Neutral Citation Number: [2023] EWHC 969 (TCC)

Case No: HT-2023-00060/HT-2023-MAN-0007

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

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

Date: 28/04/2023

Before :

MR ALEXANDER NISSEN KC
Sitting as a Deputy Judge of the High Court

- -

Between :

SLEAFORD BUILDING SERVICES LIMITED	**Part 8 Claimant/ Part 7 Defendant**
- and -	
ISOPLUS PIPING SYSTEMS LIMITED	**Part 8 Defendant/ Part 7 Claimant**

- -
- -

Ms Hannah McCarthy (instructed by **Gateley plc**) for the **Part 8 Claimant/Part 7 Defendant**
Mr Charlie Thompson (instructed by **Hill Dickinson LLP**) for the **Part 8 Defendant/Part 7 Claimant**

Hearing date: 12 April 2023

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR ALEXANDER NISSEN KC

This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be Friday 28 April 2023 at 10:30am.

Mr Alexander Nissen KC:

Introduction

1. There are two sets of proceedings before the Court arising out of an adjudication decision dated 23 December 2022. The first in time was issued by Sleaford Building Services Ltd (hereafter "Sleaford" or "SBS") in the Business & Property Courts in London on 27 February 2023, reference HT-2023-00060. The second in time was issued by Isoplus Piping Systems Ltd (hereafter "Isoplus" or "IPS") issued in the Business & Property Courts of the Manchester District Registry on 15 March 2023, reference HT-2023-MAN-0007. It is a routine Part 7 adjudication enforcement action. By consent order dated 31 March 2023, the two proceedings were consolidated.

2. Although Sleaford was the referring party in the adjudication to which these proceedings relate, claiming it was the net payee because it had overpaid Isoplus, it is common ground that the adjudicator was afforded jurisdiction to make an order for payment in favour of Isoplus if her ultimate conclusion was that it had been underpaid. In respect of the true value adjudication which she conducted in respect of an interim payment, she decided that payment should be made to Isoplus in the sum of £323,502.32. Isoplus, albeit the responding party, now seeks to enforce that decision. It is common ground that the decision is valid and of binding effect so, in that sense, little or nothing of substance turns on the Part 7 proceedings. Whether judgment should be entered depends on the Part 8 proceedings and the inter-relationship between those proceedings and the Part 7 action.

3. Pursuant to the Part 8 proceedings, Sleaford seeks declaratory relief that clause 21.4 of the subcontract between the parties contains a pre-requisite to payment with which Isoplus has not complied such that Isoplus is not entitled to any further payment and, for that reason, the adjudicator's decision should not be enforced. For its part, Isoplus contends that these matters are unsuitable for resolution by means of Part 8 proceedings and that, in any event, the criteria for not enforcing a valid adjudicator's decision are not fulfilled. It invites the Court to dismiss the Part 8 proceedings or to order that they be dealt with as Part 7 proceedings which is how it says they should have been commenced.

4. Within the Part 8 proceedings, Isoplus also raises a preliminary point that clause 21.4 is unenforceable for non-compliance with s.110A Housing Grants, Construction and Regeneration Act 1996 ("HGCRA") as amended by the Local Democracy, Economic Development and Construction Act 2009. Sleaford was content for the Court to address that issue within the scope of its Part 8 claim.

5. Ms McCarthy appeared on behalf of Sleaford. Mr Thompson appeared on behalf of Isoplus. I am grateful for their submissions.

The Subcontract

6. Sleaford is a company specialising in mechanical, electrical and plumbing works. Isoplus is a specialist pipework contractor.

7. Sleaford was engaged as a subcontractor by Amey Defence Services Ltd, the main contractor, on a project for the execution of maintenance and construction works for the Ministry of Defence at Wattisham Airfield, Ipswich, Suffolk.

8. In turn, on or about 16 February 2021, Sleaford engaged Isoplus as its subcontractor for works described as the replacement of the District Heating Main (DHM) distribution system fed from Building 127 at Wattisham Airfield. The form of subcontract was the NEC3 Engineering and Construction Short Subcontract subject to bespoke amendments. In the NEC3 subcontract, Sleaford was described as the Contractor and Isoplus was described as the Subcontractor. The total of the Prices was £1,060,300.40.

9. I need only refer to two aspects of the subcontract, both of which are bespoke. The first aspect concerns payment. By reference to Clause 50, the regime for payment is one of milestones. In short, there is provision for the issue of a certificate of completion in respect of a given milestone, coupled with an obligation on the part of Sleaford to pay the lump sum due in respect of that milestone upon the issue of an application for payment referring to that completed milestone. There is a schedule which contains the list of 18 no. milestones and their associated payments ranging in amount from £3,954 to £164,307.75, totalling the Subcontract Sum of £1,060,300.40.

10. The second aspect concerns subcontracting. Clause 21.1 includes provision as follows:

> "*The Subcontractor shall not without the prior written consent of the Contractor sub-let any portion of the subcontract works or any portion of the design of the subcontract works.*"

11. There is now no suggestion that Isoplus breached this provision. To the extent it subcontracted works, it did so with the consent of Sleaford.

12. Clause 21.4 of the subcontract is also concerned with subcontracting and provides as follows:

> "*The Subcontractor in subcontracting any portion of the subcontract works to a Sub-subcontractor:*
>
> - *procures that the terms of each sub-subcontract are compatible with the terms of this subcontract; and*
> - *as a precondition to payment of any sum related to their work provides to the Contractor within 7 days from the earlier of commencement of their work or the execution of the relevant sub-subcontract a certified copy of the sub-subcontract and compatible with the terms of this subcontract (save for particulars of the sub-subcontract sum or fee), together with evidence of the professional indemnity insurance (or where applicable product liability insurance) held by such sub-subcontractor complying with the terms of the sub-subcontract and the requirements of this subcontract.*"

13. Since clause 21.4 makes reference to the provision of a "certified copy" of the sub-subcontract, it is also relevant to set out clause 12.11 which provides as follows:

> "*Where this subcontract requires that a certified copy of any document or deed is provided by the Subcontractor, that certified copy shall be a true copy of the original including all appendices, schedules and attachments…Each document (whether provided in hard copy or via an electronic copy) must be certified as a true copy by a solicitor or a director of the Subcontractor.*"

The adjudication

14. On 11 November 2022, Sleaford issued a notice of adjudication. The Referral followed on 18 November 2022. Sleaford was not legally represented during the adjudication

and, as a result, some of the drafting of these documents has subsequently given rise to ambiguity.

15. By its notice of adjudication, Sleaford alleged that Isoplus had installed incorrect fittings causing a catastrophic failure; it said this caused Sleaford to be on site for longer; non completion caused loss and expense to be incurred and the loss of opportunity to negotiate a second phase of work at the site. Paragraph 4.16 fleetingly stated that a pre-requisite for payment was the provision of sub-subcontracts which it said "are poor and are not sufficiently robust to comply with the subcontract". In respect of payment, it alleged that Isoplus had continually applied for milestone completions which it had rejected. By reference to a payment notice Sleaford had issued, Sleaford contended that it was owed sums rather than being indebted to Isoplus. The values to be attributable to works not carried out and for contra charges were largely responsible for the principal valuation differences between the parties. The figure ultimately claimed by way of payment was not actually identified within the notice of adjudication itself but was, apparently, in the appended payment notice.

16. The redress sought was expressed as follows:

"*SBS invites and seeks by remedy that the Adjudicator:*

a *Confirms whether IPS have installed a compliant installation that is in accordance with the Subcontract and which if any milestones should be certified as accepted.*

b *Advises whether IPS have acted negligently in respect to the catastrophic failure that occurred by installing incorrect fittings that were entirely unsuitable.*

c *Values the works and addresses whether SBS should make payment to IPS or whether IPS should make payment to SBS.*

d *Directs that payment should be made in accordance with the decision that has been reached.*

e *If a payment is awarded to IPS advises if all pre-requisites for payment have been complied with in respect to insurances and provision of sub-subcontract conditions etc to enable payment to be made without being in breach of the Subcontract.*

f *For the avoidance of doubt SBS seeks reasons for the Adjudicator's Decision.*"

17. At section 9, the Referral contained some bare allegations relating to clause 21.4. It was said that no attempt was made by Isoplus to comply with that provision; that the sub-subcontracts provided on 4 October 2022 were not compatible with the subcontract; that no evidence of insurance had been provided; and that:

> "*It is SBS's position that the requirements for any payment have not been met and accordingly any award of payment to IPS from SBS (which is denied and not accepted) can therefore not be made.*"

18. The redress sought was, essentially, that which had been set out in the notice.

19. In the Response, Isoplus claimed a balance was owed to it of £505,741.16 and sought payment of that amount. In respect of the section dealing with clause 21.4, the point was taken that the adjudicator was not empowered to "advise" the parties (this being a reference to the word used in sub-paragraph (e) of the notice) such that the redress sought under that heading should be refused. It was nonetheless accepted that the adjudicator was empowered to "decide on any 'pre-requisites to payment'." Isoplus made the point that no particulars had been given as to the insufficiency of insurances or why they did not meet the requirements of the subcontract; nor had particulars been provided as to why the sub-subcontracts did not comply with the requirements of the subcontract. Other complaints about the lack of particularity regarding clause 21 were made.

20. For completeness, I should also record that Isoplus raised various jurisdictional challenges, none of which prevailed and all of which are no longer pursued. On the contrary, it is Isoplus which seeks to enforce the decision which Sleaford accepts is valid.

21. In the Reply, Sleaford reiterated its reliance on the amount of payment sought in its payment notice. In respect of pre-conditions for payment, Sleaford said that:

> "*If in the unlikely event that payment is to be awarded to IPS it is entirely appropriate and relevant to consider if the pre-conditions for payment have been met.*"

It went on to give some examples of the lack of compliance with the terms of the subcontract. These included that the terms were not allied (sic) to the terms of the subcontract; the absence of inclusion of specifications in the sub-subcontract terms; and the lack of insurance cover for the design and supply of the joints.

22. Isoplus provided a brief Rejoinder. In respect of the section dealing with pre-conditions to payment, Isoplus said that the Reply did nothing to answer its prior legitimate criticisms in the Response.

23. On 13 December 2022 the adjudicator wrote to the parties with some questions which, by Direction No.5, she asked them to address. In respect of the redress sought at (b), which asked that the adjudicator "advises" in respect of negligence, she noted Isoplus had said that advice would not be binding, in contrast to a decision, and in light of this invited Sleaford to confirm "that they wish me to proceed with the redress sought". She did not raise the equivalent question in respect of the redress sought at (e), which also asked the adjudicator to advise, even though Isoplus had taken the point that she was not empowered to advise in relation to (e) such that the relief claimed should be refused on that basis.

24. Sleaford sought to answer her question in respect of (b) by saying that it was asking for her to inform, notify and make known whether on a balance of probability Isoplus had acted negligently.

25. On 23 December 2022 the adjudicator issued her decision. She addressed the point about the redress sought at (b) of the notice (but not (e), as noted above) in the following way:

> "*Redress Sought*

> [21] *The Redress sought includes the request that the Adjudicator "advises" in respect to the negligence claim. HD[1] challenged that a) I am not empowered to 'advise' the Parties, and b) that only the Adjudicator's Decisions are binding, not any advice. As such any advice will not be enforceable.*
>
> [22] *I considered the point raised regarding enforceability to be a valid concern and invited SBS to comment and confirm that they wished me to proceed with the negligence claim. The response from SBS was that they considered this to be a "play on words" and requested that I consider alternative descriptions of the redress sought such as inform notify or make known.*
>
> [23] *SBS are not legally represented and are not required to be for the purposes of adjudication. However, they should note that when making my Decision I am required to apply the law as appropriate. I agree with HD that SBS are not entitled to subsequently amend the wording of the Notice and that the wording of the redress sought is important when it comes to my jurisdiction.*
>
> [24] *I have been asked to 'advise' in respect of the negligence claim and that is what I shall do, but with the caveat that SBS have been notified that any such advice may not be enforceable.*"

26. At [92] she recorded her findings that all milestones save for No.18 had been completed. No.18 was commissioning and handover, worth a mere £4,500. The balance in respect of milestones was therefore £1,055,800. After addressing deductions for works not done, retention, contra charges, and making allowance for sums previously paid, she concluded at [166] that a payment was now due to Isoplus of £323,502.32. She also concluded that Isoplus had installed a compliant installation. Sleaford's attempt to recover payment by means of an adjudication had clearly failed.

27. Under the heading **"Pre-requisites for Payment"** she said this:

[1] This is a reference to Hill Dickinson, solicitors for Isoplus.

"*[167] The Responding Party acknowledges that in paragraph 7.2 of the Response that the Adjudicator is empowered to decide on any 'pre-requisites' to payment.*

[168] The only general precondition to payment I can see in the Subcontract is in clause 51.4 which relates to the issue of a valid VAT invoice.

[169] In respect of subcontracting however clause 21.4 does require that the terms of each sub-subcontract are compatible with the terms of the Subcontract, that a certified copy of the sub-subcontract be provided along with evidence of the sub-subcontractor's professional indemnity insurance. IPS has not commented on this provision which is stated to be a precondition to payment of any sum related to the work of the sub-subcontractor.

[170] I am satisfied on a balance of probabilities that compliance with clause 21.4 is required as a precondition to payment of any sums related to a sub-subcontractor. Based on the information provided I am not able to confirm whether IPS have complied with this obligation."

28. Under the heading "**THE REDRESS SOUGHT**" she wrote:

"*[171] Based on my findings I therefore:*

a) Confirm that IPS have installed a compliant installation that is in accordance with the Subcontract and that milestones 1-17 should be certified as accepted.

b) Advise that SBS has not demonstrated on the balance of probability that IPS have acted negligently in respect to the 'catastrophic' failure that occurred by installing incorrect fittings that were entirely unsuitable.

c) Value the works in the sum of £838,400.71 and find that SBS should make payment to IPS in the sum of £323,502.32.

d) Direct that payment should be made in accordance with the Decision that has been reached.

e) *Advise that I am not able to confirm that all pre-requisites for payment have been complied with in respect to payment for sub-subcontract works.*"

29. Finally, she provided a summary of, respectively, her Decisions and her Advice as follows:

"***SUMMARY OF DECISIONS***

[173] Having carefully considered the Parties' submissions and the documents submitted to me in the Adjudication and for all the reasons set out above I confirm that:

IPS have installed a compliant installation;

Milestones 1- 17 should be certified as accepted;

The works are valued in the sum of £838,400.71;

That SBS should make payment to IPS in the sum of £323,502.32;

That SBS shall be liable for my fees in the sum of £10,600.00 excluding VAT.

SUMMARY OF ADVICE

[174] Having carefully considered the Parties' submissions and the documents submitted to me in the Adjudication and for all the reasons set out above I advise that:

SBS has not demonstrated on the balance of probability that IPS have acted negligently in respect to the 'catastrophic' failure that occurred by installing incorrect fittings that were entirely unsuitable;

Advise that I am not able to confirm that all pre-requisites for payment have been complied with in respect to payment for sub-subcontract works."

30. On 27 December 2022, Sleaford asked the adjudicator to correct her decision, alleging a clerical or typographical error. By reference to paragraphs 167 to 170, it contended that the adjudicator had clearly decided that clause 21.4 was a precondition to payment and that IPS had not been able to comply with it. It was suggested that no payment could be made by Sleaford until this precondition had been satisfied. Isoplus contended that there was no clerical or typographical error that required amendment. The adjudicator agreed with that and declined to make any changes.

The Part 8 Proceedings

31. A demand for payment based upon the decision was duly issued by Isoplus on 14 February 2023 and resisted by Sleaford on 23 February 2023.

32. In anticipation of the inevitable enforcement proceedings, Sleaford issued its own proceedings pursuant to Part 8 on 27 February 2023. The claim was issued in London. The relief claimed is as follows:

> "*The Claimant seeks a declaration that:*
>
> *a. Clause 21.4 provides for pre-requisites for payment for the sub-subcontract works and that the Defendant has not complied with the pre-requisites.*
>
> *b. As a result, no further payment is due to the Defendant and the Court should decline to enforce the Decision.*"

33. In its application for directions in the Part 8 proceedings, it contended that:

> "*If it obtains the declarations sought, they will take precedence over the Adjudicator's decision, with the effect that no sum will be due to the Defendant.*"

34. The Part 8 proceedings were supported by written evidence from Piet Van Gelder.

35. In the Acknowledgment of Service, Isoplus objected to the suitability of the Part 8 proceedings and asked for them to be dismissed on the grounds that Part 7 was the appropriate procedure for determination of the issues.

36. The substance of the response was contained in written evidence from David Banks and Steve Webster. Mr Webster's evidence included that Sleaford was aware that sub-subcontractors had been engaged because access to site for them had to be requested;

that method statements and risk assessments had been undertaken; and that one of them, ERH, had attended site meetings with Isoplus and Sleaford. On that basis it was said to be inconceivable that Sleaford could have been unaware of the involvement of the sub-subcontractors in carrying out a portion of the works between November 2020 and September 2021. (Ms McCarthy did not, in fact, dispute this.) Within that window of time, applications for payment were issued by Isoplus and paid by Sleaford. Mr Webster said it would have been abundantly clear to Sleaford that the applications for payment accounted for work carried out both by Isoplus and its sub-subcontractors. Despite that, there was no assertion of non-compliance with clause 21.4 and, to the contrary, payments were made in full.

37. There was no material evidence in reply.

The Part 7 Proceedings

38. On 15 March 2023, Isoplus issued its Part 7 claim for enforcement of the decision in the Manchester District Registry. The two sets of proceedings were consolidated by consent order dated 31 March 2023. It was ultimately determined that both matters would be heard by this Court in London.

39. Beyond the evidence issued with the application, which was largely repetitive of that served by Isoplus in the Part 8 claim, no further evidence was filed in respect of the Part 7 claim.

The Parties' Contentions

40. It is convenient to take the position of Isoplus first. Its position is that the adjudicator's decision in its favour should be enforced pursuant to its Part 7 claim unless Sleaford succeeds at this concurrent hearing on the substance of its Part 8 declarations. As to that, it submits that Sleaford cannot succeed at this hearing. It contends that Sleaford's proceedings are unsuitable for determination by Part 8 because the complaints of non-compliance with clause 21.4 have not been properly particularised and because its defence to any breach depends on resolution of factual issues, including waiver. Dependent on how the clause is construed, it may also be necessary to have valuation evidence on quantum. Even if Part 8 were suitable for resolution, the clause should not be construed in the manner contended by Sleaford. It was inoperable as a condition precedent or, alternatively, not all of the sub-set provisions should be regarded as

conditions precedent. Some of the provisions were opaque. In any event, whatever construction of clause 21.4 was correct, it could not impact upon enforcement of the adjudicator's decision because there was insufficient evidence to show what the financial impact of non-compliance with clause 21.4 was. If it was appropriate for the Court to determine anything within the Part 8 claim at all, Isoplus contended that clause 21.4 is unenforceable by reason of s.110(1A) HGCRA, either because the mechanism for payment requires performance by the sub-subcontractor of its insurance obligations or because it makes payment conditional on a decision of Sleaford as contractor as to whether those insurance obligations had been performed.

41. For its part, Sleaford accepts the validity of the adjudicator's decision and, therefore, that, unless it succeeds on its Part 8 claim for declaratory relief that the decision should not be enforced, judgment will be given in respect of it. It contends that its Part 8 proceedings were properly issued as such because they raise a discrete question of contractual construction and there are no or no substantial issues of fact which require determination. On its case, it is clear that clause 21.4 is a pre-condition and, on the evidence before the Court, Isoplus is evidently and incontrovertibly in breach because none of the sub-subcontracts were provided within 7 days; the purchase order from at least one sub-subcontract CSM was not certified; and no professional indemnity insurance has been provided for any of the three sub-subcontractors. It is said to be a problem for Isoplus, not for it, that the milestone figures within the subcontract are global and, therefore, do not identify the amount applicable to work undertaken by the sub-subcontractors. It is said that the burden is on Isoplus to prove its entitlement to payment of sums due and, if that cannot be done, then Isoplus is simply not entitled to any payment. Complaints about a lack of particularisation of breach of clause 21.4 are rejected and, whilst "compatibility" may be a question of fact and degree, the extent of the breaches here are so clear that compliance cannot be shown in all respects. By reference to case law, the argument on waiver is rejected because evidence about the making of payments is said to be equivocal conduct incapable of giving rise to a waiver. On that basis, no trial of the evidence (which in any event was not disputed by Sleaford) was necessary. As to the point about s.110(1A), the exception in s.110(1C) was a complete answer.

Procedural Considerations

42. It is unfortunate that Isoplus chose to issue its Part 7 proceedings in Manchester given that the Part 8 claim had already been issued in London. No satisfactory explanation for this was offered by Isoplus. Paragraph 9.4.4 of the TCC Guide particularly cautions against the issue of separate proceedings in different court centres. As a result of what happened in this case, public resource was needlessly spent resolving the question of where the proceedings would be heard.

43. I am clear that the proper approach to these two sets of proceedings is that identified by Coulson LJ in A&V Building Solutions Ltd v J&B Hopkins Ltd [2023] EWCA Civ 54 at [38]:

> "*The proper approach to parallel proceedings was outlined by O'Farrell J in Structure Consulting Limited v Maroush Food Production Limited [2017] EWHC 962 (TCC). The judge should usually give judgment on the claim based on the adjudicator's decision and then – to the extent possible – endeavour to sort out the Part 8 proceedings. The same point was made in Hutton Construction Limited v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC); [2017] BLR 344, where the judge said that the Part 8 claim should be dealt with after the enforcement, unless the point raised was straightforward and self-contained, and the parties were agreed that it could be dealt with at the enforcement application without adding to the time estimate.*"

44. It follows that I should determine the issues in the following sequence:

(a) Is there any defence to the Part 7 claim?
(b) Are the matters raised in the Part 8 claim suitable for determination by means of Part 8?
(c) What, if any, decision should be reached in respect of the point raised in respect of s.110(1A) HGCRA?
(d) If the matters are not suitable for determination by Part 8, what should become of the Part 8 claim?
(e) If the matters raised are suitable for determination by means of Part 8, and can now be determined, how should they be determined? What, if any, impact does such determination have on the decision on the Part 7 claim?

(a) Is there any defence to the Part 7 claim?

45. At one stage, both parties approached this question having regard to three-stage test identified in Hutton Construction Ltd v Wilson Properties (London) Ltd [2017] EWHC 517 (TCC), now reflected in paragraph 9.4.5 of the TCC Guide. This states as follows:

    "*However, in cases where an adjudicator has made a clear error (but has acted within his jurisdiction), it may on occasions be appropriate to bring proceedings under Part 8 for a declaration as a pre-emptive response to an anticipated application to enforce the decision. In light of this guidance, a practice had grown up of applications to enforce an adjudicator's decision being met by an application for a declaration that the adjudicator had erred often without proceedings under Part 8 being commenced. This approach was disruptive and not in accordance with the spirit of the TCC's procedure for the enforcement of adjudicator's decisions. It is emphasised, therefore, that such cases are limited to those where:*

    a) There is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest;

    b) That issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing for enforcement;

    c) The issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore; and further that there should in all cases be proper proceedings for declaratory relief."

46. However, the parties were ultimately agreed that the three stage test does not directly arise in this case. The first sentence of paragraph 9.4.5 acknowledges that, in some cases, it may be appropriate for Part 8 proceeding to be issued. The second sentence contrasts that with circumstances in which separate Part 8 proceedings are not issued but where a declaration that the adjudicator has erred is sought within the existing Part 7 proceedings. The third sentence, which contains the three stage test, is confined to cases in the latter category. Accordingly, where, as here, Part 8 proceedings have been issued and, importantly, it has been agreed between the parties that they should be heard together, the correct approach is to consider whether there is any defence to the Part 7 claim (i.e., as excess of jurisdiction or breach of natural justice) and, then, to go on and sort out the Part 8 claim: see A&V Building Solutions. This requires an assessment of suitability for Part 8; if suitable, a determination of the merits at the hearing; and consideration of the extent to which the relief granted constitutes a final determination

of the subject matter of the adjudication. Either if the Part 8 proceedings are unsuitable, or the Court is not able to make a final determination at that hearing, judgment in the enforcement proceedings should ordinarily be given. Those considerations are not really very different from an application of the Hutton three-stage test but arise in a different context where Part 8 proceedings have been issued.

47. In my view, that is consistent with the approach adopted by Constable J in Elements (Europe) Ltd v FK Building Ltd [2023] EWHC 726 (TCC) in which he decided at [33] that the three stage test in Hutton was not intended as some form of higher Part 8 test. Rather, in considering whether Part 8 proceedings should be heard at such time as would, if successful, affect the enforceability of the decision, the Court should be guided by the three stages, originally in Hutton and now in the TCC Guide, but now in the context of the suitability of the proceedings to Part 8.

48. At this point, it is convenient to address a matter which was the subject of submissions from the parties, namely whether there is any distinction properly to be made between the advice of the adjudicator on the one hand and the decision of the adjudicator on the other. The adjudicator was aware of the potential distinction when she drew it to the attention of the parties and invited comment on it. Whether or not she was right to do so, the adjudicator ultimately construed the request that she "advise" the parties literally and distinctly from those matters upon which she was called to decide. This is clear from the approach she took in paragraph 24 ("any such advice may not be enforceable") and, respectively, paragraphs 173 and 174 of the decision in which she contrasts her decision from her advice. Having made that distinction, she clearly did decide that clause 21.4 contained pre-requisites to payment. Pending trial, that element of her decision is binding. However, by distinguishing between her advice on the one hand and her decision on the other, it follows that, viewed objectively, she did not intend the subject matter of paragraph 174 to be binding on the parties. In practical terms, this is a distinction without a difference because it is common ground that she either advised or decided that she was unable to reach any conclusion whether or not all pre-requisites to payment had in fact been met. However, what is abundantly clear is that she did not consider that that inability was such as to shut out Isoplus from its entitlement to payment. She clearly decided that payment was to be made.

49. Thus, it is accepted by Sleaford that the adjudicator's decision in respect of payment is enforceable. Accordingly, there should be judgment in favour of Isoplus for the sum payable, namely £323,502.32, unless the effect of any substantive declaration made concurrently in the Part 8 proceedings impacts upon its efficacy by reason of any final determination therein made.

(b) Are the matters raised in the Part 8 claim suitable for determination by means of Part 8?

50. As set out above, there are three assertions in the Part 8 declarations sought. First, that there are pre-requisites (which I take to be an inter-changeable expression for conditions precedent) to payment on a proper construction of the subcontract. Second, that, on the facts, Isoplus failed to comply with those conditions precedent. Third, that the effects of this are both that no further payments can be made to Isoplus and that the adjudicator's decision should not be enforced. Sleaford's case is that a final determination of the issues raised by the Part 8 claim would take precedence over the adjudicator's decision.

51. It is therefore necessary for me to consider whether these issues are suitable for determination by Part 8. At the outset, I refer to and have well in mind what Coulson LJ said in A&V Building Solutions Ltd v J&B Hopkins Ltd [2023] EWCA Civ 54 at [39]:

> "*Warnings have continued to be given as to the over-liberal and inappropriate use of Part 8 in adjudication cases: see Jefford J in Merit Holdings Ltd v Michael J Lonsdale Ltd [2017] EWHC 2450 (TCC); [2017] 174 Con LR 92, and Ms Joanna Smith QC (as she then was) in Victory House General Partner Linted v RGB P&C Limited [2018] EWHC 102 (TCC).*"

52. Part 8.1 of the Civil Procedure Rules states:

> "*A claimant may, unless any enactment, rule or practice direction states otherwise, use the Part 8 procedure where they seek the court' decision on a question which is unlikely to involve a substantial dispute of fact.*"

53. In respect of each of the three assertions I am not satisfied that the matters are now suitable for determination by means of Part 8. I reach those conclusions by specific reference to Part 8.1 and mindful of the factors mentioned in the TCC guide.

54. The first assertion purports to raise a question of construction relating to the meaning of clause 21.4. However, I am satisfied that there is at least one prior question which falls for resolution before the question of conditions precedent can properly be determined. That is whether the provision in clause 21.4 is ever capable of application in circumstances where the parties have agreed a regime of milestone payments. It was common ground that the effect of non-compliance with the requirements of clause 21.4 was not that Isoplus should receive no payment at all. Rather, it would not be paid any sum related to the work carried out by the sub-subcontractor in respect of which Isoplus was in default. In this case, the parties had agreed that Isoplus would be paid lump sum milestone payments which grouped together activities by zones. Accordingly, there was simply no prescribed valuation mechanism to assess the value of work in a given milestone relating to work done by a sub-subcontractor. That, in turn, begs the question of how, if at all, the condition in clause 21.4 was intended to operate. That matter may require evidence about the content and value of work and, if so, is unsuitable for Part 8 determination. Ms McCarthy accepted at the hearing that it was at least relevant to the enforceability of the condition that the valuation element may be inoperable.

55. If the condition is operable, the next point which falls for determination is whether the requirements of a condition precedent are satisfied. In Persimmon Homes (South Coast) Ltd v Hall Aggregates (South Coast) Ltd [2008] EWHC 2379 (TCC), Coulson J (as he then was) said:

> "*[298] It is trite law that, if one party's obligation to do something under a contract is contingent upon the happening of a particular event, the circumstances of the event must be identified unambiguously in the contract. It must be clear beyond doubt how and in what circumstances the relevant obligation has been triggered…*"

56. Assuming the condition is enforceable notwithstanding the milestone regime, clause 21.4 contains multiple sub-elements within it. In recognition of this, the Part 8 claim itself refers to "pre-requisites" (plural). Of course, the fact that Part 8 proceedings raise multiple questions of construction is not, in itself, objectionable but it does mean that the questions should be identified with a sufficient degree of clarity. In this case, it is possible that only some, but not all, of those elements within clause 21.4 contain

conditions precedent. The Part 8 proceedings do not identify, still less draw any distinction between, the differing elements or allow for individual declarations to be given in respect of them. To take an example, whilst Ms McCarthy submitted that the timing requirement, to provide a copy of the sub-subcontract within 7 days, was a condition precedent, a possible construction advanced by Mr Thompson is that the timing element did not form part of any condition. I accept that is an arguable proposition. Otherwise, the consequences of submitting the sub-subcontracts only one day late could mean that no sum is payable for any of the work relating thereto, which may be thought a startling outcome. That is why pleading matters out would be helpful.

57. I do not regard paragraph 18 of the Particulars of Claim (to which I was not taken at the hearing) as satisfactorily containing particulars of the breaches relied on. A fully particularised pleading from Sleaford should identify each of the individual elements which is said to be a condition and enable the Court to provide its decision on each of them where breach is alleged. Moreover, clause 21.4 only applies where a "portion" of the subcontract works has been subcontracted. The evidence before the Court is that one sub-subcontractor, CSM, was commissioned by Purchase Order on a labour only basis to provide a gang of men to carry out works as directed. It is arguable that such would not constitute the letting of a "portion" of subcontract works. I am satisfied that the multi-faceted elements within clause 21.4 are such that a properly particularised claim should be pleaded out so that each issue of construction can be separately resolved.

58. The second assertion entails consideration of whether Isoplus has, in fact, complied with such conditions precedent as may exist. A submission that allegations of breach of conditions precedent would not give rise to substantial disputes of fact is one to be approached with caution.

59. Once again, the failure by Sleaford to have adequately particularised its breaches means that there is no proper agenda for determination of the matter at this stage. Ms McCarthy submitted that sufficient particulars of breach had been provided both in the adjudication and in her skeleton argument. I disagree. The supposed breaches alleged in the adjudication are not well particularised. An illustration of this is the bare contention in paragraph 9.5 of the Referral that:

> "*The Sub-subcontracts provided by HD 4 October 2022 are in no way compatible with the SBS IPS S/C*"

No particulars of the incompatibility are provided. Nor are sufficient particulars set out in the skeleton argument. Moreover, it is not even clear to me that this contention is maintained in paragraph 18 of the Part 8 Particulars of Claim.

60. Both in the adjudication and the Particulars of Claim is a blanket assertion that, for each of the three sub-subcontracts, there had been a failure to provide evidence of the professional indemnity insurance in place. In her written skeleton, Ms McCarthy had previously contended that the failure by CJC to provide insurance was "of particular relevance". Yet, on investigation, it was ultimately accepted by Ms McCarthy that no such insurance was even required for at least two of the sub-subcontractors, namely CJC and CSM. The third, ERH, would only have been required to provide professional indemnity insurance if it was responsible for design work. That aspect has yet to be pleaded and proven by Sleaford. Further documents may be required for this. On the face of it, there is no express reference to design in Schedule 1 to the sub-subcontract with ERH.

61. In addition, the arguments about breach in the adjudication were not, in every respect, the same as the arguments on breach relied on in the skeleton argument. I am satisfied that a properly particularised claim would enable the breaches of any conditions precedent to be identified.

62. Whether the fact of those breaches is disputed will necessarily depend on what is alleged by way of breach. Sleaford presupposes there are no factual issues which will arise but I am not satisfied it is correct about that. For example, an issue raised in submissions (but, as I have noted, not clearly pleaded) concerned the question of compatibility between the subcontract and the sub-subcontracts. If it is pursued, it will require some factual analysis of what each sub-subcontractor was required to do and, perhaps, the terms upon which it was required to do it. In submissions, Ms McCarthy was unable to identify any respect in which any sub-subcontract was in fact incompatible with the subcontract.

63. I also accept the submission of Isoplus that, in order to determine matters fairly between the parties, it will be necessary to consider its defence of waiver. It is common ground that Sleaford made at least three payments to Isoplus in respect of milestone achievements. Isoplus contends that the making of these payments in full and with knowledge of any non-compliance with clause 21.4 amounts to a unilateral waiver of any preconditions. I agree that a declaration in Part 8 proceedings that there has been a breach of condition is of no utility in the abstract in circumstances where Isoplus contends that any such breach has been waived. In Elements (Europe) Ltd v FK Building Ltd, at [34], Constable J identified waiver based on site practice as an example of something unsuitable for determination on a Part 8 claim. Ms McCarthy said that the waiver defence was bound to fail, such that evidence in respect of it was immaterial, because the case law showed that the making of payments was generally an equivocal act: see A&V Building Solutions Ltd v J&B Hopkins Ltd [2023] EWCA Civ 54; Grove Developments Ltd v Balfour Beatty Regional Construction Ltd [2016] EWHC (TCC)[2]; and Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd [2017] EWHC 15 (TCC). Mr Thompson's submission was that those cases could, at least arguably, be distinguished. They were concerned with notices and payment procedures rather than with the underlying right to be paid. He submitted that where, as here, Sleaford had the supposed right not to pay part of the milestone and yet paid it in full there can be nothing equivocal about that. He confirmed he was limiting his case to one of unilateral waiver. In response, Ms McCarthy was unable to proffer any alternative (and therefore equivocal) explanation for the making of payments in full other than that the conditions in clause 21.4 had been waived. Nor did she attempt to meet the allegedly distinguishing features identified by Mr Thompson. I am satisfied that Isoplus has an arguable case that the payment in this case amounted to a waiver. But a good deal more evidence is required in order to finally determine the matter. Once (and if) breaches of clause 21.4 are identified, it will be possible to see whether the making of those payments amounted to waiver of those breaches.

64. In respect of the third assertion, Part 8 proceedings are also unsuitable. I accept Mr Thompson's submission that valuation evidence will be required because, at present, there is no basis upon which the Court could determine what part of any milestone payment related to the work of a given sub-subcontractor in respect of which a breach

[2] The case went to appeal but not on the waiver point.

of clause 21.4 has been proven. Ms McCarthy's submissions supposed that the absence of such evidence was a problem for Isoplus, not for Sleaford, and that, if Isoplus could not identify the value of such work, it was not entitled to make any claim for payment at all. I do not agree that this premise arises. Beyond seeking enforcement of the adjudicator's decision, Isoplus is not making any substantive claim for payment. When and if it does so, it would still be for Sleaford to defend that claim by reference to the supposed failure by Isoplus to satisfy the conditions precedent and for it to show what impact that failure has on the financial entitlement claimed by Isoplus. The same would have to be shown if the claim for payment is initiated by Sleaford. Ms McCarthy makes the point that without knowing the rates charged by the sub-subcontractor, Sleaford is unable to value that impact. I do not accept this. It presupposes that those rates are relevant to the exercise, which they may or may not be.

65. This point is also fatal to Sleaford's contention that, in light of its construction of clause 21.4 and the supposed breaches of those provisions, the adjudicator's decision should not be enforced. In my judgment, Ms McCarthy is, respectfully, wrong to submit that Isoplus is seeking payment of sums due under the contract – it merely seeks enforcement of the adjudicator's decision. Ms McCarthy acknowledged, as she had to, that payment of sum decided by the adjudicator was not a payment to which clause 21.4 attached. Sleaford is contractually obliged to comply with the decision of the adjudicator in full. The declaration in the Part 8 Claim Form that "as a result [of non-compliance with the pre-requisites]… the Court should decline to enforce the Decision" acknowledges the burden on Sleaford of proving the causal connection between the breaches of the conditions precedent and the content of the decision. I agree with that. In other words, in order to prevent the decision from being enforceable following a final determination it would now be for Sleaford to demonstrate what part of the work comprised within that sum decided by the adjudicator to be due actually related to the work of sub-subcontractors in respect of which a breach of clause 21.4 has been proven. At present, Sleaford has made no attempt to undertake this calculation (and never did so in the adjudication either). As such, if it were ever appropriate for the outcome of the claim for declaratory relief in the Part 8 proceedings to impact upon the adjudicator's decision, evidence would be needed in respect of it.

66. It is obvious from the factors considered above that the issues relating to clause 21.4 are by no means short and self-contained. Moreover, their resolution depends on evidence beyond that which is presently before the Court.

67. I re-iterate that, in my judgment, these proceedings are not suitable for determination under Part 8.

68. It follows that, since the Court is not currently prepared to make any final determination in respect of the declarations sought in the Part 8 claim, Isoplus must now be entitled to its judgment in respect of the Part 7 claim.

(c) What, if any, decision should be reached in respect of the point raised in respect of s.110(1A) HGCRA?

69. Although both parties were content for the Court to determine this issue within the ambit of the existing Part 8 proceedings and, although it was argued on that basis, I have concluded that it would not be appropriate for me to make any decision in respect of it. I reach that conclusion for three reasons. Firstly, so far as the research of counsel has shown, there is almost no case law on s.110(1A) and none in respect of s.110(1C). In my judgment, the Court ultimately determining this issue will benefit from any further information drawn from textbooks or other materials which shed light on the intended application of these provisions. Secondly, I do not consider the consequences, namely those set out in s.110(3), were sufficiently explored. If, as Isoplus contends, the mechanism for payment is inadequate by reason of s.110(1A) then it is necessary to explore which provisions of the Scheme for Construction Contracts apply pursuant to s.110(3) and to what extent. The adjudicator was at pains to point out that she was making a determination based on an interim, rather than final, payment. The Scheme treats each of these differently. It seems unlikely that any further interim payment will become due to Isoplus. I consider it would be more appropriate for this issue to be determined within the context of whatever payment claim next arises before the Court. Thirdly, it seems odd to be making a determination of law about the effect of s.110(1A) in circumstances where there are no proceedings which contain or define such issue of law.

70. The adjudicator noted that Isoplus had not responded on the issue as to whether clause 21.4 was a precondition: see paragraph 169 of her decision. She determined it was a precondition: see paragraph 170 of her decision. It follows that, in the meantime, the parties are bound by the adjudicator's determination that clause 21.4 must be complied with as a precondition to payment of any sums related to a sub-subcontractor. Other than in Court, it is not open to Isoplus to go behind that decision on the basis that s.110(1A) applies.

(d) If Part 8 proceedings are not suitable, what should become of the Part 8 claim?

71. Mr Thompson invites the Court either to dismiss the Part 8 proceedings or to order they be tried as Part 7 proceedings. There is probably not much practical difference between these two because, for the reasons I have set out, the first step either way will be for Sleaford to properly particularise those individual elements of clause 21.4 which it contends are conditions precedent; the breaches of those conditions; and the supposed consequences of the breaches. Not much, if any, of the current Particulars of Claim would remain. On that basis I conclude that it would be better for separate proceedings to be issued so that Sleaford can start afresh. I therefore dismiss the Part 8 claim. For the avoidance of doubt I make clear that, in doing so, I do not shut Sleaford out from advancing the same essential point as it has already raised relating to clause 21.4.

(e) If the matters raised are suitable for determination by means of Part 8 and can now be determined, how should they be determined? What, if any, impact does such determination have on the decision on the Part 7 claim?

72. It follows that it is inappropriate for me to make any substantive determination on the matters raised by the Part 8 claim and I do not do so. Since there is no determination, it has no impact on the decision on the Part 7 claim.

Conclusions

73. For these reasons, there will be judgment on the Part 7 claim in the sum of £323,502.32 plus interest. I dismiss the Part 8 claim.

74. I will hear the parties on all consequential matters to the extent they cannot be agreed.