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IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

TECHNOLOGY & CONSTRUCTION COURT (QBD)

[2020] EWHC 941 (TCC)

No. HT-2020-000023

The Rolls Building
7 Rolls Buildings
Fetter Lane
Holborn
London, EC4A 1NL

Thursday, 12 March 2020

Before:

MRS JUSTICE COCKERILL

B E T W E E N :

ROCHFORD CONSTRUCTION LIMITED

Claimant

- and -

KILHAN CONSTRUCTION LIMITED

Defendant

(- and -)

(Kilhan v Rochford under HT-2020-000020)

MS H. WHITE (instructed by Goodman Derrick) appeared on behalf of the Claimant.

MS R. DRAKE (instructed by Fieldfisher) appeared on behalf of the Defendant.

J U D G M E N T

Please note: Transcript produced from poor quality audio

MRS JUSTICE COCKERILL:

1 This is a hearing of the Part 8 claim brought by the claimant Rochford against the Defendant Kilhan, in respect of Interim Payment Application 9, “IPA 9”, which Rochford disputes was ever properly due and owing to Kilhan.

2 On 3 August 2018 the subcontract, which is the subject of the application, was entered into between Rochford and Kilhan. It concerns the construction of a reinforced concrete frame on a project known as “Richmond upon Thames College”.

3 The dispute then arises out of an adjudication dated 24 December 2019 by Mr G P Kitt in relation to the dispute between the parties over IPA9. The original application for payment was for just shy of £1.4 million, was dated 20 May 2019, and concerned the period ending 30 April 2019. The Interim Payment Notice, IPN 9, was issued on 23 October 2019, and certified a sum of just over £1.2 million.

4 The dispute then, as now, concerned the validity of that payment notice, whether it was issued late, and failed to specify how the sum sought was calculated. The adjudicator defined the issues before him at paragraph 16 of the adjudication as:

“Are the payment provisions in the contract compliant with the Act? If not, what terms are to be implied? Was Kilhan's Application For Payment 9, AFP 9, a valid application for payment, and / or a valid default payment notice? Was Rochford's IPN 9 a valid payment notice in accordance with the Act?”

5 The adjudicator concluded that the due date of IPA 9 was 20 May 2019, being the date on which the notice was served, and that the final date for payment was thirty days from that due date, being 19 June 2019. He concluded that the Claimant had neither served a Payment Notice within five days of the due date nor a Pay Less Notice no less than seven days prior to the final date for payment. On that basis, the adjudicator found that the sum claimed was owing in default.

6 I note that the second issue, which has been before me today, is one which was not really in issue in the adjudication, and contrary-wise the second issue in the adjudication as to the contents of the notice has not played much part.

7 In any event, Rochford refused to pay the sums due under the adjudication, Kilhan brought Part 7 adjudication proceedings to recover the payment, and that payment was satisfied by Rochford shortly before the hearing date for the Part 7 application, so the hearing date was vacated. Rochford, who originally hoped to have these Part 8 proceedings heard at the same time as the Part 7 proceedings, have brought Part 8 proceedings because it does not concur with the decision, and seeks the court to decide a fresh issue in relation to the due date and the final date for payment.

8 As part of the process, it seeks to obtain various declarations in respect of the validity of the Payment Notice, and also to obtain the payment of the sums previously paid over to Kilhan. In particular, Rochford seeks the following declarations, as set out in the amended details of claim.

“In respect of the due date:

- a. Under the express terms of the Subcontract, the Defendant is obliged to serve any interim application for payment on the last day of each calendar month.
- b. As a result, no payment became due under the Subcontract in respect of the April 2019 payment cycle.

In respect of the Final Date of Payment:

- c. Under the express terms of the Subcontract, the Final Date for Payment of any sum that has become due in 30 days from the date of service of a relevant invoice.
- d. Without prejudice to the fact that no sums had in fact become due, the Defendant did not serve an invoice until 7 January 2020.
- e. Insofar as the Claimant has served a payless notice more than 7 days prior to the Final Date of Payment, the Claimant is not obliged to pay the sums now claimed by the Defendant.

Generally:

- f. As a consequence of the above matters, the Claimant does not owe the Defendant the sums ordered be paid by the Adjudicator in his Decision.
- g. The Defendant must pay the Adjudicator’s fees and expenses.
- h. The Defendant must pay to the Claimant the principal sum, together with VAT, interest and Adjudicator’s fees and expenses, which the Claimant paid to, or on behalf of, the Defendant pursuant to the Adjudicator’s Decision.
- i. The Defendant claims interest pursuant to Section 35A of the Supreme Court Act 1981 for such period and at such a rate as the court thinks fit.”

- 9 The latter two grounds are grounds which were sought to be introduced by amendment. Their introduction was the subject of dispute to which I shall return.
- 10 On the substance of the Part 8 claim, in essence Rochford says that the adjudicator's decision was clearly wrong, even on the basis of a brief inspection of the terms of the subcontract, because he failed to give effect to two key expressed clauses of the subcontract: As to the date for making a claim, and as to the requirements for a final date for payment. In other words, instead of implying in the terms set out in the Scheme only insofar as was required, and construing those together with any express terms that did not directly fall foul of the Act, he simply ignored the express terms.
- 11 The subcontract, which is the subject of this dispute, states as follows, insofar as relevant:

“The brief description of subcontractor works to be carried out
Works are lump sum ... RCL will issue activity schedule to KCL,
application date end of month ... **commercial** ... valuations monthly as per
attached payment schedule end of month. Payment terms thirty days from
invoice as per attached payment schedule. S/C payment cert must be issued
with invoice.”

- 12 A point to be noted here is that there was no payment schedule. Had there been, it seems far less likely that this dispute would have arisen.

The legal framework:

- 13 The HGCRA 1996: It is agreed between the parties that the subcontract is subject to the Housing Grant Construction & Regeneration Act 1996 (“the HGCRA”), and the Scheme for Construction Contracts 1998 (“the Scheme”). The relevant sections of the HGCRA state as follows:

“[109] Entitlement to stage payments.

(1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless—

- (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
- (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.

(2) The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due.

(3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.

(4) References in the following sections to a payment [provided for by the contract] include a payment by virtue of this section.”

“[110] Dates for payment.

(1) Every construction contract shall—

- (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
- (b) provide for a final date for payment in relation to any sum which becomes due.

The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.

(1A) The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on—

- (a) the performance of obligations under another contract, or
- (b) a decision by any person as to whether obligations under another contract have been performed.

(1B) In subsection (1A)(a) and (b) the references to obligations do not include obligations to make payments (but see section 113).

(1C) Subsection (1A) does not apply where—

- (a) the construction contract is an agreement between the parties for the carrying out of construction operations by another person, whether under sub-contract or otherwise, and
- (b) the obligations referred to in that subsection are obligations on that other person to carry out those operations.

(1D) The requirement in subsection (1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction contract provides for the date on which a payment becomes due to be determined by reference to the giving to the

person to whom the payment is due of a notice which relates to what payments are due under the contract.

(2)

(3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1) ..., the relevant provisions of the Scheme for Construction Contracts apply.”

"[110A] Payment notices: contractual requirements

(1) A construction contract shall, in relation to every payment provided for by the contract—

(a) require the payer or a specified person to give a notice complying with subsection (2) to the payee not later than five days after the payment due date, or

(b) require the payee to give a notice complying with subsection (3) to the payer or a specified person not later than five days after the payment due date.

(2) A notice complies with this subsection if it specifies—

(a) in a case where the notice is given by the payer—

(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated;

(b) in a case where the notice is given by a specified person—

(i) the sum that the payer of the specified person considers to be or to have been due at the payment due date in respect of the payment, and

(ii) the basis on which that sum is calculated.

(3) A notice complies with this subsection if it specifies—

(a) the sum that the payee considers to be or to have been due at the payment due date in respect of the payment, and

(b) the basis on which that sum is calculated.

(4) For the purposes of this section, it is immaterial that the sum referred to in subsection (2)(a) or (b) or (3)(a) may be zero.

(5) If or to the extent that a contract does not comply with subsection (1), the relevant provisions of the Scheme for Construction Contracts apply.

(6) In this and the following sections, in relation to any payment provided for by a construction contract—

'payee' means the person to whom the payment is due;

'payer' means the person from whom the payment is due;

'payment due date' means the date provided for by the contract as the date on which the payment is due;

'specified person' means a person specified in or determined in accordance with the provisions of the contract.”

14 Under the Scheme, insofar as is relevant:

PART II PAYMENT

“Entitlement to and amount of stage payments

1. Where the parties to a relevant construction contract fail to agree—

(a) the amount of any instalment or stage or periodic payment for any work under the contract, or

- (b) the intervals at which, or circumstances in which, such payments become due under that contract, or
- (c) both of the matters mentioned in sub-paragraphs (a) and (b) above

the relevant provisions of paragraphs 2 to 4 below shall apply.”

“Dates for payment

3. Where the parties to a construction contract fail to provide an adequate mechanism for determining either what payments become due under the contract, or when they become due for payment, or both, the relevant provisions of paragraphs 4 to 7 shall apply.”

“4. Any payment of a kind mentioned in paragraph 2 above shall become due on whichever of the following dates occurs later—

- (a) the expiry of 7 days following the relevant period mentioned in paragraph 2(1) above, or
- (b) the making of a claim by the payee.”

“Final date for payment

8.—(1) Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the provisions of this paragraph shall apply.

(2) The final date for the making of any payment of a kind mentioned in paragraphs 2, 5, 6 or 7, shall be 17 days from the date that payment becomes due.”

“Notice specifying amount of payment

9. A party to a construction contract shall, not later than 5 days after the date on which any payment—

- (a) becomes due from him, or
- (b) would have become due, if—
 - (i) the other party had carried out his obligations under the contract, and
 - (ii) no set-off or abatement was permitted by reference to any sum claimed to be due under one or more other contracts, give notice to the other party to the contract specifying the amount (if any) of the payment he has made or proposes to make, specifying to what the payment relates and the basis on which that amount is calculated.”

“Notice of intention to withhold payment

10. Any notice of intention to withhold payment mentioned in section 111 of the Act shall be given not later than the prescribed period, which is to say not later than 7 days before the final date for payment determined either in accordance with the construction contract, or where no such provision is made in the contract, in accordance with paragraph 8 above.”

“Interpretation

12. In this Part of the Scheme for Construction Contracts—

'claim by the payee' means a written notice given by the party carrying out work under a construction contract to the other party specifying the amount of any payment or payments which he considers to be due and the basis on which it is, or they are calculated;

'contract price' means the entire sum payable under the construction contract in respect of the work;

'relevant construction contract' means any construction contract other than one—

(a) which specifies that the duration of the work is to be less than 45 days, or

(b) in respect of which the parties agree that the duration of the work is estimated to be less than 45 days;

'relevant period' means a period which is specified in, or is calculated by reference to the construction contract or where no such period is so specified or is so calculable, a period of 28 days;

'value of work' means an amount determined in accordance with the construction contract under which the work is performed or where the contract contains no such provision, the cost of any work performed in accordance with that contract together with an amount equal to any overhead or profit included in the contract price;

'work' means any of the work or services mentioned in section 104 of the Act.”

15 Although Kilhan suggests that there is a question as to whether the subcontract is compliant with the Act, the reality is that the parties are *ad idem* that it is at least to some extent non-compliant with the Act. The real issue between them is the extent of that non-compliance, and how the Scheme is to be fitted into the provisions of the subcontract.

16 Before moving onto the case advanced by Rochford, I should note two things: The first is that the application of the Scheme is triggered, *inter alia*, by the parties' failure to agree circumstances in which staged payments become due under a particular contract. The second is that the Scheme contemplates a number of specific features, as appears from the passages quoted above, including (1) due dates for payments; (2) final date of payment; (3) notice of payment from the payer: and (4) notice of intention to withhold payment by the payer.

The case advanced by Rochford:

17 It is plain, both from the wording of the Act, and from the authorities, that, as Rochford submitted, a piecemeal incorporation of the Scheme's provisions can be done to the extent that it is necessary to achieve what is required by the Act. I was referred to the judgment of Coulson LJ in *Bennett (Construction) Ltd v CMC MBS Limited* [2019] EWCA Civ 1515. At [52]:

“ ... piecemeal incorporation is permitted in respect of the payment provisions in Part II of the Scheme in a way that is not permitted in respect of Part I.”

And at [54] where he makes plain that such provisions apply:

“ ... only to the extent that such implication is necessary to achieve

what is required by the Act.”

- 18 As before the adjudicator, Rochford placed considerable emphasis on the authorities which stressed the importance of giving effect to the express terms of the parties' contract. Rochford relied on the *dictum* which I have already cited at [54] and also earlier passages in the judgment citing the judgment of Stuart-Smith J in *Grove Developments v Balfour Beatty Regional Construction Ltd* [2016] EWHC 168 (TCC); 165 Con LR 153:

“In *Yuanda (UK) Co Ltd v WW Gear Construction* [2010] BLR 435 at [55]ff Edwards-Stuart J contrasted the words of s. 108 of the Act (which incorporates the Adjudication provisions of the Scheme) with those of ss. 109, 110 and 113 (which incorporate the Payment provisions of the Scheme). He concluded at [62] that, where s. 108 of the Act applies to bring the Scheme's provisions concerning adjudication into play, it implements all of those provisions of the Scheme. At [63]-[64] he contrasted the position pursuant to s. 108 relating to Adjudication provisions with the position pursuant to ss. 109 and 110 relating to the Payment provisions of the scheme and expressed his agreement with the reasoning of the Outer House in the Scottish Case of *Hills Electrical & Mechanical v Dawn Construction Ltd* [2004] SLT 477. In *Hills*, Lord Clarke decided on the basis of the wording used in ss 109 and 110 that the approach of the legislature when dealing with the Payment provisions of the Scheme was not automatically to incorporate all of the Payment provisions but was to import the appropriate provision or provisions of the Scheme in order to make up for their omission or inadequacy in the Construction contract.

I also respectfully agree with the reasoning and decision in *Hills Electrical*. It follows that where s. 109 or s. 110 is engaged, the provisions of the Scheme as to Payment will only be imported and apply so as to govern the legal relations of the parties to the extent that they have not already concluded binding contractual arrangements that can remain operative. They will not automatically or necessarily be imported in their entirety. It is of course possible that the existing arrangements under a given contract are not capable of forming part of a payment scheme when read with the relevant provisions of the Scheme. If that were the case it may be necessary to import the Scheme's Payment provisions as a whole. But that is not a necessary or correct outcome if the existing contractual arrangements are capable of co-existing with some of the Payment provisions of the Scheme to form a coherent whole.”

- 19 Rochford also cited the very recent Court of Appeal judgement in *C Spencer Limited v M W High Tech Projects UK Limited* [2020] EWCA Civ 331 where Coulson LJ decided the issue of whether in the case of hybrid contracts providing for both construction operations expressly covered by HGCRA and non-construction operations excluded from the Act, a valid payment notice was required to identify separately the sum due in respect of construction operations. In finding that it did not, he emphasised the primacy of the contract:

“38. Mr Nissen argued that the sub-contract terms were of limited importance because what mattered was the Act. He also said that, since the whole basis of the Act was contrary to the general principle of freedom of contract, it was inappropriate to start any analysis by reference to the terms of the sub-contract. I disagree with those submissions.

39. What the Act does is to identify certain minimum provisions, as to payment and as to dispute resolution by way of adjudication, which every construction contract must contain. Thus, any analysis must start with the contract terms, in order to see if they comply with the Act. The Act itself envisages that the parties will contract on terms which they agree between themselves. If the agreed terms comply with the Act, then the conventional view is that the Act is no longer of any direct relevance to the rights and obligations of the parties.”

20 Reference was also made to *Manor Asset Limited v Demolition Services Limited* [2016] EWHC 222, where Edwards-Stuart J was at pains to give effect to the express terms agreed between the parties, including a term “*payment to be made within seventy-two hours of receipt of invoice*”, which he held determined the final date for payment. In particular reliance was placed on [58] and [71 - 72] of that judgment:

“[58] The words 'Payment to be made within 72 hours of receipt of invoice' are, to my mind, clear and unequivocal: they cannot reasonably be construed to mean payment at some later (unspecified) date. It seems to me that, unless there is a compelling reason to give them any other meaning, then they must be understood as referring to 'the final date for payment' within the meaning of the Act. The adjudicator came to the same conclusion: see paragraph 10.2.5 of his Decision.”

“[71] Faced with a stark choice between rendering the amendment wholly ineffective or enabling it to work, the parties must surely have intended the latter (a proposition which, as I have said, is one for which Mr Lewis contends). The only way in which it can be made to work, whether by so construing the contract or implying a term, is to say that the prescribed period was to be nil - thus enabling MAL to serve a pay less notice at any time within 72 hours after receipt of the invoice. In my judgment such an agreement is necessary and it is not inequitable: if DSL wanted prompt payment within 72 hours of its invoice, it could not reasonably object to a corresponding reduction in the prescribed period.”

“[72] I therefore declare that, as a result of the amendment, the final date for payment is 72 hours after receipt by MAL of DSL's invoice following achievement of a milestone. Two other conclusions necessarily follow from the reasoning that leads to this conclusion: first, the due date for payment is the date when the milestone is achieved and, second, the parties are to be taken to have agreed by necessary implication that the 'prescribed period' for the service by MAL of any pay less notice is nil (in other words, it can be served at any time between receipt of DSL's invoice and the expiry of the 72 hours following such receipt).”

21 Rochford's point, and its complaint about the adjudication, is that it says that the adjudicator did not, but the court should, give effect to the express terms of the subcontract which require:

1. Kilhan to issue its Interim Payment Applications on the last day of each month; and
2. The final date for payment to be fixed by reference to Kilhan's service of its invoice.

I deal with these two issues in turn:

Due date:

- 22 Rochford submits that there is a clear requirement in the subcontract that application for the payment must be made on the last day of each month. It submits that the contract particulars state, “*Application date end of month*”. So, that, they say, literally means “*the date at the end of the month*”. Rochford acknowledges that on the odd occasion the last day of the month might fall on the non-business day, as will occur on three occasions in this year. It submits that the proper construction of the subcontract would be that any application would potentially need to be submitted either on the last business day of any month or in good time to enable the last business day to be met.
- 23 Rochford focuses on this, and submits that the clause does not make any reference to any other document, such as a schedule of payments; and, in any event, anyone reading the subcontract would not need to make reference to a schedule in order to understand and calculate the date by which applications had to be prepared and made. It is agreed between the parties that the relevant period ends at the end of every calendar month. The valuation cycle is determined by the express term “*valuations monthly as per attached payment schedule end of month*”. Rochford says that insofar as there might be a slight mismatch when the last date of the month falls at a weekend, there is no difficulty with that fact insofar as it would still be possible for Kilhan to estimate what work would be done, if any weekend working is required, prior to the last day of the month, and submit its application on the last business day.
- 24 It will be apparent that this is an argument which really grapples with the AFP and not with IPA 9. It was and is Rochford's case that there was no valid request for payment, so IPA 9 itself could not be late. This argument appears to have been a fairly late construct, and was dismissed by the adjudicator.
- 25 In essence, I will agree with the conclusion to which the adjudicator has come. As I shall explain further, the conclusion to which I have come, despite the determined and skilful submissions advanced on behalf of Rochford by Ms White, is that the argument depends upon reading far too much into a phrase which is not, absent a factual matrix or additional material which was lacking, clear and unambiguous. Further, applying normal principles of contractual construction, one inevitably ends up, via the iterative process, testing the Rochford contention by reference to business common sense. And when one does so, the result is either absurd or very close to it.
- 26 The first question is what the provision relied upon says, and whether it is clear such that recourse to the iterative process becomes otiose. In my judgment, it is plainly not clear. The wording could mean what Rochford contends, but it could equally well mean that the end of the month is the date which forms the end of the relevant period such that the application is to be made with reference to that date. Simply looking at the wording cannot answer the question. This is perhaps more so when one looks at the context in which it occurs within the subcontract, which is under a “*brief description of subcontractor works to be carried out*”, not really a part of the contract to which one would look naturally for key terms.
- 27 Further, as I noted in argument, what is being contended for is not simply a term which says “*submission end of month*” but a term which is in its nature a condition precedent: “*If you*

do not submit by such a date, your claim in respect of this period cannot be brought at this time”.

- 28 The next question is whether there is a relevant backdrop which makes words which, sounding alone, are not clear, become clear. It was not submitted that there is such a relevant factual backdrop, and it seems plain that the Act does not supply such a thing. There is no provision in it for when claims must be made by reference to a relevant period, failing which the claim will not be valid. It was not suggested that there was some specific referable standard form which would offer this context.
- 29 Ms White suggested in oral argument, in response to a question from me, that there was in effect a convention in relation to the submission of payment applications, and pointed me to what had happened regarding the other payments. However, the parties' own dealings in this case would not be enough to give rise to such a convention, given that they demonstrate applications being submitted after the end of the month. Secondly, no case of convention was put before the adjudicator or pleaded or supported by evidence, and I cannot simply assume that such a thing exists.
- 30 There is then the question of practicality, which has a number of layers. Kilhan identified a number of practical questions, starting with the wording “end of the month”: Does it mean “on the end of the month”, “by the end of the month”, “after the end of the month”, “the final business day” or “the final calendar day”? What if the final day of the calendar month is not a business day? How does one square the circle as to know when to make the application?
- 31 Although Rochford at one point appeared to say that the application should be made the previous or following day, the basis of the assumption is unclear. It also demonstrates a fault line in the argument. Excluding non-business dates from the calculation of the thirty-day period is inconsistent with the initial submission that an invoice must always be issued on the final calendar day of each month. Further, in a different part of its argument Rochford appeared to acknowledge that, by one means or another, the date might bleed over into the next month by a couple of days.
- 32 Plainly, the answer to exactly what the provision means is not clear to Rochford, and this was also clear from Ms White's submissions where she reiterated that there were several possible ways in which the wording could comply with business efficacy. And yet, it is imperative that the answer is clear because of the consequences. It is further imperative that the answer is clear because one is effectively implying words into the parties' agreement, and where one is looking to imply a term, the term must be clear. There must be only one option.
- 33 Looking again at the consequences, on Rochford's case, failure to call this point correctly on the part of Kilhan would result in the loss of the ability to issue an invoice for another month.
- 34 Another practical oddity about this approach is that the date by which Rochford contends that Kilhan is obliged to submit its application exactly coincides with the end of each relevant period, that is the period in respect of which valuations are to be calculated. It is hard to see that it would make practical sense to have a firm cut-off date at the same time as the relevant accounting period. In the real world, it will rarely be practicable to compile a claim or invoice accurately for the entirety of the month, including that day, and submit it within that day.

35 Rochford's construction therefore creates considerable practical difficulties. It is worthy of note that this seemed to be implicitly recognised in the *Waco* case to which I was referred, that is *Leeds City Council v Waco UK Limited* [2015] EWHC 1400 (TCC). That was against the background of Clause 4.9.2 which provided that:

“... where Alternative B applies, Applications for Interim Payment shall be made on the dates provided for in the Contract Particulars ...”

36 There was then an issue as to when the interim payment had to be made, and at [35] Edwards-Stuart J said:

“In my view an Application for Interim Payment under this contract is required to be made on the relevant date: that is to say that it must state the financial position as at that date. It has to include the total value of the work properly executed up to that date (clause 4.14).”

“[36] There is no express requirement in the contract for an Application for Interim Payment to be served by any particular date and, in the light of the provisions of clauses 4.10.1 and 4.10.3 ... the employer comes under no obligation to do anything until receipt of the application ... “

37 That indicates that even in the context of a much fuller and clearer wording, the court was not minded to find that there was a condition precedent to recovery of an application where the Interim Payment Application was not served on the exact date, and in fact the outcome in that case was that a reasonable time was allowed.

38 The next question is whether this approach harmonises with the rest of the contractual provisions. Here again there are difficulties. There is the question of what else is plainly missing. The contract says, “*S/C payment cert must be issued with invoice*”. There is no separate provision for issuing an invoice. It would appear for the payment certificate an invoice must follow the notification of a claim / application for payment. And it is not clear what relationship there is to the due date or the final date, and which of those relates to the thirty-day period referred to elsewhere. There is no date for the payment certificate or the invoice.

39 At first blush it seemed, and it was the impression of Kilhan, that if Rochford was right, not just the invoice but the payment certificate and the due date and the application would all effectively have to be put in on the same day. In argument, Rochford clarified its case, and disclaimed any such intent, saying that its argument is that while the application has to be in by the end of the month, the due date comes after that, and the invoice date remains essentially indeterminate. This was apparent from the worked examples in its very helpful supplemental skeleton.

40 This introduces a different oddity. A cut-off date which can prevent a due date arising, which is not something specifically envisaged by the legislation, is limited to a single day, and yet is introduced by the most casual drafting, as set out above. In my judgment this would fly in the face of the authorities relating to exclusion clauses and conditions precedent, which state time and time again that for serious consequences such as result from such clauses drafting must be clear.

- 41 One can then add to this the material relating to the absence of the payment schedule. The contract did not have this wording alone. It contained the wording of “*payment terms thirty days from invoice as per attached payment schedule*” and “*valuation monthly as per attached payment schedule end of month*”. Of course, no payment schedule was produced, but the plain inference from these provisions is that the parties objectively intended for claims and invoices to be submitted not necessarily on the last day of the month, but by reference to whatever was set out in the payment schedule, which was never ultimately issued.
- 42 On this basis, and following normal contractual construction principles, I conclude, with relatively little hesitation, that Rochford's case on this issue is incorrect and unsustainable. Indeed, it did seem to me that this was in some sense tacitly conceded by Rochford's case at paragraph 28 of its response. This said all those applications were made shortly after the end of the month, and that this was in accordance with the subcontract. While this argument was reworked skilfully by Ms White as a fall-back position relating to course of dealing or estoppel, that is not necessarily how it reads. Nor, against the above context, is the starting point reached by any such argument.
- 43 The parties intended claims and invoices and payment certificates to be submitted as per the payment schedule, but in the absence of the schedule they did not intend an impractical and unworkable solution. The effect was to leave the date for submission of the claim at large. The words "end of the month" are best seen in this context as pertaining to the period for the application rather than as a condition precedent to the entitlement to make a claim for the period. This is not a “throwing-out” of the parties' agreement, but an interpretation of it, which balances respect for their words with contractual certainty and fairness.
- 44 I would also add that the real world construction at which I arrive on this basis is to some extent reflected in what the parties actually did. I have been referred to the response to the adjudication which shows that the previous eight applications were made with a time lag. The closest in time to the end of the period was one day later; others were a week or so later. This particular claim is of course rather later than that, but it is plain from what I have seen that the parties were not in fact operating on the basis of that firm cut-off date. Even at the start of the relationship, before a course of dealing could have been established, the first submission was after the end of the month.
- 45 This is also reflected in the fact noted by the adjudicator that the AFP was not actually greeted with the response which is now advanced at the time. It was on the contrary acknowledged, and the IPA was sent specifically as a payment notice responding to the AFP.
- 46 The question which then presents itself is which parts of the Scheme must be imported? It follows that to the extent only that the subcontract did not “*provide an adequate mechanism for determining when*” each monthly payment became due, that the relevant elements of the Scheme needed to be implied into the subcontract, without trespassing on any legitimate expressed terms between the parties. And this depends on the extent to which one can say that the contract has effective provisions which can fit within the Scheme.
- 47 So far as due date for payment is concerned, it is essentially common ground that the parties did not agree when each interim payment would become due. Aside from the end of the month argument, it was not argued that the parties had agreed a due date, and I concur with that analysis. Under paragraph 4 of the Scheme payment will become due on whichever of

these two dates occurs later: (1) The expiry of seven days from the “relevant period”, or (2) The making of a claim by the other paying party.

48 On the basis that, as I have found, Kilhan was not pegged to the final day of the month for making the application, it follows that this regime comes into effect, and that the due date in this case was, as the adjudicator found, 20 May 2019, the date on which the claim was issued.

Final date for payment:

49 The real question as to the applicability of this Scheme, and in some ways the major issue in this Part 8 hearing, is how this interrelates with the provision in the subcontract which states, “*Payment terms thirty days from invoice as per attached payment schedule*”. This is because if this imports a final date for payment which is effective, Kilhan cannot say that the notice was late, because no invoice had been submitted by them by this stage. The invoices which were submitted by Kilhan were dated in October, and later in January.

50 It appears to me to be tolerably clear that the parties contemplated invoice and payment certificate coming together sometime after the claim was notified, and that that would be at or close to the due date. Thus, the thirty-day provision therefore seems to have been intended as a final due date provision. That being the case, to the extent that it can fit with the Scheme provisions, that date should be followed.

51 The question is whether that term can be effective given the absence of the payment schedule and the provision “*S/C payment certificate must be issued with invoice*”. Two arguments were advanced in relation to this, one legal and one essentially factual. I shall deal with the factual one first. Again, despite the skilful submissions advanced on behalf of Rochford by Ms White, I am not persuaded that the provision can in practical terms survive, given both the linkage to the payment schedule and the uncertainty over the payment certificate.

52 So far as in terms of the payment certificate, there was a provision for this within the contract, as I have noted, and as best one can determine, it was intended to begin at or about the time of the due date, given that there is then a thirty-day period to final date for payment. If the schedule had existed, that is roughly what one would expect to see within it, but the problem is that we simply do not know quite how the parties had scheduled matters, or had intended to schedule matters. Ms White suggested that the absence of a payment certificate, which there certainly was, could not prevent the invoice from becoming due, essentially relying on prevention principle grounds.

53 However, given the need for certainty with large sums of money in issue, and the need for the scheme of the parties to be workable, I cannot accept this submission. I refer in this regard to the judgement of Coulson LJ in the *Bennett (Construction)* case to which I have already referred where at [67] he noted that what he had previously said:

“ ... links to a wider point about the underlying purpose of the Act. As previously noted, in relation to payment provisions, the purpose of the Act was to provide for certain minimum, mandatory standards so as to achieve certainty and regular cash flow. Save in perhaps exceptional circumstances, it was not designed to delete a workable payment regime which the parties had agreed, and replace it with an entirely different payment regime based on a radically changed set of parameters. It seems to me that that could only

happen where the regime which had been agreed was so deficient that wholesale replacement was the only viable option ...”

- 54 This also ties in with Ms White's submission that what the court needs is a date which is certain. That is precisely the problem in my judgment. That is exactly what, looking to the parties' agreement, it does not achieve. If one puts oneself in the shoes of Kilhan, when is it to issue its invoice? On the face of the notation relied on, that simply sends one back to the schedule, non-existent, or the payment certificate, equally non-existent. This is a very different situation to, for example, *Grove*, a case to which I was referred, where the parties did have a functioning schedule.
- 55 It is also counterintuitive to put the stress on invoice which does not form the necessary constituent part of the statutory Scheme, in order to excuse the non-service of the payment certificate, which does form of the statutory Scheme. Absent a proper date for the payment certificate, it would be set at five days after the due date.
- 56 However, as noted already, given the absence of any provision timing the invoice, apart from the non-existent schedule, the answer to whether there is a clear date becomes known, and it becomes impractical to observe the parts of the contract that refer to the invoice, and in my judgment the Scheme's provisions effectively have to substitute because what the parties have is unworkable. Pegging the final date to service of an invoice, which is itself pegged to a payment certificate, is simply impractical. The best way of mending the misfire caused by the parties' incomplete drafting of the contractual documents, which is the position which one faces here, is effectively the one on which the adjudicator settled. Accordingly, regardless of a position on the legal point, I would reach the conclusion that the statutory Scheme comes into play as regards the final date for payment.
- 57 If I did have to decide the point on the law, I would with some diffidence have accepted Ms Drake's submissions, at least in part. She submitted that properly construed, section 110 required a final date for payment provision to fix a time period, albeit that that might itself depend on an event to fix the due date. I was directed to the section, and in particular to the distinction between subparagraph (1A), which allows an adequate mechanism for the determining of the due date, and subparagraph (1B), which refers to "how long a period is to be between the date on which a sum becomes due and a final date for payment".
- 58 That, she submitted and I accept, suggests that while a due date can be fixed by reference to, say, an invoice or a notice, the final date has to be pegged to the due date, and be a set period of time, and not an event or a mechanism. That also makes a degree of sense given that it will be important for the payer to be exactly certain how much time he or she has in which to serve a payless notice, the final date for payment being the date which is critical to that step.
- 59 Also supportive of that approach is the difference in drafting between that provision and section 109(2), which refers to circumstances in which payments become due. Against that background the drafting of section 110(1B) appears pointed.
- 60 There is also the question of the effect of the additions to the section:
- “[110] (1A) The requirement in subsection (1)(a) to provide an adequate mechanism for determining what payments become due under the contract, or when, is not satisfied where a construction contract makes payment conditional on—

- (a) the performance of obligations under another contract, or
- (b) a decision by any person as to whether obligations under another contract have been performed.”

“[110] (1D) The requirement in subsection (1)(a) to provide an adequate mechanism for determining when payments become due under the contract is not satisfied where a construction contract provides for the date on which a payment becomes due to be determined by reference to the giving to the person to whom the payment is due of a notice which relates to what payments are due under the contract.”

61 Those sections are designed to put limits on the circumstances in which a payment can be due so as not to give the payer an unfair ability to control the process. It would make no sense if such a limitation were intended in relation to subsection (1A) but not in relation to subsection (1B). The inference is that the possibility to peg final date of payment to an event rather than a fixed period was never considered acceptable under the Act.

62 Ms White referred me to the case of *Alstom Signalling Limited v Jarvis Facilities Limited* [2004] EWHC 1285 (TCC). I do not consider, even aside from the fact that it predates the amendments to the Act, that that case drives a different conclusion. *Alstom* was a case where the due date was ascertained by reference to a certificate, and the final date for payment was then seven days after that. It was not therefore at all at odds with what I have noted above. The issue was whether substituting the whole of the Scheme into the contractual scheme was wrong when there was a final date provision of seven days. This can be seen within the *Alstom* case itself at [22] where the judge said:

“Clause 2.6 said that payment would be made with seven days of the Railtrack certificate being issued in accordance with annex F1. There was therefore certainty as to the final date for payment, 'seven days of the Railtrack certificate'. That satisfied section 110(1B). The fact that Railtrack probably in breach of its contract with Alstom might fail to issue its certificate in accordance with annex F1 does not mean that for the purposes of section 110(1B) there was no final date. The final date for payment remained seven days after the issue of the certificate.”

63 That can also be seen to be confirmed in the *Bennett* case, to which I have already referred, where at [25] Coulson LJ summarises *Alstom* as a case where the judge was:

“ ... dealing with a dispute as to what was meant by a final date. He said that although the payment terms in the contract referred up the contractual chain to the main contract between Alstom and Railtrack, the contract was clear that payment would be made within seven days of a Railtrack certificate. There was therefore certainty as to the final date for payment and the fact that Railtrack, possibly in breach of its own contract with Alstom, might fail to issue that certificate did not mean that, for the purposes of s.110 (1)(b) there was no date for payment to Jarvis.”

But in any event as I have noted the case is an authority which predates those changes, and so it must be of questionable relevance at this stage.

64 It follows that for the reasons I have given, Rochford's claim for the declaration sought, and to order Kilhan to repay the sums paid by Rochford pursuant to the adjudicator's decision, is dismissed. I therefore do not need to determine the application for permission to amend.

MS WHITE: My Lady, I just ask that insofar as it might be relevant to submissions at least as a matter of principle on costs, if you were able and willing to make a declaration as to whether as a matter of principle you would have allowed the amendment, I would be grateful.

MRS JUSTICE COCKERILL: I would have been minded to allow the amendment, though that would not necessarily have resulted in the declarations that you sought at the end of the day, had you won.

MS WHITE: No----

MRS JUSTICE COCKERILL: Do you see what I mean?

MS WHITE: -- I understand, it does not change the substance of the declaration----

MRS JUSTICE COCKERILL: And even if you had won I might not necessarily have given quite the declarations you were after.

MS WHITE: Yes, but it is more as to should it have been resisted, I think, that matter.

MRS JUSTICE COCKERILL: Yes.

CERTIFICATE

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