is correct.

55. Second, it was argued that in the meeting of 29th July 2021 there was a discussion as to which conditions should apply. WJGE relies in particular on the evidence of Mr Rees. WJGE says that this should be set out in pleadings and cross-examination is required. In my judgment this material is unlikely to be relevant to the question of the applicability of the cap and, since the meeting predated the LOI, it is hard to see how it could affect the question of agreed terms. In any event, I am prepared to assume for the purposes of these proceedings that Mr Rees' evidence about the meeting should be accepted. I set out a key passage from his evidence at [9] above.

56. Third, it is said that the LOI refers to an agreement reached on 12th August 2021 in relation to the contract sum of £910,000. It is submitted that further detail of communications that day is required "to give factual context to any agreement reached." I consider that in this respect WJGE has not identified a real dispute of fact; rather WJGE is saying that further disclosure is required. In essence WJGE's position is a hope that something may turn up. That is not sufficient. WJGE should be in a position to advance a submission on the facts based upon its knowledge of what happened on 12th August. It has not done so.

The LOI and any revisions

57. WJGE submits that in order to construe the LOI, the meetings of 29th July and 12th August 2021 are relevant and so pleadings, full disclosure and witness evidence are required. It is submitted that reference to the "JCT Form of Contract with Activity schedule (Re-measurable Contract)" can only properly be construed with reference to contract conditions provided by WJGE to CLS and evidence as to those discussions. I am not convinced that there is a material dispute on the facts here. Again, WJGE's position appears to be simply that something may turn up.

58. In relation to the revisions to the LOI, WJGE draws attention to the involvement of Narberth and that the relationship between CLS and that company has not been explained. I note that the position on this point is unclear on the evidence, but I am not

persuaded that there is a material factual dispute in the context of the issues I have to decide.

Continuing Negotiations

59. WJGE submits that the whole correspondence between the parties must be looked at to determine the terms of the relationship. It seems to me that the position is that the Court must be satisfied that it is has the relevant material relating to the issues for decision and that there are no substantial disputes of fact.

Analysis

Construction of the Contract

60. Whilst WJGE's arguments have centred on the incorporation of JCT terms, as I have indicated, the crux of the dispute between the parties is whether WJGE is bound by the cap of £1,100,000.

61. In my judgment, WJGE is bound by that cap for the following reasons. First of all, Matthew Evans admitted it at paragraph 9 of his witness statement. That in itself is sufficient to dispose of the point. This seems also to be consistent with the Acknowledgement of Service which says that the Defendant agrees the maximum liability under the Letter of Intent is £1,100,000.

62. But even putting Mr Evans's evidence on one side, subject to arguments on estoppel which I address below, I would reach the same conclusion based upon an objective construction of the communications between the parties. Thus the LOI made clear that CLS's intention was to enter into a contract with WJGE but on terms to be agreed. In the meantime, WJGE was instructed to proceed but CLS would not be liable to pay WJGE more than £150,000 plus VAT. In my judgment, WJGE accepted that offer by starting work. The fact that they accepted the offer is further demonstrated by Mr Evans's email of 1st October 2021 which referred to WJGE coming "ever closer to the £150k cap". In the meantime the parties were negotiating about the other terms including JCT terms. A revised letter of intent dated 20th November 2021 increased the cap to £300,000. There does not appear to be evidence of an express acceptance of that revision, but on about 7th March 2022 CLS offered an increase in the cap to £500,000. It is clear that this was accepted because Mr Evans's email of 15th March said that he was happy "to accept the increased value of work" and his email of 4th July referred to the "current LOI limit of £500k". He also then threatened that all works would stop unless the limit was further increased. Mr Salmon's email later on the same day offered an increase to £800,000. Mr Evans accepted this the following day.

63. It has been argued by WJGE that Mr Evans's email of 5th July 2022 was a counter-offer because it referred to the JCT Intermediate Contract. If so, it was plainly rejected by Mr Salmon a few minutes later when he referred to a meeting to "hopefully finalize the Contract conditions" (which were therefore not agreed).

64. The position recurred on 18th October 2022 when Mr Evans drew attention to the fact that the cap of £800,000 was being exceeded. I consider that Mr Evans thereby expressly accepted that WJGE were working subject to that cap. The final increase to

£1,100,000 was made on the same day. WJGE noted the existence of the limit in the email of 2nd February 2023.

65. Accordingly, not only did Mr Evans admit the existence of the cap in his witness statement, the correspondence between the parties, objectively construed, shows that the cap was accepted at the time as the works progressed. There were at least six occasions on which WJGE expressly or impliedly agreed that WJGE were working subject to the cap: 1st October 2021, 15th March 2022, 4th July 2022 at 12:47, 5th July 2022, 18th October 2022 and 2nd February 2023. I reject WJGE's submission that the parties agreed that the cap should be removed. I see no basis for that in the evidence.

66. WJGE have advanced submissions as to the wider contractual relations as between the parties. I reject the submission that there was a contract between the parties based upon the communications that took place before works commenced. It is quite clear that the parties remained in discussion after that time. I also reject the submission that there was a contract based on a formal contract that the parties presupposed would be executed. The chronology shows that the parties were in discussion about JCT terms whilst the Works were being undertaken but it is also clear that there was no agreement as to which JCT terms would apply. Even at the very end, on 6th February 2023, Mr Evans was asking:

> [we] still currently await an increase to the order value, as previously advised, or the presentation of the JCT Intermediate Contract as promised since August 2021 and request an update on the current status at your earliest opportunity.

67. In my judgment, the parties' discussions in relation to a formal Contract and JCT terms never achieved a meeting of minds.

Estoppel

68. I turn then to consider WJGE's arguments on estoppel. I remind myself that estoppel is not generally suited to Part 8 determination, and so the Court should proceed cautiously in this respect. It seems to me that it is not sufficient for WJGE simply to assert an estoppel. My approach is first to scrutinise WJGE's arguments on estoppel to see whether they surmount the Part 24 hurdle. If they do, it will be necessary for the arguments to be pleaded out and for the proceedings to proceed under Part 7.

69. WJGE argued for two estoppels. They were raised for the first time (but clearly articulated) in Mr Dawson's skeleton argument. He first submitted that CLS is estopped from alleging that there was no agreement that the JCT Intermediate Form of Contract 2016 would apply. He described this as an estoppel by acquiescence. He referred to the decision of Blair J in *Starbev GP Limited v Interbrew Central European Holdings BV* [2014] EWHC 1311 in particular at [138] where he held:

> "Applying the test in *The Indian Endurance* and subsequent authorities, where one party is proceeding on the assumption that something is agreed, whereas the other party knows it is disputed, on the particular facts the other party 'acting honestly and responsibly' may be under a duty to make its disagreement known. The relevant mistake is not as to the amount, but as to whether there is a dispute as to the amount…"

70. WJGE then relied on the following points in support of its estoppel argument.

71. First, WJGE noted Mr Evans's email of 18th August 2021 ("I understand that the works will be delivered under a JCT Intermediate Form of Contract 2016 edition and so the LOI will need to be amended…"). It was submitted that it was clear that Mr Evans was proceeding on the assumption that those contract conditions were agreed and yet CLS did not make known their disagreement before works started, and it was only on 26th October that CLS proposed alternative terms. WJGE relied further on Mr Salmon's email of 1st October 2021 which referred to chasing up the solicitors on the JCT contract and confirmed that this would be in place next week. He submitted that CLS was under an obligation to make known any disagreement to those conditions. I reject this submission. It seems to me that Mr Evans's email of 18th August falls well short of evidencing an assumption that the JCT terms were agreed. That email came two days after the LOI and he thereby sought an amendment to the LOI, so there was clearly no agreement. These exchanges have to be looked at in the context of the correspondence overall. In my judgment it was or should have been clear to WJGE that the parties were in continuing negotiations as to the JCT terms and had not yet struck an agreement. I regard this estoppel argument as having no real prospect of success.

72. Secondly, WJGE submitted that Mr Salmon's email of 1st October 2021 ([14] above) amounted to a representation as to agreement of the contract conditions proposed by WJGE, and CLS is now estopped from denying that. I reject that submission. Again in light of the correspondence overall it was or should have been clear that the parties were in continuing negotiations. If there was any doubt about it, CLS's position was made clear on 26th October ([16] above) when its proposed JCT terms were issued. I regard this estoppel argument as having no real prospect of success.

73. I note that in relation to both of these estoppel arguments, even if they were to be successful, they would not affect my conclusion as to the applicability of the cap. Rather, they would go the question as to whether JCT terms applied.

74. The second estoppel relied upon does relate to the cap. WJGE submits that CLS is estopped from contending that there was a liability cap "in circumstances where it has paid sums in excess of any liability cap in the LOI and has deducted retention in keeping with the JCT Intermediate Form of Contract 2016." I have seen no evidence that sums were paid in excess of the cap. But in any event, the agreement as to the cap is clear from an objective construction of the correspondence and was agreed by Mr Evans in his witness statement. CLS cannot be estopped from relying on the liability cap in circumstances where WJGE repeatedly agreed to it and relied upon it when seeking an increase. As to the deduction of retention, this seems to me to be a neutral point. Retention is widely applied in construction contracts; it does not point to JCT terms having been agreed. In my judgment this estoppel argument has no real prospect of success.

Conclusions and Disposal

75. I conclude therefore as follows:

a. There are no disputed issues of fact which make these proceedings unsuitable for Part 8 determination;

b. WJGE's estoppel arguments stand no real prospect of success and so they are not an impediment to Part 8 determination;

c. The parties agreed that the Works would be subject to a cap on CLS's liability, as set out in the Letter of Intent. This was initially £150,000 plus VAT but was increased to £1,100,000 plus VAT through revisions to the Letter of Intent;

d. The parties did not reach an agreement as to JCT terms;

e. The Court's determination that the works were subject to a cap of £1,100,000 is independent of and not dependent upon the determination that the Contract was not subject to JCT terms.

76. Accordingly I am satisfied that the parties' relationship was governed by the LOI and its revisions insofar as the parties agreed a cap on the liability of CLS to WJGE. I am therefore minded to grant declarations in the following terms (which are a modification on the pleaded declarations):

> The Parties relationship was not governed by JCT terms.
>
> The Claimant's liability in respect of the Works is limited to £1,100,100 plus VAT in accordance with the Letter of Intent dated 14th August 2021 and its revisions provided on 20th November 2021, 7th March 2022, 4th July 2022 and 18th October 2022.

77. I invite the parties to agree an Order giving effect to this Judgment, the precise terms of any declarations, and any consequential matters. This should be done within 10 days of hand-down. If agreement cannot be reached, then short written submissions should be exchanged and I will then decide any disputed matters on the papers or list the matter for a hearing.