Neutral Citation Number: [2024] EWHC 1129 (Ch)

Case No: PT-2023-001065

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
PROPERTY TRUST AND PROBATE LIST

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

Date: 15/05/2024

Before :

MASTER KAYE

- -

Between :

BL GOODMAN (GENERAL PARTNER) LIMITED (acting as general partner on behalf of BL Goodman Limited Partnership)	**Claimant**
- and -	
MORRIS HOMES (MIDLANDS) LIMITED	**Defendant**

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- -

John McGhee KC (instructed by **Gowling WLG (UK) LLP**) for the **Claimant**
Kirk Reynolds KC and Joseph Ollech (instructed by **F S Legal Solicitors LLP**) for the **Defendant**

Hearing dates: 14 February 2024

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Approved Judgment

This judgment is handed down remotely at 10.30am on 15 May 2024 by circulation to the parties and their representatives by email and by release to the National Archives.

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MASTER KAYE

Master Kaye :

1. This is my determination of the defendant's application dated 5 January 2024 by which they challenge the court's jurisdiction and seek to stay this claim ("the Application").

2. The challenge to the court's jurisdiction is on the basis that the defendant says the dispute which has crystallised between the parties is one that falls within the scope of their contractually agreed expert dispute resolution provisions.

3. The defendant further seeks an order that if the claim proceeds it should be transferred and continue under Part 7 and not proceed as a Part 8 claim. The defendant says that the determination of the questions of interpretation raised by the claimant will require factual and expert evidence.

Background

4. The parties entered into a contract dated 15 November 2013 ("the contract"). The contract related to a prospective residential development in Coventry ("the site") and included at Schedule 4, Sales Revenue Overage provisions ("Schedule 4") which set out the mechanism for calculating overage arising from that residential development.

5. The defendant subsequently developed the site and sold over two hundred residential units. The overage provisions were triggered on 6 August 2021.

6. A dispute has arisen between the parties about the calculation of the overage. The claimant calculates that the sum they are due to be paid by way of overage is in excess of £3m whilst the defendant calculates that no sum is due to the claimant and in fact says the figure is -£106,000, a difference of in excess of £3m.

7. The difference arises as a consequence of how the parties interpret three particular elements of the calculation process set out in Schedule 4. It is common ground that the differences are ones of the legal interpretation of the provisions of Schedule 4.

8. The claimant contends that the questions of legal interpretation fall outside the scope of the expert dispute resolution provisions in Schedule 4 whilst the defendant contends that they fall within it.

9. The question for me is not the interpretation of the overage provisions themselves but rather who is right about the scope and effect of the expert dispute resolution provisions in Schedule 4.

The Claim

10. On 5 December 2023 the claimant issued a Part 8 claim form by which they sought a determination of the following questions:

> "(1) as to whether in calculating "D" (being the aggregate of the Net Revenue from Sales amounts calculated on each Calculation Date during the Overage Period) within the meaning of Schedule 4 paragraph 1 of the said contract Build Cost Inflation is to be calculated on Revenue from Sales for the twelve months prior to any Calculation Date:

(a) only in respect of the period up to that Calculation Dale (as the Claimant contends); or

(b) in respect of the whole of the period up to the final Calculation Date (as the Defendant contends);

(2) as to whether the BCIS Inflation Index as defined in Schedule 4 paragraph 1 of the said contract is for so long as the Building Cost Information Service General Building Cost Price Index continues to be published:

(a) that Index (as the Claimant contends); or

(b) Is capable of constituting some other Index If a surveyor appointed under Schedule 4 paragraph 4 of the said contract should so determine (as the Defendant contends);

(3) as to whether in calculating the amount, if any of the Allowable Incentives provided by the Defendant to a purchaser within the meaning of Schedule 4 paragraph 1 thereof by way of shared equity loan:

(a) account should be taken not only of the amount of such loan but also of the benefit to the Defendant of the rights, secured by a second charge over such purchaser's property, to Interest on such loan and to 20% of the sales proceeds so as to calculate the overall cost (If any) to the Defendant of providing such loan (as the Claimant contends); or

(b) the whole amount of such loan should be treated as the amount of the Allowable Incentive without regard to the benefit to the Defendant of such rights as aforesaid (as the Defendant contends).

11. The claim was supported by the witness statement of Jason Harris of BL Goodman (General Partner) Limited dated 4 December 2023. The defendant's acknowledgment of service dated 22 December 2023 set out its challenge to the jurisdiction and its challenge to the use of Part 8.

12. The secondary point about procedure, even leaving aside whether any factual or expert evidence might be appropriate, was one that seemed to me to be based on a misapprehension of the scope and flexibility of Part 8. I return to that at the end of this judgment.

13. The Application was supported by the witness statement of Christopher Sorrell dated 5 January 2024. The evidence in opposition was set out in a witness statement of Clive Chalkley dated 17 January 2024.

14. I had the benefit of written and oral submissions from Mr McGhee KC for the claimant and Mr Reynolds KC and Mr Ollech for the defendant. I have taken into account those

submissions written and oral and the evidence when reaching this decision even if I have not set out every point raised by the parties.

15. The contract is a substantial document. The claimants'/sellers' solicitors were Wragge & Co LLP, and the buyers/defendant were represented by Mr Kendall of the defendant when the contract was negotiated and entered into in 2013. It will be apparent from the excerpts set out in this judgment that however careful parties are, when such a lengthy and complex agreement is negotiated inconsistencies or errors can arise.

16. Expert with a capital E is defined in the definitions section of the contract at clause 1.1(i) although the final few words of the definition are missing:

> "…a person having appropriate professional qualifications and experience in such matters appointed jointly by the parties or in default on the application of either party by the President for the time being of the Royal Town Planning Institute…in connection with planning matters or by the President of the Law Society…in connection with the construction of this contract or the President…of the Royal institute of Chartered Surveyor in connection".

17. There is no dispute resolution clause or mechanism in the main part of the contract rather Expert having been defined is then not used at all in the main part of the contract but then relied on in the schedules and annexures which form part of the overall suite of documents making up the contract. It is helpful to have regard to the contract as a whole when seeking to interpret or understand the context of a particular clause. It is rarely helpful to consider a clause or paragraph in isolation. That approach is no different when seeking to understand the scope of the expert dispute resolution provisions.

18. Looking therefore at the wider context Expert having been defined is then referred to in three different places in the suite of documents making up the contract. At first blush those three areas where disputes were envisaged would appear to marry up with the three types of expert identified in the definition of Expert although because of the missing words the intended scope of the surveyor expert role is not set out.

19. Expert is first referred to in Schedule 3 entitled "Planning". Paragraph 3.11 of Schedule 3 provides:

> "Any dispute as to whether or not a Permission or any associated Planning Agreement or any conditions contained therein together comprise an Acceptable Permission may be referred for determination by the Expert on the application of either party. "

20. Paragraph 2 of Schedule 3 provided the mechanism by which the parties were to ascertain the date of satisfaction of the "Planning Condition" which then specifically refers to the Expert determination referred to in paragraph 3.11.

21. The definition of Expert in the contract helpfully identifies that matters of planning are to be a determined by a professional agreed by the parties or as nominated by the President for the time being of the Royal Town Planning Institute. There are no specific

provisions in the contract or Schedule 3 setting out a dispute process beyond the definition of Expert and that it is for the Expert to determine any dispute. For planning issues therefore it appears it would be for the Expert to determine their own procedure.

22. Annexure 2 to the contract contains the form of Legal Charge which the defendant was to enter into on completion to secure staged completion payments. Clause 12 of the form of Legal Charge sets out the provisions for granting rights in the event of a sale or transfer of any part of the land the subject of the contract. The clause includes:

> "…and provided always that in the event of dispute between the parties which cannot be resolved within a reasonable period then such dispute may be referred for determination by the Expert (as defined in the Sale Agreement) on the application of either party and if either party serves notice on the other implementing this provision the parties shall do all such things as are necessary to give effect to the Expert's appointment. "

23. The Legal Charge does not specify which type of Expert as defined is to be used in this scenario but given the nature of the dispute envisaged it would not be unreasonable to assume that the appropriate professional might be a lawyer who if not agreed would be appointed by the President of the Law Society although it is not immediately obvious that the type of dispute to which clause 12 relates is one in connection with the construction of the contract but rather it appears to be related to property rights arising from a sale of part. Helpfully however, clause 12 of the legal charge does at least specifically refer back to the Expert as defined in the Sale Agreement (the contract) to provide some assistance in working out what was intended. It does, however, again leave it for any Expert to determine their own procedure given the absence of a dispute resolution clause in either the contract or Annexure 2. One can envisage that difficulties may have arisen on the wording and application of the dispute resolution provisions had a dispute arisen.

24. Finally, the reference to Expert with which this judgment is concerned is in Schedule 4. Unlike the other two references to Expert, Schedule 4 sets out its own definitions, before setting out the provisions for the calculation and payment of the Sales Overage Payment as defined in Schedule 4 at paragraph 3.

25. Paragraph 3.7 provides that:

> "Any dispute about the calculation of a Sales Overage Payment is to be referred to the Expert for determination in accordance with paragraph 4 of this Schedule."

26. Paragraph 3 makes no reference back to the contract definition of Expert but instead refers to paragraph 4 of Schedule 4 which provides an entirely separate comprehensive and apparently self-contained dispute resolution mechanism for resolving disputes about the calculation of the sales overage by a surveyor as follows:

> "4.1 If any dispute arises between the Seller and the Buyer relating to or arising out of the calculation of a Sales Overage Payment, the Seller or the Buyer may give to the other written

notice requiring the dispute to be determined by an independent surveyor under this paragraph 4.

4.2 The surveyor:

(a) is to be a professionally qualified surveyor having not less than ten years' experience in the subject matter of the dispute; and

(b) is to be appointed by agreement between the 'parties or, in the absence of agreement, appointed pursuant to paragraph 4.3.

4.3 A dispute over the appointment of the surveyor is to be referred at the request of the Seller or the Buyer to the President or other most senior available officer of the Royal Institution of Chartered Surveyors who may appoint a surveyor to determine the dispute and the Seller and the Buyer agree to accept the appointment of the surveyor.

4.4 The surveyor is to act as an independent expert and:

(a) the Seller and the Buyer may make written representations within ten Working Days of the surveyor's appointment and will copy the written representations to the other party;

(b) the Seller and the Buyer are to have a further ten Working Days to make written comments to each other's representations and will copy the written comments to the other party;

(c) the surveyor is to be at liberty to call for each written evidence from the parties and to seek such legal or other expert assistance as the surveyor may reasonably require;

(d) the surveyor is not to take oral representations from the Seller or the Buyer without giving the other parties the opportunity to be present and to give evidence and each to cross-examine the other;

(e) the surveyor is to have regard to all representations and evidence before him when making his decision, which is to be in writing, and be required to give reasons for his decision;

(f) the surveyor is to use all reasonable endeavours to publish his decision within four weeks of this appointment;

(g) the surveyor is to act impartially and in good faith between the parties; and

(h) the surveyor's decision will be final and binding on the parties, save in the event of manifest error.

> 4.5 Responsibility for the costs or referring a dispute to a surveyor under this paragraph 4, including costs connected with the appointment of the surveyor but not the legal and other professional costs of any party in relation to the dispute, will be decided by the surveyor.
>
> 4.6 This paragraph 4 does not apply to disputes in relation to matters of law which will be subject to the jurisdiction of the courts."

27. Schedule 4 unlike the references to Expert in Schedule 3 or Annexure 2 appears to provide an entire mechanism for resolving the disputes in relation to overage not even using the defined term Expert but setting out its own definition of an expert with a small "e" and the process of appointment of a surveyor expert at paragraph 4.2 and 4.3.

28. Paragraph 4.1 sets out the scope of the role of the expert and then provides at paragraph 4.4 that the surveyor appointed under paragraph 4 is to act as an independent expert and sets out various steps to be taken and the nature of the role including that the surveyor may seek legal advice and assistance if required in relation to any matters relating to or arising out of the calculation of the Sales Overage Payment as referred to in paragraph 4.1. Paragraph 4.5 addresses the costs of the expert appointed under this process and then paragraph 4.6 makes it clear that the paragraph 4 dispute resolution process does not apply to disputes in relation to matters of law.

29. It appeared to me that it may have been lifted wholesale from another document and dropped into Schedule 4. There is nothing wrong with that and indeed where there is something that has worked well before it would not be uncommon to do so but it does not appear to have been adjusted to marry up with the other definitions or processes in the contract if that were what was intended, which is at least in part why this dispute arises.

30. How then to decide whether as submitted by the defendant, paragraph 4 should be read across such that an Expert should be appointed to determine the dispute about interpretation of the overage provisions because it arises in connection with the construction of the contract to which the definition of Expert applies rather than be treated as a matter of law to which paragraph 4.6 Schedule 4 will apply.

31. The legal principles can be considered shortly. The court has a general power to stay proceedings under section 49 (3) Senior Courts Act 1981 which may be used to stay proceedings where the parties have specified an alternative form of dispute resolution which addresses the issues which a party seeks to ask the court to determine.

32. Lord Mustill in *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] 1 All ER 664 (HL), said at 678 e - f: there is a presumption that the agreed dispute resolution mechanism will prevail, and the party seeking to depart from them must show "good reason" for departing from them. And the fact that the dissenting party may now find the agreed method too slow to suit their purpose is expressly "*quite beside the point*". Like the parties in Channel Tunnel, the parties here might be considered to be commercial enterprises with long experience of negotiating contracts and who are likely to have considered the balance of risk in the processes for dispute resolution they

put in place albeit it seems to me that the processes they ended up with do not all hang together.

33. In *Cott UK Ltd v FE Barber Ltd* [1997] 3 All ER 540, the judge said that the court should be slow to interfere with the parties' choice and "should normally grant a stay, unless there are strong grounds for permitting the matter to proceed in the ordinary courts". Further that where there is a dispute resolution clause which is contractually binding the burden is on the party opposing the stay to provide grounds for doing so.

34. However, in determining whether the dispute between the parties about the overage provisions falls within the scope of the dispute resolution provisions in the contract I also keep well in mind the well-known dictum of Lord Clarke JSC in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900 at [23]: "*Where the parties have used unambiguous language, the court must apply it*".

35. The question is therefore whether the definition of Expert in the contract is sufficiently broad to be read across and to encompass the questions of the legal interpretation of the overage provisions which the claimant has identified in Schedule 4. As set out above it is common ground that the declarations sought relate to issues of interpretation of the law.

36. Mr Reynolds submits that the starting point is the definition of Expert which includes provision for the parties to appoint " *a person having appropriate professional qualifications and experience … in connection with the construction of this contract…"* He argues that Schedule 4 then binds the parties to have issues between them decided either under paragraph 3.7 which he submits should be read to include any dispute arising under Schedule 4 including matters of construction or alternatively under paragraph 4.1 which is limited to disputes arising out of the calculation of the overage. He says that both types of dispute should then be determined in accordance with the procedure in paragraph 4.

37. Consequently he argues that disputes about the calculation of the overage alone under paragraph 4.1 are to be referred to a surveyor whilst disputes under paragraph 3.7 which encompass "any dispute" about the calculation of the overage can and do include disputes related to the interpretation or construction of the overage provisions and are referred to an Expert as defined in the contract. Mr Reynolds submits that the Expert appointed under paragraph 3.7 includes any of the types of expert in the definition of Expert in the contract, who is then to determine the matter referred for expert determination under the procedure set out in paragraph 4.

38. He argued that paragraph 3.7 and 4.1 operated in parallel and whilst a surveyor was the appropriate type of Expert for calculating the overage it did not oust the jurisdiction of the Expert as defined to make decisions on matters that were within their appointment. This could therefore lead to a binding determination on interpretation by an Expert appointed under paragraph 3.7 using the process set out in paragraph 4.

39. The provision in paragraph 4.4 which permitted a surveyor expert to seek legal advice could be explained on the basis that it would enable the surveyor to seek that assistance directly and without going through the paragraph 3.7 procedure when determining any disputes about the calculation of the overage. It could be used separately from the paragraph 3.7 procedure which enabled the parties to appoint an Expert in connection

with the construction of the contract which would include determining any issues of law.

40. Mr Reynolds argued that paragraph 4.6 was another process that could work in parallel with paragraph 3.7. Whilst a determination under paragraph 3.7 would be binding on the parties, he argued that a decision by a surveyor acting as an expert relying on legal assistance obtained under paragraph 4.4 (c) would not be binding on the parties in the same way. He further argues that paragraph 4.6 did not apply to interpretation of the contract which was covered by paragraph 3.7 and the Expert determination process but should be interpreted or construed so as only to apply to matters of "law" such as rectification, mistake, misrepresentation and the like not matters of construction.

41. Consequently based on Mr Reynolds' analysis all the declarations sought by the claimants fell within the scope of paragraph 3.7 with the questions of legal interpretation of the overage calculation that were to be determined by the Expert as defined in accordance with the process in paragraph 4 but reading across lawyer for surveyor.

42. Mr Reynolds was unable to satisfactorily explain this odd combination of parallel processes which did not appear to me to follow the more natural reading of Schedule 4 when considered in context. Indeed his approach seemed to produce a very odd and strained construction. His suggestion that the purpose of paragraph 4.6 was simply to address matters of law in a much broader context was not an obvious construction of paragraph 4.6 in context.

43. So far as discretion is concerned, he argued that the contract set out the agreed dispute mechanism negotiated between the parties and the court should not lightly allow parties to avoid the consequences of what they had agreed (see *Channel Tunnel* and *Cott*). This was a negotiated and bespoke contract with bespoke dispute resolution provisions. The claimant's complaint that it might cause delay is a consequence of those negotiated terms which include the failure to make any provision for interest. Just because it is a slower procedure is not relevant.

44. However, whilst the court should apply clear and unambiguous language and apply a dispute mechanism agreed between the parties the court has to be satisfied as to both. This application is not such a simple application as one that asks the court to simply require the parties to apply their contractually agreed dispute resolution process. Here there is a dispute about how the very dispute mechanism itself works. I remind myself that no party has applied to rectify the provisions of the contract. Neither party suggests that anything has gone wrong or that there is any need to correct the terms of the contract or Schedule 4.

45. Here it seems to me that the attempts to shoehorn the Expert process that Mr Reynolds would like to apply into Schedule 4 highlights that this is not a case where there is simple clear unambiguous dispute resolution mechanism to apply.

46. Mr McGhee disagrees with Mr Reynolds attempts to differentiate between paragraph 3.7 and paragraph 4.1. He submits, compellingly, that both paragraphs are within Schedule 4, and both are about disputes related to the calculation of the overage. They are about when, how and the extent of the overage and both point to the process in

paragraph 4 as being the dispute resolution process for determining any dispute arising from Schedule 4 and those paragraphs.

47. Paragraph 3.7 covers any dispute about the calculation of the overage and paragraph 4.1 covers any dispute relating to and arising out of the calculation of the overage. Mr McGhee argues that the two paragraphs cover the same types of dispute and that their overall scope is the same. He says this is not surprising as paragraph 3.7 is simply a pointer to the paragraph 4 procedure. The paragraphs are not separate provisions and do not therefore operate in parallel. This can be tested by a careful review of the provisions in paragraph 4.

48. Paragraph 4.1 specifies determination by an independent surveyor under paragraph 4 without reference back to the contract or its definition of Expert with a capital E. Paragraphs 4.2 and 4.3 determine who the surveyor should be and how they are appointed. All of which would be unnecessary if in fact the intention was that the definition of Expert in the contract was to be imported into paragraph 4. He submits that the identification of an independent surveyor as the expert to determine disputes in this context is entirely consistent with the scope of both paragraph 3.7 and 4.1. I agree.

49. He says that a surveyor would be well suited to determine the calculation of overage but not the construction of the overage provisions themselves which then explains the inclusion of paragraph 4.4(c) which provides the surveyor with the power to seek legal or other expert input as they may reasonably require. The definition of Expert in the contract is simply that, a definition.

50. When construing the terms of the contract, the definition of Expert and Schedule 4 and in particular the paragraph 4 process of appointment of a surveyor expert it seems plain to me that the intention was for a surveyor to be appointed to determine disputes about the calculation of the overage and that does not appear to be seriously disputed by the defendant. The defendant's argument is that that does not preclude the same process being used to appoint a lawyer Expert using the same paragraph 4 process to determine issues of construction or interpretation of the terms of the overage provisions.

51. I did not find this approach an easy or natural construction of Schedule 4 or the contract. I preferred Mr McGhee's analysis which also then allows for a simpler reading and understanding of paragraph 4.6 as addressing matters not within the scope of the reference to the expert surveyor under Schedule 4. It carves out any matters of law not within the scope of the reference under paragraph 4. The carve out in paragraph 4.6 includes any issues of construction or interpretation of the overage provisions and is not to be read as relating to only matters of "law" excluding construction of the contract as submitted by the defendant.

52. As is clear from the decisions of Mustill J (as he then was) in *Finelvet AG v Vinava Shipping Co Ltd* [1983] 1 WLR 1469 at page 1475, His Honour Judge Peter Coulson QC (as he then was) in *Stern Settlement Trustees v Levy* [2007] EWHC 1187 (TCC) at [9] and [10] it has long been recognised that issues of interpretation and construction would fall within the broad scope of questions of law.

53. There would therefore need to be clear and unambiguous wording to exclude interpretation and construction of the contract from those issues of law to which paragraph 4.6 relates. Mr Reynolds accepted that construction was a matter of law but

argued the terms of the contract had in fact carved out matters of construction of the contract as set out above which he said favoured his interpretation of paragraph 4.6 as being intended to apply to questions of law other than construction and interpretation.

54. In the context of paragraph 4 and Schedule 4 as a whole it does not appear to me that paragraph 4.6 was intended to exclude from its scope interpretation or construction of the contract. I am not persuaded that the reference to construction in the definition of Expert in combination with paragraph 3.7 has the effect of limiting the scope of paragraph 4.6 in the way suggested by Mr Reynolds. It seems to me that there is a tension in the contract between its definitions and the self-contained provisions of Schedule 4, but I consider that the more consistent reading of the two is that Schedule 4 is intended to be an entire expert determination provision for the surveyor appointed as an expert in relation to the calculation of the overage.

55. This did raise the question of the extent of and/or intention behind the provision in paragraph 4.4 (c) which provides the surveyor with the ability to obtain legal or other expert advice. Mr McGhee squared this circle by focussing on the role of the surveyor expert in interpreting the overage provisions for the purposes of undertaking the calculation. He argued that the purpose of 4.4 (c) was to assist the surveyor when they were looking at the "nuts and bolts" of how to calculate the overage. However, in doing so the surveyor was not just a calculator but had to make decisions and value judgments based on their expertise about some of the elements of the calculation of the overage such as determining the allowable incentives or when assessing revenue sales considering what would be "money's worth". If in the course of undertaking that exercise a question of construction, or another question were to arise related to that calculation process the surveyor could either seek the agreement of the parties or seek legal advice or other expert advice to assist them in making those decisions. They would then go on to complete their determination of the calculation of the overage. However, the decisions or advice underpinning the surveyor's calculation would not be final and binding. That may be right, but I also note that the provisions of paragraph 4.4(h) do mean that the surveyor's own decision will be final and binding, save in the event of manifest error.

56. Mr McGhee submitted that nonetheless if the parties wanted a final and binding decision on a question of law relating to the construction of the terms of the contract that affected the calculation of the overage any such question would have to be determined by the court under paragraph 4.6 as a matter of law. This appeared to me to satisfactorily address the connection between paragraph 4.4 and 4.6 and how to approach the two paragraphs.

57. Mr Reynolds further suggested that if it were right that it was for the court to make a final decision on these matters of construction that arguably the claim was being made too early. He said that the proper course would be for the surveyor to simply get on and make a determination and for the parties to see where they ended up. Mr McGhee says that this is not the appropriate course in this case where it is already clear that the parties differing interpretations of the overage provisions produce a difference of over £3m.

58. I agree with Mr McGhee given the history of this matter which I touch on below in relation to Part 8 it seems to me that the appropriate course is to proceed to determine the questions of interpretation now rather than the parties incur further costs and time on an exercise that will be incomplete without a decision on the issues of interpretation.

That is particularly so where the defendant agrees that the issues identified by the claimant are in fact the ones on which a decision is needed.

Conclusion on jurisdiction

59. For the reasons set out above I prefer Mr McGhee's construction arguments and agree that the disputes identified in the Part 8 claim are subject to the jurisdiction of the courts under paragraph 4.6 of Schedule 4. I am satisfied that Schedule 4 provides a comprehensive dispute resolution process for determination of the issues relating to the calculation of the overage by an independent surveyor identified and appointed under Schedule 4 paragraph 4 and specifically carves out issues of law, which include issues of construction and interpretation of the terms of Schedule 4, as matters to be referred to the courts under paragraph 4.6. The jurisdiction limb of the application therefore fails.

Part 8 or Part 7

60. As a consequence it is necessary to consider the defendant's objections to the Part 8 procedure.

61. Mr Reynolds submitted that Part 8 was unfair to the defendant and the court since the scope of the dispute on the interpretation was set out in correspondence and not in statements of case. He submitted that the court could not know from this process what the final scope of the arguments were between the parties. He argued that the only appropriate way to take this dispute forwards was by transferring it on to Part 7 and having full statements of case, disclosure, witness evidence and potentially expert evidence on what typical overage provisions might be.

62. However, in the absence of any application to rectify the only issues to be determined are issues of interpretation and construction relating to the way in which the overage should be calculated by reference to the provisions and definitions in Schedule 4. They are agreed to be issues of interpretation with Mr Reynolds accepting that issues of construction were issues of law. Indeed it appeared that the defendant even accepted that the questions of interpretation identified by the claimants in the Part 8 claim were those which the court will need to determine.

63. In *Cathay Pacific Airlines Ltd v Lufthansa Tehnick AG* [2019] EWHC 484 (Ch), John Kimbell KC said that where a claim could have been started under either Part 7 or Part 8 and Part 8 was chosen the parties should seek to engage before issue. This was intended to avoid the parties wasting time and costs arguing about whether the claim as advanced should be transferred to and continued on Part 7. The defendants would say that is precisely so that the type of argument advanced in this case could be avoided.

64. However, it seemed to me that the real complaint in this case was that whilst the defendant prevaricated between September to December 2023, the claimant simply got on with issuing a claim seeking the declarations in December 2023, having warned the defendant on 9 November 2023 that it intended to do so. The defendant can hardly say they were taken by surprise or did not have sufficient time to clearly set out what their position was so that it would have been clear to the claimant that issuing a Part 8 claim was inappropriate. The holding position adopted during November was unhelpful. Whilst it might be said that the provision of a draft of the claim would have drawn out

this issue further it appears from the approach adopted by the defendant on this Application that this claim would always have been made. Despite the opportunity to file evidence in response to the Part 8 claim and the Application it is difficult to identify a proper basis for the objection to Part 8 or a basis for the claim continuing as a Part 7 claim.

65. As set out above the overage provisions were triggered in August 2021. In May 2023, the claimant's solicitors ("Gowling") engaged with the defendant directly to seek to obtain information to enable the overage to be calculated. Although that correspondence continued between Gowling and the defendant, the claimant provided its overage calculation to the defendant directly on about 5 September 2023 although this appears to have been prepared whilst various issues remained outstanding.

66. On 14 September 2023 Gowling sought a response on various issues about the calculation of the overage, including whether the claimant's calculation could be agreed and if not the reasons for any disagreement within 14 days, so by 28 September.

67. FS Legal were instructed by the defendant on about 3 October. They surfaced and sent Gowling a holding response on 17 October 2023 by which they sought an extension of time to respond to 31 October 2023. A letter of response was provided on 3 November 2023 some two months after the overage calculation was initially submitted by the claimant. In this letter FS Legal first set out the defendant's overage calculation of -£106,943.20. The defendant raised some issues about the basis of the claimant's calculation at least one of which was an issue now identified in this claim. Curiously, given the Application, FS Legal highlighted the possibility of disputes relating to construction of Schedule 4 being matters which might need to be considered under paragraph 4.6 as part of court proceedings. The letter recognised that proceedings in separate tribunals should be avoided. It provided no specific date by which the defendant would respond substantively on those issues.

68. On 9 November 2023 Gowling made it clear that if they did not receive a substantive response by 23 November 2023 the claimant would commence declaration proceedings. Gowling identified the three legal questions of interpretation which it said needed to be considered by the court.

69. Rather than provide a substantive response, on 23 November FS Legal indicated that they were considering whether the court had any jurisdiction at all to deal with the issues identified and reserved their position. It was plain that a dispute had already crystallised and there was no obvious objection to the issues for determination that had been identified.

70. The issue of this claim on 5 December nearly two weeks later cannot have come as a surprise given the contents of the correspondence between September and November 2023. The declarations sought had been identified in outline as long ago as 9 November and FS Legal had not suggested that they were inappropriate nor do they now. The issue they raised was and is one of process.

71. Part 8 is a flexible procedure. The court will only transfer from Part 8 to Part 7 if it is clear that a claim is unsuitable for Part 8. It is far from clear even now with the benefit of the Application and submissions why the court would need to hear oral evidence or cross examination or why expert evidence is necessary.

72. At present on the evidence available there is no substantive dispute of fact and no obvious prejudice to the defendant in proceeding on Part 8.

73. Although the defendant's acknowledgment of service identifies a need for factual evidence or expert evidence in relation to a rectification claim, no such claim/counterclaim has been made. There is no proper explanation of what factual or expert evidence would be needed or would assist the court on matters of interpretation or construction which are the ones in issue.

74. The high point of the justification for the requirement of such evidence seems to be Mr Sorrell's witness statement. He suggests that despite the contract being a bespoke contract negotiated between the parties that the court might be assisted by expert evidence on typical or usual overage percentage provisions. It was not immediately obvious to me that such evidence would assist the court on the interpretation of the contract terms these parties had negotiated on a bespoke basis. It was not clear at all why any expert evidence about what other parties to other contracts and in other situations might have done was going to be of any assistance to the court in interpreting the overage provisions entered into by these parties in this bespoke contract. Nor was it obvious why the court would be assisted by evidence of what the "standard" overage provisions might be.

75. But even if I were to be persuaded that such evidence might provide some assistance to a trial judge that of itself would not preclude the use of Part 8.

76. Mr Reynolds complains that the parties' positions on the proposed declarations are set out in correspondence rather than in statements of case and there is no clarity. That complaint could be raised in relation to many Part 8 claims but it does not preclude it being the appropriate procedure for determining the claim.

77. All the evidence on which the parties intended to rely should have been included in their witness evidence either at the time of issuing the claim or in response to the claim. In so far as it may have been necessary or appropriate to seek dispensation from the full rigours of PD 57AC to enable the evidence to address any issues that would not otherwise be included in witness evidence no such application was made. But given the nature of the disputes I remain far from convinced that substantive further evidence is likely to be necessary and the evidence available on the Application does not obviously identify a need for any.

78. It is not uncommon for the court to order parties to a Part 8 claim to agree statements of fact or law where that is considered useful. The court would expect the parties to seek to agree a list of issues in any event. In so far as there is any need for something akin to statements of case, if necessary, points of claim and defence could be directed. However, it is not immediately obvious that such a process will be necessary in this case.

79. I am simply not convinced there is any proper basis put forward for this claim to proceed on Part 7. It would be cumbersome, time consuming and costly for all parties and build in considerable and unnecessary delay. It would not be consistent with the overriding objective to manage cases justly, efficiently and at proportionate cost.

80. I am not persuaded that Part 8 is inappropriate for the determination of the declarations which relate to issues of interpretation or construction of the overage provisions. There is no current claim for rectification, and I cannot determine this application on the possibility of some future application to rectify.

81. If Mr Reynolds is able to persuade me that there is some merit in the court giving permission for some narrow and limited further factual evidence to assist the court on questions of construction or interpretation bearing in mind the approach that the court should take to such questions there is no reason why it cannot be accommodated within the Part 8 process.

82. Equally there is no reason why the court could not, should there be some proper basis for doing so, direct some form of costs management which appeared to be another concern. I can see some value in the parties exchanging costs information in the form of the front page of a Precedent H however, I am not currently persuaded that there is any need to impose full costs management to this claim and none was identified. It appears to me that would add an additional unnecessary layer of costs and be disproportionate.

83. The benefits that the defendant appears to want to achieve from the claim proceeding under Part 7 claim and the limitations it considers arise from the claim proceeding on Part 8 seem to me to be illusory.

84. On the basis of the evidence and submissions of the parties I am satisfied that the claim should continue as a Part 8 claim and the second limb of the Application fails. I will consider what further directions to give in relation to that claim and its disposal, if they cannot be agreed between the parties, on paper.

85. This judgment will be handed down remotely. It appears to me that the consequential matters ought to be capable of agreement or determination on paper and the parties should seek to resolve them in that way. If exceptionally they consider that a short consequentials hearing is necessary, they should have regard to the provisions of chapter 12 Chancery Guide when seeking to fix that hearing.