Neutral Citation Number: [2019] EWHC 3482 (TCC)

Case No: HT-2019-MAN-000063

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
TECHNOLOGY AND CONSTRUCTION COURT (QB)

Manchester Civil Justice Centre,
1 Bridge Street West, Manchester M60 9DJ
Date: 16 December 2019

Before:

HIS HONOUR JUDGE STEPHEN DAVIES
SITTING AS A JUDGE OF THE HIGH COURT

Between:

ISG CONSTRUCTION LIMITED	**Claimant**
- and –	
ENGLISH ARCHITECTURAL GLAZING LIMITED	**Defendant**

Justin Mort QC (instructed by **Mills & Co, 107 Cheapside, London**) for the **Claimant**

Steven Walker QC (instructed by **Mills & Reeve LLP, 74-84 Colmore Row, Birmingham**) for the **Defendant**

Hearing dates: 20 November 2019
Draft judgment circulated: 29 November 2019

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APPROVED JUDGMENT

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

……..

His Honour Judge Stephen Davies

His Honour Judge Stephen Davies:

1. By these Part 8 proceedings the claimant claims the following declarations, or such modified version of them as the court might consider to be appropriate:

"(1) the defendant failed to comply with clause 9 of the subcontract conditions;

(2) pursuant to clause 9(8) of the subcontract conditions the defendant is not entitled to any extension of time (irrespective of the underlying merits of any such claim);

(3) the defendant was therefore obliged to complete the subcontract works by 6 March 2018 (being the date for completion of the subcontract works conceded by the claimant);

(4) the adjudicator lacked jurisdiction to "set aside" the claimant's bona fide estimate;

(5) further or alternatively: whether or not he had jurisdiction to do so, the adjudicator was wrong to do so having regard to the terms of the parties' subcontract and in particular their agreement that the bona fide estimate was binding and conclusive until final determination;

(6) (without prejudice to the foregoing) that in any event the adjudicator's decision (at paragraph 173.1) that "a fair and reasonable time" for completion of the subcontract works is 22 October 2018

(a) is determinative only for

(i) the limited context of the defendant's application for payment the subject of the adjudication (payment number 35), rather than for the purposes of the subcontract generally; alternatively:

(ii) the limited context of the claimant's bona fide estimate;

(b) is irrelevant for the purposes of the "final determination" of the amount of loss or damage suffered by the claimant as that phrase is used in clause 9(8);

(c) in the circumstances it would be open to either party to refer a dispute as to such "final determination" to adjudication, notwithstanding the terms of the existing decision;

(7) that the adjudicator's decision (at paragraph 173.2) that "ISG has not demonstrated and proved that EAG was responsible for causing 20 weeks delay" is to be understood in the context of the defendant's application for payment number 35, and does not prevent the claimant from now seeking to recover loss and expense in adjudication and/or limit any such claim."

2. It will be seen from these declarations that the context of these Part 8 proceedings is that the claimant is dissatisfied with the outcome of an adjudication and now seeks the final determination by the court of: (a) certain discrete substantive issues decided by the adjudicator; and/or (b) the ambit and effect of the adjudicator's decision.

3. As regards (a), the claimant's argument is that this is a suitable case to invite the court to determine these discrete substantive issues because: (i) they raise short points of contract interpretation and do not involve substantial issues of fact; and (ii) the adjudicator's decision on these points is wrong and can finally and conveniently be determined to be wrong in these Part 8 proceedings.

4. As regards (b), the claimant's argument is that if the court is not prepared to answer these discrete substantive issues, or does not answer them in its favour, then it is important that the ambit and effect of the adjudicator's decision is determined so that both parties will know for the future what issues each is entitled to refer to a further adjudication and what jurisdiction any future adjudicator will have.

5. The claimant emphasises that this is not a case where it is seeking to invoke the Part 8 jurisdiction to avoid paying the sum which the adjudicator decided it should pay. It has already paid that relatively modest sum of £137,434.53, being its valuation of interim payment application number 35. Its real complaint is that the adjudicator decided that it could not rely upon what it contends is its contractually binding bona fide estimate in the sum of £3,183,000 representing, so it claims, the loss and damage suffered by it due to the defendant's breach in failing to complete the subcontract works by the contract completion date (as extended) and that: (a) this decision can be shown to be demonstrably wrong; and in any event (b) it needs to know the ambit and effect of that decision so that it can decide whether, and if so on what basis, it can seek to enforce its claim for loss and damage in any further adjudication.

6. The defendant's position is that:

   (a) the proper determination of the issues raised by declarations (1) to (3) above will require resolution of issues of fact as well as issues of law such that it is not appropriate for those issues to be determined in these Part 8 proceedings;

   (b) insofar as the issues raised by declarations (4) to (5) above do not, on the basis argued by the claimant, require resolution of issues of fact, then they can and should be answered in the defendant's favour in these Part 8 proceedings; and

   (c) no sufficient reason has been shown for inviting the court to determine the ambit and effect of the adjudicator's decision at this stage. It is more appropriate to do so if and when any further dispute is in fact referred to adjudication, when a clear comparison of the case as advanced in that further adjudication as compared with the case advanced and decision made in this adjudication can be made and a decision of real utility to the parties obtained.

7. I had the benefit of detailed and helpful written and oral submissions from leading counsel for the claimant and for the defendant over the course of a full day on 20 November 2019 and now produce this reserved judgment. In summary, my decision is that I am not prepared to make the proposed or any declarations.

8. My reasons are set out below under the following sub-headings: (A) relevant facts [paragraphs 9-19]; (B) Part 8 declaratory relief – relevant principles [paragraphs 20-25]; (C) the substantive declarations sought by the claimant [paragraphs 26-48]; and (D) the declarations sought as to the ambit and effect of the adjudicator's decision [paragraphs 49-66].

A. Relevant facts

9. This is only a summary of such facts as are necessary for me to make and explain my decision.

10. The claimant and the defendant entered into a subcontract for the design, supply and installation of cladding on a project in Lombard Street, London EC3, where the claimant was the main contractor and the defendant its cladding subcontractor.

11. The subcontract provided for a start on site on 20 March 2017 and a contractual completion date of 11 September 2017.

12. The subcontract also incorporated the claimant's standard subcontract conditions. I can summarise most of the clauses of relevance but need to set out clause 9(8) in full.

    (1) Clause 2 contained fairly standard provisions for interim payments which complied with the requirements of the Housing Grants Construction and Regeneration Act 1996 ("**the 1996 Act**"). The procedure for interim payments required the defendant to submit applications for payment by reference to the specified payment dates set out in the contract and the claimant to issue a payment notice containing its interim valuation, with the amount stated to be paid by the final date for payment, subject to any timely pay less notice which might be issued by the claimant.

    (2) Clause 2 also contained provisions for the determination of the final account, involving the submission by the defendant of its final account within 3 months of practical completion, failing which the claimant might prepare the final account in lieu. Provision was made for the final account to be agreed, failing which the procedure applicable to interim payments would then apply.

    (3) There was also a provision in clause 2 requiring the defendant to give notice if it disputed the final account prepared by the claimant, failing which the account would become conclusive. There was also a conclusive evidence provision in relation to the effect of any payment notices or pay less notices issued by the claimant, whether in relation to an interim payment or the final account,

which were not challenged by proceedings in court or by adjudication commenced within 30 days of issue. There was also a provision entitling the claimant to deduct any monies recoverable from or payable by the defendant under the subcontract from any sums due to the defendant, but subject to compliance with the pay less notice procedure.

(4) If the claimant instructed a later start date then the defendant should be entitled to an extension of time without the need to give notice (clause 9(2)).

(5) The defendant should notify the claimant "forthwith in the event it becomes aware that progress of the Works is being or is likely to be delayed and/or that it may achieve practical completion of the Works or any section thereof after the Completion Date relevant thereto, together with details of the cause of the delay and the date upon which the Sub-Contractor considers it will achieve practical completion of the Works and/or the relevant section" (clause 9(4)).

(6) If the defendant was delayed in practical completion due to one or more of 4 specified reasons then it should be entitled to a "fair and reasonable extension to the Completion Date for the Works … affected by such delay provided that the Sub-Contractor has given written notice to ISG of the circumstance or occurrence which is delaying him and details of the effects or likely effects of such delay with a best estimate of the continuing extent of such delay and its impact on practical completion of the Works and/or the relevant section within fourteen days of such circumstance or occurrence first occurring" (clause 9(5)).

(7) The defendant's right to an extension of time was conditional upon it demonstrating to the claimant that the delay would delay practical completion notwithstanding the defendant having used best endeavours to prevent delay (clause 9(7)).

(8) Clause 9(8) provided that:

"If the Sub-Contractor is in breach of any of the foregoing provisions of this clause 9 then the Sub-Contractor shall not have any entitlement to an extension of time in relation to any delay to which such breach or breaches relates and without prejudice to ISG's other rights and remedies the Sub-Contractor shall without prejudice to and pending the final determination or agreement between the parties as to the amount of the loss or damage suffered or which may be suffered by ISG in consequence thereof forthwith pay or allow to ISG such sum (in which event ISG shall be entitled to deduct such sum from any amount otherwise payable to the Sub-Contractor as ISG shall bona fide estimate as the amount of such loss or damage such estimate to be binding and conclusive upon the Sub-Contractor until such final determination or agreement. Such estimate may include without limitation a sum in respect of liquidated and ascertained damages paid or to be paid by ISG under the Principal Contract where ISG reasonably considers that the Sub-Contractor has caused or contributed to delay to practical completion of ISG's works under the Principal Contract".

(9) Clause 30(1) conferred on either party the right to refer any dispute or difference arising under or in connection with the subcontract to adjudication at any time. This was not restricted or qualified in any way whatsoever. The following sub-clauses set out the procedure for such adjudications, upon which nothing turns, save that clause 30(4) provided that the decision of the adjudicator should be binding until the dispute was finally determined by the English court.

13. It is common ground that the claimant did not permit the defendant to start on site by the contractual site start date of 20 March 2017 and that the defendant was only able to start on site on the contractual completion date of 11 September 2017. It is common ground that under clause 9(2) the defendant was entitled to an extension of time in that regard without the need to give any notice. The claimant has conceded that the defendant is entitled to an extension of time to 6 March 2018 which, as I understand it, represents a straight-line extension based on a delay of 25 weeks. There is a dispute about whether this is a sufficient extension since the defendant: (a) contends that the straight-line extension fails to take into account the difference between the actual winter working conditions compared with the anticipated summer working conditions; (b) notes that on 25 June 2018 the claimant calculated a revised completion date of 6 April 2018, seemingly reflecting only the delayed start on site, which was based on the contract provision specifying a site duration of 30 weeks together with an allowance for additional bank holidays over the period of delay.

14. It is also common ground that there were some communications about delay, although there is a dispute about whether or not these were sufficient to meet the notice requirements of clause 9. In particular:

(a) On 5 April 2018 the defendant requested an extension of time to 15 June 2018, specifying 6 causes of delay and stating its expected revised completion dates.

(b) On 16 May 2018 the claimant replied, stating that it did not believe that sufficient details were given and asking for specific details "when it becomes practicable".

(c) On 25 June 2018 the claimant wrote, recording that the defendant had failed to complete by the stated revised completion date of 6 April 2018.

(d) On 29 June 2018 the defendant responded, referring to a discussion at a meeting on 26 June 2018 at which it was "agreed that the actual commencement date and completion date should be reviewed against the events as discussed impacting on these dates that had not been taken into consideration at the time of assessment". It was said that these events included but were not limited to seven events specified in the letter. It was said that the defendant intended to work collaboratively so as to agree these issues and complete the works and agree the final account. There is no evidence of any contemporaneous response to this letter.

15. It also appears from subsequent correspondence that by November 2018 the parties were in dispute regarding the defendant's entitlement to an extension of time and the claimant's entitlement to set off, as it had done against interim valuations 33 and 34, liquidated damages which it was asserting had been

levied against it by its employer due to delays for which the defendant was responsible. By December 2018 the claimant had purported to deduct the sum of £3,183,000 against interim valuation 35, such sums being stated to be its bona fide estimate of loss and damage pursuant to clause 9(8). This was made up as to £1,600,000 liquidated damages levied under the main contract and £1,583,000 in respect of its own delay related costs, including third party costs from other subcontractors.

16. On 9 January 2019 the claims consultants instructed by the defendant submitted a notice of adjudication. It stated that the dispute related to: (a) the claimant's claim that the defendant was responsible for causing 20 weeks delay to the main contract and that the defendant was liable for the sum of £3,183,000, both of which claims were disputed by the defendant; (b) the claimant's failure to grant the defendant a sufficient extension of time under clause 9 or to accept that the defendant was entitled to a reasonable time for completion[1], the date contended for in both cases being 21 December 2018; (c) the claimant's failure to support its claim by detailed particulars or substantive evidence. The redress sought was stated to be decisions that: (i) 21 December 2018 (or such other date as the adjudicator might decide) was a fair and reasonable time for completion on the twin basis identified above; (ii) the claimant had not demonstrated or proved that the defendant had caused 20 weeks' delay to the claimant's works or that it was liable for the sum of £3,183,000; (iii) the claimant should pay the defendant the £137,434.53 balance due under interim valuation 35 after omitting the deduction made (or such other sum as the adjudicator might decide).

17. On the same day Mr Collie was appointed as adjudicator. The defendant duly submitted its referral notice which was to similar effect as the notice of adjudication.

18. The response as submitted by the claimant contained a helpful executive summary at paragraph 2, from which it is apparent that the claimant's position was as follows:

    (a) The defendant was liable for the continuing delay to the subcontract works.

    (b) The defendant had not established its entitlement to an extension of time under clause 9 on any basis, including – but not limited to – the lack of compliance with the notification requirements of clause 9. The claimant made it clear that it agreed that the adjudicator should have jurisdiction to determine the extension of time issue notwithstanding that it had previously contended that this was not a claim which had crystallised before the dispute was referred.

    (c) The claimant had made and was entitled to rely upon its bona fide estimate of loss and damage due to the 20 weeks' delay caused by the defendant to the overall delay to the main contract works. Although the claimant was entitled to rely upon the same to set off against the sum otherwise due under interim valuation 35 it had not sought, and was not seeking, to claim payment of any greater sum in this adjudication.

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[1] From previous correspondence it appears that this alternative basis was being contended for on the basis of an argument that the time for completion had become at large.

(d) The adjudicator had no jurisdiction under paragraph 20 of the Scheme for Construction Contracts to open up, review or revise the claimant's bona fide estimate because of the provision in clause 9(8) that, although provisional, it should be binding and conclusive pending final determination.

(e) As and when the claimant had resolved all delay related claims it would finally determine its loss and damage due to the defendant's delay and reserved the right to do so under clause 9(8) and/or by way of damages for breach of contract at that stage.

19. It is unnecessary for me to refer to the subsequent exchanges in the adjudication. The adjudicator duly produced his decision. It is a detailed document, running to 173 separate numbered paragraphs over 32 pages. It is only necessary for me to identify the key points in the decision, which are as follows:

(1) The adjudicator recorded that there was a dispute as to whether he had jurisdiction to determine the dispute over the claimant's bona fide estimate of £3,183,000 or only the deduction from interim valuation 35. He decided that he had jurisdiction to determine the former and there is no challenge to that decision in this Part 8 claim.

(2) He referred to the provisions of clause 9. He said at [37] that the clause should be construed and applied literally and at [39] that it created obligations on both parties to comply with it, the defendant having to give notice and the claimant having to demonstrate that the damages claimed were caused or contributed as a consequence of the specific breach. He noted at [40] that on his analysis of clause 9(8) the relevant breach consisted in the failure to give the correct notice as opposed to the underlying breach as regards the delayed performance of the works.

(3) He referred to the notices relied upon by the defendant in these terms:

"41 In relation to the alleged notices. The 2017 notices relate to the delay in commencing the work. There seems to be a disagreement about it, but it is common ground that EAG did commence on 11 September 2017.

42 As for the alleged notice on 5 April 2018, it is of limited consequence as it does not notify all the items now claimed and some of the claims are clearly not within 14 days of the event first occurring.

43 As for the events of 25 to 29 June I can see no evidence that ISG agreed to consider EAG's entitlement to an extension of time without reference to clause 9.

44 Save for the limited effects of 5th April letter I am aware of no further valid notice."

(4) He referred to the onus and burden of proving a delay claim and, having recorded the arguments as advanced by the parties, said this:

"48 The issue about whether the contract places on either party a burden of proof is not the real issue. The point is that in Adjudication as in litigation the party that asserts must prove.

49 That said, the only obligation upon EAG is to give notice of the delay and an estimate of the effect within 14 days of the event first occurring. There is no obligation to provide a programme let alone a critical path network.

50 Whereas the obligation upon ISG is to demonstrate that the alleged losses were incurred or may be incurred in consequence of the breach and the breach caused or contributed to a delay to practical completion.

51 The main assertion in this dispute is ISG's assertion that EAG are responsible for 20 weeks delay and as a consequence ISG have incurred or may incur £3,183,000. It is for ISG to prove this liability.

52 EAG's position is that they have excuses for not performing and that ISG has not proven that EAG caused or contributed to any loss in consequence of any alleged breach. Insofar as EAG seek to demonstrate an extension of time it is for them to prove an entitlement."

(5) He then considered in some detail the respective assertions of the parties as to the causes of delay. Under a section headed "Summary of delay" he stated that:

"91 Given the Parties submissions and given the lack of useful programming analysis I have no choice but to form an impressionistic view of the delays.

92 As such whilst there has been some significant delay to the project, I am also satisfied that EAG have some culpability for some of the delay

93 In my view EAG have excuses for their non-performance up to 22 October 2018."

(6) He then considered the respective assertions of the parties as to the bona fide estimate relied upon by the claimant. He stated that:

(i) He did have the power to open up and review the bona fide estimate, on the basis that the "final determination" referred to in clause 9(8) was not that of the claimant itself but of the court and, thus, of an adjudicator as well.

(ii) As regards causation: (a) the link had to be between the breach in failing to give notice and the delay to the main contract works, and the claimant had failed to establish any such link; (b) in any event the claimant had failed to establish a link between the delay to the subcontract and the 20 weeks delay to the main contract, in the absence of a detailed analysis. He concluded at [151] that "a proper bona fide estimate could not have concluded that EAG were liable for 20 out of 45 weeks delay" and at [152] that "as such I Decide that ISG has not demonstrated and proved that EAG was responsible for causing 20 weeks delay to the works to be carried out by ISG under the Main/Principal Contract".

(iii) He therefore concluded and decided at [163] that "as at valuation No 35 ISG did not provide a bona fide estimate of any loss or damages consequent upon any breach of contract. Accordingly, ISG must repay EAG the amount deducted".

(iv) Under the concluding section headed "Relief" he decided that:

"173.1 A fair and reasonable date for completion of the EAG Sub-Contract works is 22 October 2018.

173.2 ISG has not demonstrated and proved that EAG was responsible for causing 20 weeks delay to the works to be carried out by ISG under the Main/Principal

Contract and therefore I set aside the bona fide estimate by ISG in relation to application for payment no 35.

173.3 ISG shall pay EAG the sum of £137,434.53 immediately."

B. Part 8 declaratory relief – relevant principles

20. Before considering the respective submissions it is appropriate for me to summarise the relevant principles applicable to claims for Part 8 declaratory relief. I may conveniently begin by reference to general principles, which were set out by Mr Walker in his skeleton argument at [17] in non-controversial terms:

"The Court's power to make declarations is derived from section 19 of the Senior Courts Act. The power to make declarations is discretionary. CPR 40.20 provides that the Court may make binding declarations whether or not any other remedy is claimed. ISG has to satisfy the court that declaratory relief should be granted as a matter of discretion. The exercise of the discretion involves considering justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration: see *CIP Property (AIPT) Ltd v Transport for London* [2012] EWHC 259 (Ch); [2012] BLR 202 at [24-26], *Network Rail Infrastructure Ltd v ABC Electrification Ltd* [2019] EWHC 1769 (TCC); [2019] BLR 522 at [10-11] and *Pfizer Ltd v F. Hoffman-La Roche AG* [2019] EWHC 1520 (Pat) at [61-67]."

21. In the particular context of Part 8 claims in the context of adjudication business in the TCC the relevant considerations and cases are discussed in some detail by Sir Peter Coulson in *Construction Adjudication* 4th edition at 16.55 onwards.

22. As appears from the cases and his commentary, it is not in dispute that the court does have jurisdiction in appropriate cases to grant Part 8 declaratory relief in the context of adjudications where it is appropriate to do so. Whether it will be appropriate to do so will depend on questions such as:

(a) at what stage and for what purpose(s) the Part 8 procedure is being invoked. In particular, attempts to invoke the Part 8 procedure to challenge enforcement of an adjudicator's decision raise particular challenges, addressed by Coulson J in *Hutton Construction v Wilson Properties* [2017] EWHC 517 (TCC), but which do not arise here

(b) whether or not the issues in question are capable of being resolved under Part 8. In particular, an important consideration is likely to be whether or not they can be determined without resolving disputed questions of fact.

(c) whether or not resolving the issues in question will serve a useful purpose or otherwise do justice between the parties. There is clearly a difference between cases where it is clear that a particular issue has already arisen which both parties wish, for good reason, the court to resolve to enable them to resolve their ongoing differences, and cases where it is not clear what may happen in the

future and where resolving the particular issue may only assist one of the parties in certain circumstances which may or may not happen.

23. Particular considerations may apply where, as here, there are actual or potential successive adjudications on foot. Where, as here, the applicant is the losing party to an adjudication, whilst the decision of the first adjudicator is of course binding unless and until finally determined by the court (or arbitrator) or by agreement, so that his decision cannot be opened up in a subsequent adjudication, issues may arise as to the ambit and effect of the decision in the context of a subsequent actual or intended adjudication.

24. These issues have been considered in a number of cases discussed in *Construction Adjudication* at 7.145 onwards, to which reference was made by both counsel. The focus of the inquiry is whether or not the dispute which has been or is intended to be referred to the second adjudicator is the same or substantially the same dispute as was referred to and decided by the first adjudicator. A distinction is to be drawn between the dispute which is referred and the issues or arguments which the parties sought to deploy in support of their respective positions. These points were elaborated upon by Akenhead J in *Carillion Construction v Smith* [2011] EWHC 2910 (TCC), where he gave what Sir Peter Coulson suggested at 7.159 was helpful guidance in identifying 8 separate factors of relevance. It was in *Harding v Paice* [2015] EWCA Civ 1281 that Jackson LJ observed that it might be necessary to look not only at what was referred to the adjudicator but what he actually decided. In that case, since the first adjudicator had decided against the employer only on the basis of there being no effective pay less notice the second adjudicator had jurisdiction to determine the substantive valuation of the payment notice.

25. Mr Walker emphasised that in many, if not most, of these decisions the court was being asked to give a ruling on the basis that what was in issue was the enforceability of the later adjudicator's decision, so that the court had the benefit of both referrals and both decisions and, thus, could reach a final determination without the necessity of speculating as to the nature and extent of the dispute referred to the later adjudication. He submitted that the court should exercise greater caution where, as here, the claim referred to a later adjudication that had not yet even been advanced, let alone referred or decided. That seems to me to be right in principle, although everything will of course depend on the particular facts.

C. The substantive declarations sought by the claimant

26. It is important to understand the purpose behind the claimant's claims for substantive declaratory relief. In short, the claimant's position is that there are two issues which were before the adjudicator which can and should conveniently be determined in this Part 8 claim and which, if answered in its favour, demonstrate that the ultimate decision of the adjudicator was wrong. On the claimant's interpretation of clause 9(8): (a) if the defendant fails to give the required notifications under clauses 9(4) and/or 9(5) then the defendant loses any entitlement to any extension of time in relation to any delay which ought to have been notified; and (b) the claimant is entitled to recover from the defendant, or to deduct from any amount otherwise payable to the defendant, such amount of its loss and damage resulting from such delay as it shall bona fide estimate; and (c) such estimate is binding and conclusive upon the defendant

until the amount of its loss or damage is finally determined or agreed between the parties; and (d) that the final determination means the final determination under the final account provisions of the subcontract, as opposed to final determination by the court or any adjudicator.

27. The first issue is that according to the claimant it is self-evident that the defendant did not give the required notifications of any delay as required by clauses 9(4) and/or (5) and, hence, that there can be no question but that it loses any entitlement to any extension of time beyond that resulting from the initial delay to the start on site date for which the claimant has already conceded an extension to 6 March 2018. Thus, it is entitled to declarations (1) to (3).

28. The second issue is that according to the claimant it is self-evident that in those circumstances there is no possible basis for not according its bona fide estimate the binding and conclusive effect for which clause 9(8) expressly provides. Thus, it is entitled to declarations (4) and (5).

29. I will now address each issue in turn.

Failure to give the required notifications

30. In my judgment this is not a point of contract construction. Instead the claimant is effectively inviting me to conclude that it is unarguable on the evidence put before the adjudicator and now before the court that no required notifications were given.

31 However, as Mr Walker submitted, it is necessary for the claimant to succeed that it must satisfy the court both that it is unarguable that no required notifications were given and that it has given the defendant its full entitlement to an extension of time due to the delayed start on site. That is because Mr Mort rightly accepts that as a matter of contract construction the claimant does not have the right under clause 9(8) to decide for itself to what extension of time the defendant is entitled in relation to delays where it is not in breach of the requirements of clause 9. Thus, if and insofar as it is arguable on the facts that the defendant was entitled to any extension of time beyond 6 March 2018, then the essential foundation for the claimant's bona fide estimate is removed. As to this:

(1) It is plain from what I have already said that there is a reasonable argument on the facts that the defendant was entitled to an extension of time beyond 6 March 2018 in respect of the delayed start on site. That is because:

(a) The claimant itself in its letter of 25 June 2018 allowed an extension of time to 6 April 2018 and there is no evidence, let alone conclusive evidence, that this included causes of delay other than the delayed start on site.

(b) There is plainly a dispute as to whether or not the effect of the delayed start on site should include the delay due to winter working, which it is not possible to resolve either on the evidence or on the basis that Mr Mort is unarguably right in his submission that any such

additional delay would have to be the subject of a separate notification under clauses 9(4) and/or (5).

(2) The claimant has not set out to prove, nor has it proved, that even if the dispute as to the effect of the delayed start on site was resolved in the defendant's favour that could not adversely affect the starting point for its bona fide estimate of loss and damage.

(3) It is apparent that the delay notice of 5 April 2018 did at least arguably give sufficient and timely notification of delay, cause and effect in relation to some at least of the causes specified in that notice. Again, in the absence of evidence that the claimant has given any, let alone full and proper, effect to these causes of delay by giving a sufficient extension of time then the starting point for its bona fide estimate is at least arguably invalidated.

(4) Mr Walker has submitted that there are also arguments available to the defendant that: (a) since the claimant failed in its obligation to provide it with a construction programme during the course of the works on site, despite its requests for one, the claimant cannot rely on the defendant's alleged failure fully to comply with the notification requirements of clauses 9(4) and/or (5), since the defendant was disabled from complying due to the claimant's own breach and, thus, what is commonly referred to as the prevention principle applies; and/or (b) it was agreed at the meeting on 26 June 2018 as confirmed by the subsequent letter of 29 June 2018 that the claimant would review the defendant's entitlement to an extension of time in respect of all matters and without taking any point on the absence of prior notification. Although Mr Mort has submitted that the evidence as to the former is exiguous and that neither the defendant's evidence nor the tenor of its letter dated 29 June 2018 provides any firm evidential platform for a submission that it was agreed that the claimant should waive its right to rely on a failure to notify in accordance with clause 9, these are in my view issues of fact or at least mixed issues of fact and law which are inherently unsuitable for determination in isolation under Part 8.

32. Mr Mort submitted that the adjudicator, in paragraphs 41 – 44 of his decision, appeared to accept that the notices to which he had been referred were insufficient. However, as he rightly accepted, that finding - if that is what it was - is not in any way binding on this court in these Part 8 proceedings. In any event it would appear that the adjudicator was not purporting to decide that the notice of 5 April 2018 was wholly ineffective in relation to all of the causes of delay to which it referred, so that this reasoning would not get the claimant home in full, as it would need to do, anyway. It follows, in my judgment, that the claimant has failed to make out its case in relation to declarations (1) to (3) inclusive.

Binding and conclusive bona fide estimate

33. At first blush it appears that once the court has declined, as it has, to make the declarations sought under (1) to (3) there is no compelling reason to determine this second issue. That is because, having failed to achieve success on the first essential limb of its case, the claimant cannot by succeeding on the second limb alone achieve its ultimate ambition of obtaining declarations the effect of which would conclusively demonstrate that the adjudicator was wrong.

34. However, Mr Mort has urged me to determine this issue on the basis that its resolution will assist the parties going forwards. Mr Walker agrees that I should do so on the basis that the issue is limited to the point of contract construction identified above and does not involve any investigation into disputed facts. On that basis I am prepared to at least embark on a consideration of the issue before deciding whether or not I am prepared to grant declaratory relief.

35. As I have already indicated in paragraph 26 above, it is the claimant's case that the claimant's bona fide estimate is binding and conclusive until determined at the final account stage of the subcontract. Mr Mort submitted that this followed from a proper interpretation of the subcontract and was also consistent with the decision of the Court of Appeal in *Rosehaugh Stanhope plc v Redpath Dorman Long Ltd* (1990) BLR 69, to which I was referred.

36. Mr Mort relied upon clause 20(a) of the Scheme for Construction Contracts, which provides that the adjudicator may "open up, revise and review any decision taken or any certificate given by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive". He submits that this is the case here.

37. Mr Mort criticised the adjudicator's reliance upon clause 28 of the contract, which conferred exclusive jurisdiction upon the English courts, subject to the adjudication provision in clause 30, as missing the point.

38. Mr Walker submitted that there was nothing in the wording of clause 9(8) which led to the conclusion that the bona fide estimate was final and conclusive in the sense referred to in paragraph 20 of the Scheme. It was only final and conclusive pending the final determination and there was nothing to prevent the defendant referring a dispute as to the bona fide estimate to final determination either by the court or by an adjudicator. He submitted that if there was any doubt then the court should adopt a restrictive interpretation in the same way as did the Court of Appeal in the *Rosehaugh* case.

39. In my view it is convenient to begin by determining what is referred to in clause 9(8) as the "final determination or agreement between the parties". There is clearly no difficulty about what is referred to by final agreement. What about final determination? In my judgment this must simply mean what it says, namely the determination on a final basis of the loss or damage suffered by the claimant. As Mr Mort submitted, it is likely that this would occur as part of the final account process. However, there is nothing in the provisions in clause 2 relating to the final account which requires that any bona fide estimate produced by the claimant under clause 9(8) is to be adjusted and a final assessment of loss and damage provided in its place as part of the final account process. It could just as well be done separately and in advance of the final account process once all of the relevant facts are known . Insofar as there was any argument about this, it is plain and obvious in my view that any dispute between the parties as to this final determination may also be referred to final determination by the court (or, to adjudication, albeit that would have only temporary final effect) unless the right is lost by the time-bar provisions in clause 2.

40. It is significant that clause 9(8) expressly distinguishes between the final determination process and the bona fide estimate process. It is apparent that the bona fide estimate process is intended to be an interim determination, which again is likely to be undertaken in conjunction with an interim valuation and a payless notice, but which is not necessarily linked to such a stage. The essential question is what does the reference to being binding and conclusive pending final determination mean in this context? Again, in my judgment it means what it says. It cannot be opened up or reviewed, whether in court or in an adjudication, in relation to the matters in respect of which it is conclusive. So far as the court is concerned, there is no basis for not giving this provision effect. So far as an adjudication is concerned, in my judgment paragraph 20(a) of the Scheme is perfectly clear. It follows that I accept Mr Mort's submission that it would not be open to the defendant to ask the court or an adjudicator to determine a dispute as to whether or not the amount of loss and damage stated in the bona fide estimate was right or wrong.

41. However, the question also arises as to in respect of what matters is the bona fide estimate conclusive? It is clearly not conclusive as to whether or not the defendant is entitled to any extension and, if so, what extension. It is also clearly not conclusive as to whether or not the claimant had acted bona fide (in good faith) in producing the estimate. It is also in my view clearly not conclusive as to whether or not the claimant had acted reasonably in his determination as to whether or not the defendant had caused or contributed to delay in practical completion of the claimant's works under the main contract.

42. Other arguments as to the proper construction of the bona fide estimate provision in clause 9(8) have been ventilated before the adjudicator and before me. Thus, the adjudicator considered that the loss and damage had to be the consequence of the defendant's breach of the notice provisions of clause 9. Mr Mort submitted that this was wrong and that the words "in consequence thereof" referred back to the "delay" to which the breach related, rather than to the breach of the notice provisions. I see the force of this submission, although I do not think that it is for me to finally determine the question in these Part 8 proceedings, since it is not an issue raised in the declarations actually sought. Mr Walker submitted that the issue of causation was not within the scope of the loss or damage which the claimant could bona fide estimate. I find this more difficult since, whilst I fully accept that as a matter of principle there is a distinction to be drawn between the quantification of loss and damage and its causation, I can also see the force of the argument that on my interpretation of clause 9(8) the words "in consequence [of the delay to which the breach relates]" must be given a wide meaning, consistent with the "reasonable consideration" final provision in relation to liquidated damages levied under the main contract. Again, however, I do not think that it is for me to finally determine this question in these Part 8 proceedings for the same reason.

43. I do not find the decision in *Rosehaugh* of any real assistance in reaching any clear conclusion on the issues raised in the proposed declarations. In that case which, of course, preceded the statutory payment and adjudication provisions introduced by the 1996 Act, the construction manager employed by the employer was required to determine applications for extension of time and also, under clause 19(3) of the contract, was empowered to make a bona fide estimate of any loss or damage suffered by the employer if the contractor, in breach of clause 19(1), failed to complete the works on time or diligently.

Under clause 19(3) the contractor was required to pay or allow the amount of such estimate to the employer and the estimate should be binding and conclusive until final ascertainment or agreement. Under clause 19(5) the construction manager was also empowered to ascertain any loss or damage suffered by the employer in consequence of any breach of clause 19(1) and it was provided that such amount should be a debt due from the contractor to the employer. The contract also provided for any disputes to be resolved by the courts and for the courts to have power to open up, review or revise any decisions made. The contractor failed to complete the works on time but had applied for an extension of time which had been rejected. The construction manager made a bona fide estimate under clause 19(3) of the loss and damage suffered by reference to the original date for completion and the employer sought, and obtained at first instance, summary judgment for such amount on the basis that the bona fide estimate was binding and conclusive.

44. The Court of Appeal allowed the contractor's appeal, holding that on a true construction of the contract any bona fide estimate made under clause 19(3) was only binding and conclusive in the event that there was no dispute as to whether or not the contractor was in breach of clause 19(1). Since there was an extant arguable issue as to whether or not the construction manager ought to have granted the contractor an extension of time it could not be said that there was no dispute and, hence, the contractor was not obliged to pay the amount stated in the bona fide estimate.

45. It does not appear to have been argued by the contractor that it was entitled to challenge the estimate in court on the merits, i.e. in advance of and separate from any final determination of loss and damage. Nor does it appear to have been argued by the contractor that the bona fide estimate was not conclusive as to matters of causation as regards the loss and damage. So far as I am aware, nothing was said by the Court of Appeal on either issue. The most that can be said in the defendant's favour is that Bingham L.J. (at p.84): (a) considered it relevant to the proper construction of the contract that the parties could not have intended the contractor to be subject to a "potentially crippling obligation upon a contingency"; and (b) held in the alternative that the provisions in question were ambiguous and should be construed less favourably to the employer who had produced the contract[2].

46. I have no difficulty in concluding that the claimant is not entitled to the declarations which it seeks at (4) and (5). They are premised on the basis of an all or nothing position. The adjudicator was plainly entitled in my judgment to determine whether or not the defendant was entitled to any, and if so what, extension of time. The adjudicator was also plainly entitled in my judgment to determine whether or not the estimate was bona fide and whether or not the claimant could reasonably have considered that the liquidated damages resulted from delay by the subcontractor, for which he was not entitled to an extension of time, and which caused or contributed to delay to the claimant's works under the main contract. I am not invited to, and cannot fairly, determine in these Part 8 proceedings whether or not the adjudicator was right in the conclusions which he reached on these points. I am not invited to make determinations as to whether or not he exceeded his jurisdiction in making the findings which he did and, if so, what the consequence of that might be.

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[2] Stocker and Nourse LJJ agreed with Bingham LJ on the construction issue and felt no need to decide the issue on the fallback point on ambiguity.

47. The question which then arises is whether or not I should, at the invitation of both parties, embark upon the process of making declarations which determine the construction of clause 9(8) on the basis that I accept some or all of the further submissions about the nature and ambit of the bona fide estimate provisions. Having considered this question I have reached the firm conclusion that I should not do so. There are two principal reasons for this. The first is that my decision on these points will not have any clear consequence in relation to whether or not this adjudicator's decision was right or wrong. The second is that whilst it might be of some assistance to a future adjudicator for me to do so, that would only be the case if (and only if) the claimant chooses to make a further estimate under clause 9(8). In that respect I am reluctant to make findings in the abstract, especially in circumstances where: (a) the parties have not, understandably perhaps, produced alternative forms of declarations which indicate precisely what declarations based on what constructions of clause 9(8) they are each inviting the court to make; and (b) any decision which I may make would not so far as I can see be binding upon any judge who might subsequently have to rule on the enforceability of a decision made by a future adjudicator, even if the approach of the adjudicator was in accordance with any declaration I might have been prepared to make in this case.

48. In the circumstances I am not prepared to make any such declarations, not because I do not wish to be helpful, but because I do not consider it appropriate to do.

D. The declarations sought as to the ambit and effect of the adjudicator's decision

49. In the course of the hearing there was some discussion both as to the specific declarations sought and as to whether or not it was appropriate for the court to make other declarations, even if it was not prepared to make the specific declarations sought. I will address the specific declarations in order first and address the question of any alternative declarations as I proceed.

50. The first specific declaration sought is that the adjudicator's decision (at paragraph 173.1) that "a fair and reasonable time" for completion of the subcontract works is 22 October 2018 is determinative only for: (i) the limited context of the defendant's application for payment the subject of the adjudication (payment number 35), rather than for the purposes of the subcontract generally; alternatively (ii) the limited context of the claimant's bona fide estimate.

51. I do not consider that (i) is right. It is plain from the prior correspondence, from the notice of adjudication and referral, and from the response, that the validity and correctness of the bona fide estimate was referred to the adjudicator for his decision not only in the context of the defendant's claim to be entitled to payment of interim valuation 35 without deduction but also in its own right. The adjudicator was entitled to decide the validity and correctness of the bona fide estimate in its own right. This is not comparable to the sort of case where the referring party makes a claim for payment of an interim valuation on the basis that there was no or no effective payless notice and the decision of the adjudicator is binding only in the context of that particular payless notice in relation to that particular interim valuation. Whilst I note that the adjudicator's actual decision at [173.2] was that "I set aside the

bona fide estimate by ISG in relation to application for payment no 35" I am not convinced that this can or should be read, when the decision is considered as a whole, as limiting the ambit of his decision so as to enable the claimant to argue that it has only this limited effect. In any event I am satisfied for the additional reasons given below in response to (ii) that it would not be right to make a declaration to this effect even if that was wrong.

52. As regards (ii) I do not accept that this is right nor, as contended for in paragraph 6(b) and (c), that the adjudicator's decision that a fair and reasonable time for completion of the subcontract works is 22 October 2018 is irrelevant for the purposes of the final determination of the amount of the loss and damage suffered by the claimant as that phrase is used in clause 9(8), nor that in the circumstances it would be open to either party to refer a dispute as to such final determination to adjudication, notwithstanding the terms of the existing decision.

53. In his skeleton at [45] Mr Walker submitted that "there can only be one date for completion under the subcontract and the adjudicator has decided what that date is: 22 October 2018. The adjudicator's decision is binding as to the date for completion until the court makes a final determination of that issue: see clause 30(4)".

54. I accept that submission. In my judgment it follows on from the clear distinction drawn in clause 9 between: (a) whether or not the defendant was entitled to any extension of time and, if so, what; (b) the bona fide estimate which the claimant was entitled to make under clause 9(8) in respect of loss and damage suffered due to delay for which the defendant had no entitlement to an extension of time. It is quite plain from the notice of adjudication and referral that the defendant was seeking the adjudicator's decision as to what extension of time the defendant was entitled to. It is quite plain from the response that the claimant chose to waive any argument that the adjudicator did not have jurisdiction to determine that issue. This particular issue was separate and distinct from the further and separate issue as to the validity and correctness of the bona fide estimate of loss and damage. Whilst I agree that no-one was suggesting that the adjudicator should make a final determination of the loss and damage, if any, which the claimant was entitled to outside of the bona fide estimate, that is irrelevant to the issue as to whether or not the adjudicator was being asked to make a final determination in relation to the issue of extension of time.

55. In oral submissions Mr Mort argued that whatever may have been referred, in fact the adjudicator did not make any determination as to what extension of time the defendant was entitled to. He took me through the adjudicator's decision in some detail and submitted as follows.

    (a) Given the adjudicator's reasoning in paragraphs 38 to 44 as noted above, it is inconceivable that the adjudicator could have decided that the defendant was entitled to any extension of time.

    (b) Given the adjudicator's reasoning in paragraphs 45 to 52 as noted above, it is plain that the adjudicator was well aware of the distinction between a decision that the defendant was entitled

to an extension of time under the contract and a decision that the claimant had failed to make out its case regarding delay and that the defendant had good reasons for not performing.

(c) At no point in his decision did the adjudicator state in clear terms a conclusion that the defendant was entitled to an extension of time up to 22 October 2018. Instead he decided at [93] that the defendant had excuses for their non-performance up to 22 October 2018 which, submitted Mr Mort, showed that he was only making a determination of the second issue.

(d) It followed from the above that the adjudicator's decision at [173.1] that "A fair and reasonable date for completion of the EAG Sub-Contract works is 22 October 2018" can only be understood as a decision in relation to the second issue and not a decision that the defendant was entitled to an extension of time to that date.

56. In reply Mr Walker submitted that the court should be very cautious before undertaking a detailed dissection of the reasons given by the adjudicator and, instead, should focus on what was referred to him and what he decided. Since the question as to what extension of time the defendant was entitled to was clearly referred to him, and since he clearly had jurisdiction to decide it, and since his decision at [173.1] was clearly that a fair and reasonable extension of time should be granted to 22 October 2018, that is the end of the matter. He also submitted in response to the particular points made by Mr Mort as follows.

(a) It cannot be discerned from the reasons given by the adjudicator as regards notice that he had positively concluded that the defendant was not entitled to any extension of time because of his failure to comply with clauses 9(4) and/or (5). In any event, even if the internal reasoning was arguably inconsistent and/or the adjudicator was arguably in error in these respects, that does not undermine the well-known principle that the adjudicator's decision is binding until finally determined by the court (or arbitration) or agreement.

(b) There is no clearly defined distinction drawn between the issue of extension of time and the issue of delay. Again, to seek to draw such a distinction and to criticise the adjudicator's reasoning does not assist the claimant if the effect of the decision, right or wrong, is clear.

(c) At no point in the decision did the adjudicator positively state that he was not allowing the defendant any extension of time. Silence on this issue is at best equivocal and does not prove the claimant's case.

(d) The words "fair and reasonable" cannot fairly be understood as not being applicable to a decision as to extension of time. Indeed, the words used in clause 9(5) are that the defendant should be "entitled to a fair and reasonable extension to the completion date". The wording of paragraph 173.1 is entirely consistent with a decision that under the terms of the subcontract the defendant was entitled to a fair and reasonable extension of the time for completion of its works. Moreover, if paragraph 173.1 is not to be read as a decision that the defendant is entitled to an extension of

time to 22 October 2018 it is difficult to understand why it is there as a decision separate and distinct from the further decision in paragraph 173.2.

57. I prefer Mr Walker's submissions on these points for, essentially, the reasons he gave. In particular, it seems to me that he is correct that the court ought to be concerned only with the question as to what was referred and the question as to what was decided. The court ought not to be too willing to cut down the scope of what was decided from a consideration of the words used in the decision itself by undertaking too detailed and too fine an analysis of the reasons given by the adjudicator for his decision. That would be both wrong in principle and also unfair on the adjudicator, given the pressure of time under which he, like all adjudicators, operate. It cannot be assumed that the reasons actually given are exhaustive as to the actual reasons for the decision. This is not an appellate process akin to an appeal to the Court of Appeal from a decision after a trial at first instance.

58. I would also add that in my view it is apparent from the way in which the defendant's case was put before the adjudicator that it was being argued both that the defendant was entitled to an extension of time under the contract and also that because of the claimant's alleged non-compliance with the contractual provisions time was at large anyway. It seems to me that this may well explain what initially puzzled me, which is why the adjudicator appears to have considered the issue of delay from these two different standpoints. However, what is plain in my view is that the adjudicator was undoubtedly considering the issue of responsibility for delay to the subcontract differently from the question of consequential delay to the main contract. Since it is neither plain nor obvious that there were two entirely separate issues in relation to the question of delay to the subcontract on which entirely separate decisions had to be made, it cannot be said to be plain and obvious that the decision on the question of responsibility for delay to the subcontract cannot be regarded as a decision on both issues at the same time.

59. In the circumstances I am quite satisfied that I should not make the declaration sought by the claimant in this respect. This also disposes of the alternative formulation proposed by Mr Mort in argument, which is that I should simply declare that the adjudicator did not make a decision that the defendant was entitled to an extension of time under clause 9 of the sub-contract to 22 October 2018.

60. The second of the two declarations sought by the claimant under this head is that the adjudicator's finding that "ISG has not demonstrated and proved that EAG was responsible for causing 20 weeks delay" is to be understood in the context of the defendant's application for payment number 35 and does not prevent the claimant from now seeking to recover loss and expense in adjudication and/or limit any such claim.

61. As to this Mr Walker submitted that the claim is premature and serves no useful purpose as the claimant has not identified what loss and expense it wishes to claim nor any dispute in relation to any such claim that could be referred to adjudication. He submitted that any suggestion that the adjudicator's decision imposes no limit at all on the claimant's right to refer disputes to adjudication is plainly wrong, since it is binding on the parties pending final determination by the court.

62. In my judgment the position is as follows.

(1) I agree that the dispute which was referred and the decision which was made was about whether or not the defendant was entitled to any extension of time beyond 5 March 2018 and whether or not the claimant was entitled to rely upon its bona fide estimate in relation to loss and damage suffered in consequence of delay to the subcontract from that date, both generally and to justify non-payment of interim valuation 35.

(2) Thus, I disagree that the dispute and the decision were only about whether or not the claimant was entitled to rely upon its bona fide estimate to justify non-payment of interim valuation 35.

(3) However, I also agree that, leaving aside the question of extension of time under the subcontract, which I have already addressed above, the dispute and the decision were only concerned with whether or not the claimant was entitled to rely upon its bona fide estimate. I agree that what was referred to the adjudicator was not a dispute arising from a final determination as to whether or not the claimant was entitled to claim any sums at all from the defendant for delay-related breaches of contract. I also agree that the decision did not purport to be a final determination as to whether or not the claimant was entitled to claim any sums at all from the defendant for delay-related breaches of contract.

63. However, as Mr Walker submitted, it by no means follows that the claimant is entitled to a declaration in the extremely wide terms sought. In particular:

(1) For the reasons given above in relation to declaration (6) I do not accept that the adjudicator's decision was plainly limited so that it related only to the defendant's application for payment of interim valuation 35. I note, as I did above, that this is what the decision at [173.2] might appear to indicate, but I am not satisfied that on a proper analysis this is unarguably its only effect, objectively considered.

(2) Whilst I do accept that the adjudicator's decision was limited so that it related only to the issue as to whether or not the claimant was entitled to rely upon its bona fide estimate, I am by no means clear that it is settled beyond argument as to the impact of this. Thus, in submissions Mr Mort argued that the effect of the bona fide estimate being set aside was that there was nothing to prevent the claimant from simply making a fresh bona fide estimate without being bound in any way by the adjudicator's decision. As to this, I do not think that it would be open for the claimant to do so based on an argument that the defendant was not even entitled to the extension of time to 22 October 2018 to which the adjudicator had decided that it was entitled. Nor am I convinced that it is open to the claimant to issue a further bona fide estimate entirely unaffected by the adjudicator's finding that the claimant had not demonstrated or proved that the defendant was responsible for causing 20 weeks delay to the main contract. Whilst I can see the force of the submission by Mr Mort that this can only properly be viewed as a finding along the way to the

ultimate decision in paragraph 173.2 that the claimant's bona fide estimate should be set aside, I am not clear that it is beyond reasonable argument that the contrary is unarguable or, looking at matters more widely, that there is no restriction whatsoever upon the circumstances in which the claimant can make a fresh bona fide estimate.

(3) As I have said, I accept that it is plain that nothing in the decision could affect the claimant's (or, indeed, the defendant's) entitlement to adjudicate any issues arising in relation to the final determination of any loss and damage caused by any delay-related breaches which the claimant may establish. However, given the conclusion which I have reached as to the claimant's ability to seek to refer to adjudication any further dispute as to whether or not the defendant was entitled to a lesser extension of time under the subcontract than to 22 October 2018 there appears to be little or any practical utility in making such a declaration. This was the subject of Mr Mort's alternative more limited proposed declaration, but I am not persuaded that it is appropriate in the circumstances to make such a declaration.

64. In conclusion, whilst I have some sympathy for the claimant in seeking to obtain clarity as to the nature and ambit of the adjudicator's decision, on the basis of the proper approach as demonstrated by the authorities I should refrain from doing so unless I am satisfied that I can make a fair determination at this stage and also that there is practical utility in doing so. For all of the reasons I have sought to give above I am not satisfied that either condition is satisfied and therefore I decline to grant any declaration.

65. For the avoidance of doubt, in the absence of the defendant having formulated clear declarations which it is seeking which reflect the arguments it has advanced, and given the conclusions which I have reached, I am not prepared to make any declarations in its favour either.

66. It is perhaps worth observing in passing that in opening this part of the case Mr Mort submitted that the TCC should be particularly willing to make declarations as to the ambit and effect of a first adjudicator's decision in advance of a second adjudication because the reality is that disputes like this are almost always adjudicated as opposed to litigated or arbitrated, notwithstanding that in theory it is always open to a losing party in adjudication to have the dispute finally settled by the court or arbitrator. It is of course the policy of the TCC to support adjudication. However in my view it would not be proper for me to proceed on the basis that it is always in the best interests of the parties to engage in a diet of serial adjudications, supplemented as required by a series of applications to the TCC seeking enforcement or Part 8 declaratory relief. In appropriate cases the parties' interests might be better served by persuading the TCC to exercise its case and cost management powers to enable their disputes to be finally determined in an expeditious and cost-effective manner.