Neutral Citation Number: [2022] EWHC 1842 (TCC)

Case No: HT-2022-000122

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT (QBD)

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

Date: 15 July 2022

Before :

MR ALEXANDER NISSEN QC
(sitting as a Deputy High Court Judge)

- -

Between :

BUCKINGHAM GROUP CONTRACTING LIMITED	**Claimant**
- and -	
PEEL L&P INVESTMENTS AND PROPERTY LIMITED	**Defendant**

- -

- -

Ronan Hanna (instructed by Fenwick Elliott LLP) for the **Claimant**

Justin Mort QC (instructed by Hill Dickinson LLP) for the **Defendant**

Hearing dates: 5 July 2022

- -

MR ALEXANDER NISSEN QC:

Introduction

1. The Claimant, Buckingham Group Contracting Ltd ("Buckingham"), is a contractor. The Defendant, Peel L&P Investments and Property Ltd ("Peel") is a property development company. Peel was engaged by Prowell Ltd to develop a project for the construction of a new plant for the manufacture of corrugated cardboard at Ellesmere Port in Merseyside. Peel engaged Buckingham as its contractor to design and construct the production building and certain external works pursuant to a written agreement dated 29 January 2018 ("the Contract").

2. In these Part 8 proceedings, Buckingham seeks declarations from the Court in respect of provisions relating to liquidated damages. The wider context in which the declarations are sought is that the works were significantly delayed and the parties are in dispute as to responsibility for those delays. On 14 November 2018, a Pay Less Notice was issued by RPS, on behalf of Peel, notifying Buckingham of its intention to deduct from a sum that would otherwise have been due to it an amount of £1,928,253.77 by way of capped liquidated damages pursuant to clause 2.29A.1.2 of the Contract. For the reasons elaborated upon below, Buckingham contends that the provisions in respect of liquidated damages are void and unenforceable and that any remedy in respect of general damages is capped in the amount of £1,928,253.77.

3. According to the Contract Particulars, the Date for Completion was 1 October 2018. The facts before the Court in respect of actual completion are very limited. Whilst they may be contentious in other proceedings, it is agreed for present purposes that Peel took over possession of the building on 2 July 2019. Thereafter, remaining works (essentially comprising external works) were completed in late 2019. The deemed date for taking those elements over was 24 December 2019.

4. The case in support of the declarations was advanced by Mr Hanna for Buckingham and was resisted by Mr Mort QC for Peel. I am grateful to both counsel for their helpful skeleton arguments and oral submissions.

5. In his skeleton argument, Mr Mort identified three "modest" procedural points arising in this case but he did not develop them in oral argument and, for that reason, Mr Hanna did not address them either. I do not propose to deal with them in those circumstances.

The Contract

6. The basic structure of the Contract was the JCT Design and Build Contract 2016 but it was subject to a schedule of bespoke amendments (described as a Schedule of Amendments). There were various Annexes to the Contract including the Employer's Requirements, Contractor's Proposals and the Contract Sum Analysis.

7. Helpfully, the Court was provided with a conformed copy of the Contract which incorporates all the amendments into a single document, identifying where the changes may be found. This was of great assistance and meant that it was largely unnecessary to refer and cross refer to the original documents.

8. The Works are defined as *"Design and build of a new manufacturing facility and associated external works at South Road, Ellesmere Port, Merseyside"* (First Recital).

9. The Contract Sum is £26,164,049.28 (Article 2).

10. There are several terms that concern how the Contract should be read / interpreted:

    (a) Clause 1.3 of the Agreement provides that the schedules form part of the agreement and shall have effect as if set out in full in the body of the agreement.

    (b) In the case of any difference, discrepancy or conflict between the Schedule of Amendments and the JCT standard form contract terms, the former is to prevail: Clause 1.9 of the Agreement.

    (c) Clause 1.3 of the Conditions provided that, *"The Agreement and these Conditions are to be read as a whole. Nothing contained in any other Contract Document, irrespective of its terms, shall override or modify the Schedule of Amendments, the Agreement or these Conditions."*. As to this:

(d) The Agreement was defined as *"the Agreement to which these Conditions are annexed, including its Recitals, Articles and Contract Particulars, each as amended by the Schedule of Amendments."*

(e) The Conditions are defined as *"the clauses set out in sections 1 to 9 of these Conditions, together with and including the Schedules hereto, each as amended by Part 4 of the Schedule of Amendments."*

(f) Contract Documents is defined as *"the Agreement and these Conditions, together with the Employer's Requirements, the Contractor's Proposals, the Contract Sum Analysis and (where applicable) the BIM Protocol."*

11. Schedule 10, on which these proceedings turn, states:

"If there is any conflict or inconsistency between the wording of this schedule and clause 2.29 the wording of this schedule shall take precedence."

12. Clause 2.3 of the Conditions provides that the Contractor shall be given possession of the Site on the Date of Possession and that the Contractor shall *"thereupon begin the construction of the Works or Section and regularly and diligently proceed with and complete the same on or before the relevant Completion Date."*.

13. Completion Date is defined as *"the Date for Completion of the Works or of a Section or of a Milestone Date as stated in the Contract Particulars or the Employer's Requirements or such other date as is fixed either under clause 2.25 or by a Pre-agreed Adjustment."*

14. The "Date for Completion" is defined as *"the date stated as such date in the Contract Particulars (against the reference to clause 1.1) or Employer's Requirements in relation to the Works or a Section or a Milestone Date."* As to this, the Contract Particulars provided as follows:

(a) The Date for Completion of the Works was 1 October 2018: Contract Particulars at item 1.1.

(b) The Contract Particulars state that the Works are not divided into Sections and completion by Sections does not apply. See:

- The Fifth Recital ("Description of Sections"), which is left blank;

- Item 1.1 ("Date for Completion of the Works"), which as set out above is 1 October 2018 and which is said to apply "*where completion by Sections does not apply"*

- Items 2.3 ("Dates of Possession of Sections"), 2.4 ("Deferment of Possession of Sections"), 2.29.2 ("Rates of liquidated damages for each Section") and 2.34 ("Sections: section sums"), where for each of these it is stated that *"Sections do not apply"*.

15. Clause 2.27 is concerned with the achievement of practical completion. Bespoke provisions were agreed in respect of other associated matters. Thus, clause 2.27A sets out criteria by which the state of practical completion of the Works would be assessed and clause 2.27B.1 makes provision for notice to be given of imminent achievement of practical completion. Clause 2.27B.2 provides for similar notice to be given in respect of the achievement of a Milestone Date. Clause 2.27C.3 provides for a written statement that a relevant part of the Works have reached a Milestone Date.

16. Clause 2.27D.1 contains a regime for early access, based on an Early Access Area plan and a series of Early Access Dates. The concept of early access is to be distinguished from that of partial possession which is separately provided for. Clause 2.27D.1 provides for the Contractor to give notice when an Early Access Area is available for the Employer to commence the relevant fitting out works.

17. Clauses 2.28 and 2.29 of the Conditions concern liquidated damages for delay in completing the Works. These clauses were not amended from the JCT form and accordingly are as follows:

"Non-Completion Notice

2.28 If the Contractor fails to complete the Works or a Section by the relevant Completion Date, the Employer shall issue a notice to that effect (a 'Non-

Completion Notice'). If a new Completion Date is fixed after the issue of such a notice, such fixing shall cancel that notice and the Employer shall where necessary issue a further notice.

Payment or allowance of liquidated damages

2.29 .1 Provided:

.1 the Employer has issued a Non-Completion Notice for the Works or a Section; and

.2 the Employer has notified the Contractor before the due date for the final payment under clause 4.24.5 that he may required payment of, or may withhold or deduct, liquidated damages,

the Employer may, not later than 5 days before the final date for payment of the amount payable under clause 4.24, give notice to the Contractor in the terms set out in clause 2.29.2.

.2 *A notice from the Employer under clause 2.29.1 shall state that for the period between the Completion Date and the date of practical completion of the Works or that Section:*

.1 he requires the Contractor to pay liquidated damages at the rate stated in the Contract Particulars, or lesser rate stated in the notice, in which event the Employer may recover the same as a debt; and/or

.2 that he will withhold or deduct liquidated damages at the rate stated in the Contract Particulars, or at such lesser stated rate, from sums due to the Contractor.

.3 If the Employer fixes a later Completion date for the Works or a Section, the Employer shall pay or repay to the Contractor any amounts recovered, allowed or paid under clause 2.29 for the period up to that later Completion Date.

> *.4 If the Employer in relation to the Works or a Section has notified the Contractor in accordance with clause 2.29.1.2 that he may require payment of, or may withhold or deduct, liquidated damages, then, unless the Employer states otherwise in writing, clause 2.29.1.2 shall remain satisfied in relation to the Works or Section, notwithstanding the cancellation of the relevant Non-Completion Notice and issue of any further Non-Completion Notice."*

18. Clause 2.29A is a bespoke clause inserted by the Schedule of Amendments and concerns liquidated damages for failure to achieve "Milestone Dates". It provides, in full, as follows:

> *"Payment of allowance of liquidated damages for Milestone Dates*[1]
>
> *2.29A .1 If the Contractor fails to complete the works necessary to reach a Milestone Date the Employer may give notice to the Contractor that:*
>
> *.1 he requires the Contractor to pay liquidated damages at the rate stated Schedule 10 or lesser rate stated in the notice, in which event the Employer may recover the same as a debt; and/or*
>
> *.2 that he will withhold or deduct liquidated damages at the rate stated in Schedule 10 or at such lesser stated rate, from sums due to the Contractor.*
>
> *.2 If the Employer fixes a later Completion Date for the Milestone Date the Employer shall pay or repay to the Contractor without attracting any interest any amounts recovered, allowed or paid under this clause up to that later Completion Date.*
>
> *.3 Without prejudice to the above, if notwithstanding a failure to reach a Milestone Date the Contractor achieves [the Completion Date] the Employer may at his absolute discretion pay or repay to the Contractor without attracting any interest any amounts recovered, allowed or paid."*

[1] The term "Milestone Dates" is defined as follows: *"the dates detailed in the Employer's Requirements [insert section reference] so as to enable the Employer (or those authorised or licensed by the Employer) to commence fitting out works."* This definition was inserted by the Schedule of Amendments.

19. The Contract Particulars state as follows in relation to liquidated damages:

2.29.2	*Liquidated damages* *(where completion by Sections does not apply)*	*See the Liquidated Damages Schedule (Schedule 10)*
	Sections: rate of liquidated damages for each Section	*Sections do not apply*

20. Schedule 10 provides as follows:

"SCHEDULE 10

LIQUIDATED DAMAGES SCHEDULE

Schedule of Agreed Liquidated and Ascertained Damages ('LADs') recoverable pursuant to clause 2.29

If there is any conflict or inconsistency between the wording of this schedule and clause 2.29 the wording of this clause shall take precedence.

For the purposes of this schedule 10 the following definitions apply:

"Owner" means PROWELL LTD (Company No 06018149) whose registered office is situate at Pioneer 210 North Road Ellesmere Port Cheshire CH65 1AQ

Liquidated Damages (fixed)

New Manufacturing Facility, Ellesmere Port **Peel/Powell**		
LADs/ Proposal		
Schedule of Accepted Sectional Milestones & Proposed LADs applicable		
Proposed CSA (BAFO)	£	25,710,050.28

Ref	Description	Sectional Milestone (dd/mm/yy)	LADs as Per Tender Schedule 10		BGCL LADs Proposal ref BAFO Ltr 13.9.17	
			% of CSA/day	£/wk	% of CSA/day	£/wk
1	High Bay Ground Floor Slab	23/01/2018	0.075%	£134,977.76	0.075%	£134,977.76
2	All other Production Areas Ground Floor Slabs.	25/05/2018	0.075%	£134,977.76	0.075%	£134,977.76
3	All other slabs (offices, mezzanines) and building closed.	25/05/2018	0.075%	£134,977.76	0.038%	£67,488.88
4	Installation of Utilities Completed. Ready for permanent use.	01/08/2018	0.075%	£134,977.76	0.038%	£67,488.88
5	All installation MEP and other works, relevant for start of trial production and SPO tested and commissioned ready for permanent use.	31/08/2018	0.075%	£134,977.76	0.038%	£67,488.88
6	Works completed, tested and commissioned for production hall, gatehouse, office areas and infrastructure.	28/09/2108	0.075%	£134,977.76	0.038%	£67,488.88
7	Practical Completion	30/11/2018	0.005%	£89,985.18	0.050%	£89,985.18
	Cap on Maximum LADs		7.50%	£1,928,253.77	7.50%	£1,928,253.77
	Cap on Maximum Weekly Run Rate (Combined LADs in the event of multiple Milestones being delayed)		n/a			£200,000.00
	The LADs for Sectional Milestones shall be refunded to the Contractor if in the case of a delay reasonable efforts have been taken by the Contractor to accelerate the Works in order to achieve the		Note	Note	Note	Note

	following dates important to the Owner:- (i) Start of Trial Production [03/09/2018] ** (ii) Start of Regular Full Production Process [01/10/2018]**					

*** The dates in square brackets above for the start of trial and full production are not actually stated in the tender version of Schedule 110 but are inferred dates from the Prowell draft sequencing of works' programme issued post tender.*

GENUINE PRE-ESTIMATE OF LOSS

The Parties agree that the maximum LADs to be paid, deducted and/or withheld at any one time [ ] per week (pro rate for any part of a week) and that having given careful consideration to this matter, all LADs payable by the Contractor are considered by the Parties to be a genuine pre-estimate of the losses which the Employer will incur in relation to the Contractor's failure to achieve Practical Completion of the Works or any Section or any Milestone Date by the relevant Completion Date; arrived at without any inequality of bargaining position as between the Parties as a true bargain between the Parties; fair, given the nature and circumstances of the agreement; neither excessive, extravagant, unconscionable or oppressive in all the circumstances; and as such these monies are payable as liquidated damages such that the Contractor waives absolutely any entitlement to challenge the enforceability in whole or in part of the liquidated damages provision. The Parties' joint intention in agreeing a scheme of liquidated damages in such circumstances is to substantially reduce and, to the fullest extent possible in law, eliminate, the risk of a dispute and potential litigation in relation to such circumstances.

Each Party confirms that:

a) it has taken specific legal advice on the effect of this Liquidated Damages Schedule; and

> b) *based on such advice, it does not enter into the agreement in anticipation that, or with any expectation that this Schedule or any part of it will be unenforceable for any reason".*

21. Finally, I should also refer to the Contract Sum Analysis ("CSA"). There are actually two parts to this included within the Contract, one dated 14 September 2017 and another dated 6 November 2017. Both are initialled as contract documents. The former, titled "Schedule of Tender Adjustments", sets out a series of various financial adjustments from a tender price submission and it then includes a fixed price discount against the following item:

    > *"Discount offered to Prowell/Peel on the basis of 10% of Contract Sum Mobilisation fee payable on Contract Award, capped at a maximum cumulative run rate of LAD's at £200,000 per week for the High Bay and Production slab access dates, 50% reduction for other milestone dates; Nil retention to be deducted but a 3% Retention Bond to be provided. (£141,000)"*

22. The total price in this part is £26,164,049.28, which corresponds to the Contract Sum in Article 2.

23. The second part of the CSA contains the detailed make up and includes a repetition of the same discount described above. The total price in this part is also identified as £26,164,049.28.

The Declarations

24. Pursuant to its Claim Form, Buckingham seeks declarations that:
    (a) The terms of Schedule 10 of the Contract concerning liquidated damages are void for uncertainty and/or are unenforceable; and/or
    (b) The Defendant is not entitled to levy and/or withhold liquidated damages for delay; and/or
    (c) The financial cap on liquidated damages for delay in Schedule 10 of the Contract operates as a cap on liability for general damages for delay; and/or
    (d) Pursuant to the terms of Schedule 10, the Claimant's maximum liability for general damages for delay is £1,928,253.77; and/or

(e) Such further and/or other declarations as the Court considers proper and just.

25. At the outset, it is appropriate to point out that none of the declarations sought by Buckingham were dependent on an argument that the provisions in respect of liquidated damages were a penalty. Rather, its case is that the contractual provisions are so defectively drafted and/or incomplete that they are void for uncertainty and/or unenforceable.

26. It is convenient to address declarations (a) and (b) together and separately from declarations (c) and (d). I do this in Parts 1 and 2 respectively.

Part 1 – Void for uncertainty and unenforceable

27. I begin by setting out the legal landscape.

Construction of Contracts - general

28. There is no dispute about the law relating to the construction of contracts generally. The principles are set out in Rainy Sky SA v Kookmin Bank [2011] UKSC 50 at [14] to [30]; Arnold v Britton [2015] UKSC 36 at [14]-[22]; and Wood v Capita Insurance Services Ltd [2017] UKSC 24 at [8] to [15]. Recently, they have been pithily summarised[2] as follows:

> *"the contract must be construed against the surrounding circumstances, in order to ascertain what a reasonable person would have understood the parties to have meant; that this should be done primarily by reference to the language that the parties have used; and that it is only if the meaning of the words used is uncertain or ambiguous that the court needs to have regard to other matters, such as commercial common sense, on the one hand, or excessive literalism, on the other."*

Construction of Contracts - Uncertainty

29. Given Buckingham's case that the provisions are void for uncertainty, it is relevant to consider the approach which the law takes in this respect. Mr Hanna cited a useful (and uncontroversial) summary of the position as expressed by O'Farrell J in Vinci

[2] There are many such summaries available but I have used Mashael Alebrahim v BM Design London Ltd [2022] EWCA Civ 183 at [22].

Construction UK Ltd v Beumer Group UK Ltd [2017] EWHC 2196, TCC at [47] to [49] as follows:

> *"[47] The courts are reluctant to hold a provision in a contract void for uncertainty, particularly where the contract has been performed: Anangel Atlas Compania Naviera SA v Ishikawajima-Harima Heavy Industries [1990] 2 Ll.Rep. 526 per Hirst J pp. 545-546:*
>
> > *"... the Court will strive if possible not to find a contract or contractual provision uncertain; indeed such a conclusion has been graphically described as a "counsel of despair" (Nea Agrex SA v Baltic Shipping Co Ltd., [1976] 2 Lloyd's Rep. 47 at p.50; [1976] 1 QB 933, at p.943, per Lord Denning, MR).*
> >
> > *An important and well-recognised distinction must be drawn between conceptual uncertainty on the one hand, which invalidates the instrument, and evidential uncertainty, which merely means that a party may on a given set of facts be unable to establish that he comes within a particular aspect of the provision in question ..."*
>
> *See also: Whitecap v John H Rundle [2008] EWCA Civ 429 per Moore-Bick LJ at para.21:*
>
> > *"The conclusion that a contractual provision is so uncertain that it is incapable of being given a meaning of any kind is one which the courts have always been reluctant to accept, since they recognise that the very fact that it was included demonstrates that the parties intended it to have some effect."*
>
> *[48] If it is open to the court to find an interpretation that will give effect to the parties' intentions, then it will do so: GLC v Connolly [1970] 2 QB 100 per Lord Denning MR at p.108; per Lord Pearson at p.110; Scammell v Dicker [2005] EWCA Civ 405 per Rix LJ at paras. [30] and [39]:*
>
> > *"... it is simply a non sequitur to argue from a disagreement about the meaning and effect of a contract to its legal uncertainty. Parties are always disagreeing about the contracts which they make. They take those arguments, if necessary, to the courts, or to arbitration, for their resolution: and sometimes the resolution is very difficult indeed to arrive at. That is equally true of disputes as to the meaning of contracts and of disputes as to the application of contracts to the facts and of disputes as to the proper understanding of the facts. None of that makes a contract uncertain. For that to occur – and it very rarely occurs – it has to be legally or practically impossible to give to the parties' agreement any sensible content...*
> >
> > *... that is certain which can be rendered certain ..."*
>
> *[49] However, a provision in a contract will be void for uncertainty if the court cannot reach a conclusion as to what was in the parties' minds or where it is*

> *not safe for the court to prefer one possible meaning to other equally possible meanings: Arnhold & Co Ltd v Attorney General of Hong Kong (1989) 47 BLR 129 per Sears J. p.136."*

Mistake

30. There is no claim for rectification. The Court must therefore construe the provisions of the Contract as they appear. Nonetheless, a mistake in a written instrument can be corrected as a matter of construction without the need for rectification. It is not in issue that, in order for that to occur, two conditions must be satisfied:
    (a) There must be a clear mistake on the face of the instrument;
    (b) It must be clear what correction ought to be made in order to cure the mistake.

    These twin requirements were identified in East v Pantiles (1982) EG Vol 263 at 61 but were reiterated by Lord Hodge in Arnold v Britton [2015] AC 1619, SC at [78]. He said:

    > *"Nor is this a case in which the courts can identify and remedy a mistake by construction. Even if, contrary to my view, one concluded that there was a clear mistake in the parties' use of the language, it is not clear what correction ought to be made. The court must be satisfied as to both the mistake and the nature of the correction."*

31. If those two conditions are not satisfied, the claimant must leave it to the court construing the document to reach what answer it can on the basis that the uncorrected wording represents the manner in which the parties decided to express their intention: see East v Pantiles (1982) EG Vol 263 at 61.

32. The Court of Appeal has recently confirmed that the process of correcting a mistake by construction is, in principle, a different exercise from that of choosing between rival interpretations arising due to the ambiguity of a provision: MonSolar IQ Ltd v Woden Park Ltd [2021] EWCA Civ 961, CA at [25] referring to Britvic plc v Britvic Pensions Ltd [2021] EWCA Civ 867, CA. In the latter case, Sir Geoffrey Vos MR said at [33]:

    > *"Moreover, the process of corrective construction … is only normally adopted where there really is an obvious mistake on the face of the document"*

Liquidated damages

33. The leading case in this field is undoubtedly Cavendish Square Holding BV v Makdessi [2016] AC 1172, SC. That case is primarily relevant where a contention is raised that a clause is penal in its effect. As I have said, that is not this case.

34. In Triple Point Technology v PTT Public Company Ltd [2021] UKSC 29, SC the Supreme Court has cause to consider the purpose of liquidated damages provisions. Lady Arden, with whom Lord Leggatt and Lord Burrows agreed, said at [35]:

> *"The difficulty about this approach is that it is inconsistent with commercial reality and the accepted function of liquidated damages. Parties agree a liquidated damages clause so as to provide a remedy that is predictable and certain for a particular event (here, as often, that event is a delay in completion). The employer does not then have to quantify its loss, which may be difficult and time-consuming for it to do."*

35. At [74], Lord Leggatt, with whom Lord Burrows agreed, said:

> *"A liquidated damages clause is a clause in a contract which stipulates what amount of money will be payable as damages for loss caused by a breach of the contract irrespective of what loss may actually be suffered if a breach of the relevant kind (typically, delay in performance of the contract) occurs. Liquidated damages clauses are a standard feature of major construction and engineering contracts and commonly provide for damages to be payable at a specified rate for each week or day of delay in the completion of work by the contractor after the contractual completion date has passed. Such a clause serves two useful purposes. First, establishing what financial loss delay has caused the employer would often be an intractable task capable of giving rise to costly disputes. Fixing in advance the damages payable for such delay avoids such difficulty and cost. Second, such a clause limits the contractor's exposure to liability of an otherwise unknown and open-ended kind, while at the same time giving the employer certainty about the amount that it will be entitled to recover as compensation. Each party is therefore better able to manage the risk of delay in the completion of the project."*

36. Mr Hanna emphasised these passages because he said they showed it was important that there should be certainty as to what should happen in the event of delay. In fact, the comments about the need for predictability and certainty were not made in respect of the operability of the provision, which was assumed, but rather in respect of the amount which would be payable for a given delay.

37. Mr Hanna submitted that there were three errors in the agreement in respect of liquidated damages. His submission was that the resolution of those errors could not be

determined by the process of correction by construction in the absence of a clear solution and, as such, the entire provisions were uncertain and incapable of operation. Mr Hanna's second contention is that, even if the liquidated damages regime in the Contract is sufficiently certain, it is nonetheless void and unenforceable as a consequence of its interaction with the partial possession provisions of the Contract.

38. As to the first point, Mr Mort submitted that it was wrong to treat any drafting infelicities as errors. Rather, the conventional process of construction should be embarked upon so as to resolve any such infelicities. He further submitted that they were not all errors in any event. If they were, the answer to them was clear. In the result, the provisions were both certain and capable of operation. In respect of the second point, Mr Mort contended that the provisions were workable by reference to the different rates in Schedule 10.

39. As set out in the passage from Vinci v Beumer above, the court is reluctant to hold a provision in a contract is void for uncertainty and, if it is open to the court to find an interpretation which gives effect to the parties' intentions, then it will do so. It is only if the court cannot reach any conclusion as to what was in the minds of the parties or where it is unsafe to prefer one possible meaning to other equally possible meanings that the provision would be void.

Alleged Errors

40. Against that high level introduction, I now turn to the three points relied on by Mr Hanna in his first submission.

(1) The date of practical completion

41. Mr Hanna pointed out that, according to the Contract Particulars in respect of clause 1.1, the Date for Completion of the Works is 1 October 2018 whereas, according to Schedule 10, the seventh Milestone Date for Practical Completion is identified as 30 November 2018. He submitted that a clause which provides for liquidated damages to accrue if works are not completed by a certain date cannot be considered clear and certain when the Contract contains two competing dates for completion, with no other terms to assist in resolving the question of which date applies. He submitted that both options were equally plausible.

42. Mr Mort accepted that this was a modest inconsistency within the documents. However, they could be reconciled by a process of construction which he submitted the Court should strive to identify. On his construction, if Buckingham failed to achieve the seventh Milestone Date by 30 November 2018, it would become liable for liquidated damages as shown in Schedule 10. Whilst Buckingham had an obligation to complete the Works by 1 October 2018, no liquidated damages attached to such breach. The date was relevant to clause 2.29A.3 and the possible refund referred to in the table if Buckingham makes reasonable efforts to accelerate in order to achieve "Start or Regular Full Production Process" by 1 October 2018.

43. These competing positions actually threw up a wider question of construction, namely the extent to which the parties intended the regime for liquidated damages in clause 2.29 to apply. The position is not clear. On the one hand, the parties retained clause 2.29 and provided that liquidated damages for non-completion of the whole of the Works were as set out in Schedule 10. However, schedule 10 made no specific provision for late completion of the whole of the Works by reference to clause 2.29. On the other hand, the parties introduced in clause 2.29A a bespoke Milestone Date regime with attached liquidated damages which included, as its final Milestone Date, the date of Practical Completion for the whole of the Works. The picture is further confused by the exclusive reference, in Schedule 10, to clause 2.29, not clause 2.29A. If the liquidated damages regime in clause 2.29 is not effective, it begs the question what should happen in the event of a breach of clause 2.3 (failing to complete the Works on or before the Date for Completion of the whole of the Works).

44. None of the contractual hierarchy tools assist the court in respect of this point since both clauses appear within the conditions of contract and one of its schedules, all of which have the same status.

45. Mr Mort submitted that the parties cannot have intended a parallel regime operating in clause 2.29 and clause 2.29A. He submitted that clause 2.29 was redundant by virtue of the inclusion of the seventh milestone within Schedule 10.

46. Mr Hanna postulated that the parties may have intended to keep both regimes. Of course, he provided no ultimate solution to the question because his case was that the answer was not clear. He did agree, however, that no liquidated damages would attach to the failure to complete by 1 October 2018.

47. I accept Mr Mort's submission that, whilst the parties did not delete clause 2.29, they did not intend that it should have any meaningful effect. By choosing to include within clause 2.29A a comprehensive and bespoke Milestone Date regime which actually included a date for practical completion of the whole of the Works and liquidated damages in respect thereof, the parties must have intended for that clause to operate as the sole regime in this respect. The bespoke regime prevails. The parties appear to have treated the clauses as interchangeable as evidenced by the fact that, in respect of clause 2.29.2, the Contract Particulars refer only to Schedule 10. It may also explain why Schedule 10 itself refers to clause 2.29 (as opposed to clause 2.29A).Whether or not the parties were right to assume that the two procedures operated in the same way, I am satisfied that, overall, they intended the bespoke regime should apply.

48. Viewed in that light, it is questionable whether the Date for Completion of the Works set out in the Contract Particulars for clause 1.1 serves the function for which the JCT originally intended it. Even if it does, it has no impact on the liability for liquidated damages set out in Schedule 10. Under this regime, pursuant to clause 2.29A.1, Buckingham is liable for not achieving practical completion by 30 November 2018, whatever the Date for Completion of the Works may be for the purposes of clause 1.1. Liability arises pursuant to clause 2.29A.1 for not meeting the Milestone Dates, not for failing to meet the Date for Completion of the Works.

49. However, the defined Date for Completion, namely 1 October 2018, was intended to serve a function within clause 2.29A. Pursuant to clause 2.29A.3, Peel has a discretion to refund damages if, say, any or all of Milestone Dates 1 to 5 were late but completion of the whole of the Works was nonetheless achieved by 1 October 2018, namely the Completion Date. I reject Mr Hanna's submission that "Completion Date" in this context could mean any Milestone Completion Date, as only one Completion Date is referred to. The position can be contrasted with clause 2.29A.2 which refers to a later Completion Date for the Milestone Date. The possible relief from damages made

available in clause 2.29A.3 is similar to, but not quite the same as, the note expressed in Schedule 10. The note at least indicates there was a commercial purpose behind selecting the Date for Completion as 1 October 2018.

50. I reject Mr Hanna's submission that there is any error here. Rather, the point he raises is something which can be explained by a process of conventional construction. As regards completion, what matters is that which is set out in clause 2.29A.1 and Schedule 10. In that respect, the date from which liquidated damages run for non-achievement of Milestone Date 7 is clearly 30 November 2018. The Date for Completion of the Works is there for a different purpose, explained by clause 2.29A.3.

51. It follows that it is possible to find an interpretation of the provisions which gives clear effect to the intention of the parties. The different dates identified by Mr Hanna have different functions and are not such as to render the provisions in Schedule 10 void.

(2) <u>The two sets of rates for liquidated damages</u>

52. Mr Hanna's second point was that Schedule 10 contains two sets of rates and it is impossible to discern which, if either, the parties intended should apply. For that reason, he disavowed any positive case as to which applied. In his written argument, he relied also on the fact that Schedule 10 is identified as a "LADs Proposal". There are two further references to the content of Schedule 10 being a proposal to which he also referred. His submission was that these words were indicative that the parties may not in fact have reached agreement on any of rates in Schedule 10. He also pointed out that one option included a weekly cap of £200,000 whereas the other option did not. In the absence of clarity and certainty as to which, if any, columns applied, Mr Hanna submitted that the provisions in Schedule 10 were void for uncertainty.

53. Mr Mort submitted that, by a process of conventional construction, it was possible to conclude not only that the parties had reached agreement on the content of Schedule 10 but also that their agreement was reflected by the right hand set of columns under the heading "BGCL LAD Proposal ref BAO Ltr 13.09.17". It was not an error but a mild ambiguity as to which set of rates applied.

54. This submission prompted a secondary debate about the materials to which the court may have recourse when construing contracts. Peel had adduced evidence in these proceedings in the form of a witness statement from Rositsa Chavdarova dated 9 May 2022 in which she explains some of the background to Schedule 10. Ms Chavdarova is employed by RPS, the Employer's Agent under the Contract. For Buckingham, Mr Hanna objected to Peel's entitlement to rely on this evidence on the grounds that it was evidence of negotiations designed to draw inferences of what the Contract meant, contrary to the exclusionary rule: see Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101, HL at [42] and Lewison on the Interpretation of Contracts 7th edition Chapter 3, p.117.

55. I am satisfied that it is appropriate to have regard to this evidence as factual background because it sheds light on why the parties included within their executed agreement a table described as "LADs Proposal". It also explains why there are two sets of columns. The evidence is not being relied on to demonstrate the substantive position of one party in negotiations. Nor is it being relied on to show the subjective intention of a party. Instead, it is relevant to explain why the parties chose to include within their executed Contract a document which had plainly been used as a mere proposal before that.

56. I reject Mr Hanna's submission that anything turns on the fact that Schedule 10 is described, in three places, as a proposal. If the parties had bothered to manually transcribe the table in Schedule 10 and, in so doing, had still included the description of its contents as a proposal, that argument might have had some force. But in this case, it is plain that the parties had (perhaps unwisely) taken a short cut by copying and pasting the entire table into Schedule 10 without removing those parts of it which described it as a proposal. That is a far more likely explanation. To adopt the approach in Wood v Capita, it would be wrong to interpret the expression "proposal" in a literal manner and it is instead preferable to consider the matter in a contextual way having regard to the manner in which the table in Schedule 10 came to be included. The parties acted informally and with brevity by copying the whole table including the superseded expressions of "proposal". The parties executed the entire agreement as a deed and, in my judgment, must have intended the table in Schedule 10 included within that Contract to have had legal effect. There are multiple references to Schedule 10 within the Contract including those in clause 2.29A and within the Contract Particulars. It is

simply not tenable to suggest that the parties merely intended this as some form of non-binding document or a matter requiring further agreement.

57. Having established that the parties intended the table in Schedule 10 to have meaningful effect, it is necessary to consider Mr Hanna's point that there are two sets of columns. In my judgment, it is perfectly possible to reach the conclusion that the right hand set of columns was the only relevant one, as Mr Mort submitted. Understanding that, at the time of its preparation, the document was a proposal sheds light on which set of columns was to prevail, namely the subsequent offer which was made last in time. As is to be expected, the tender schedule, represented by the left hand set of columns, would have come first, followed by Buckingham's BAFO (best and final offer) dated 13 September 2017. Mr Hanna submits there is no basis for relying on the mere incidence of timing but I accept Mr Mort's submission that the counter-offer proposing different rates for liquidated damages from those identified in the tender documents would have nullified the earlier offer. The parties must be taken to know this.

58. Construing the contract documents as a whole, the conclusion is also apparent from the agreed Contract Sum Analysis pursuant to which a discount was offered by Buckingham on terms which are reflected in the rates in the right hand set of columns. The discount was offered by making some reductions in rates for LADs and introducing a weekly cap. Those features are the very differences between the two sets of rates[3]. Given that the discount formed part of the agreed Contract Sum, it must follow that it was the right hand set of columns which was to apply. In those circumstances, Buckingham's submission that the parties embarked on this executed contract without knowing whether the rates in the BAFO columns had been agreed is, respectfully, hopeless.

59. All of these conclusions can be reached on the face of the documents and without regard to the factual evidence. But that evidence reinforces those conclusions. Ms Chavdarova's evidence, the content of which is not disputed (assuming admissibility),

[3] Mr Hanna made a further point that the brief description in the CSA in respect of LADs did not correspond exactly to the content of the table in Schedule 10. He submitted that these discrepancies further confuses things. I consider the description in the CSA to be sufficiently clear and representative of what was proposed but, in any event, it is the table in Schedule 10 which prevails over the CSA.

is that the BAFO letter dated 13 September 2017 constituted a further offer made by Buckingham to Peel with a commercial discount on terms which impacted upon LADs. In particular it proposed a reduction in the rates proposed in the tender Schedule 10 for all except Milestones for the High Bay Slab and Main Production Area Slab; and providing a weekly cap on LADs of £200,000.

60. This BAFO was modestly updated and re-issued the next day, but contained the same LAD proposal. On 15 September 2017, Buckingham sent an email to Ms Chavdarova which said:

> *"We understand that there may have been some confusion or ambiguity in relation to our BAFO and our position on LADs. With this in mind for the sake of clarity we attached a spreadsheet/schedule summarising our position on LADs."*

61. The spreadsheet was the table which was ultimately included in Schedule 10. Thus, at the time of its preparation, it was still a proposal. It was sent on 15 September 2017 by Buckingham to explain and clarify what it had earlier proposed in a letter dated 13 September 2017. All of those post-dated Buckingham's original tender offer, which set out the original rates for LADs. The history and emergence of this document is part of the background to which the court is entitled to have regard.

62. The reason for having included two sets of rates within the table was to identify, for clarity, the changes in applicable LADs that had been made from the tender submission. It is therefore somewhat ironic that it is now the Claimant who says that its own document lacks clarity by virtue of it having been included as a contract document.

63. In summary, with or without the evidence, I am wholly satisfied that, on a proper construction of this Contract, the parties intended the substantive content of the table to be effective and, further, that the applicable rates are those under the heading "BGCL LAD Proposal ref BAO Ltr 13.09.17", rather than those under the left hand set of columns. It follows that it has been possible to find an interpretation of the provisions which gives effect to the intention of the parties and there is no uncertainty as to which provisions apply. Beyond the fact that the parties took a short cut by copying and pasting a proposal document into the finally concluded document, there is no error, as

such, which arises from the fact that the proposal document included a now redundant set of LAD rates in the left hand set of columns.

(3) The Contract Sum

64. The third point relied on by Mr Hanna as an error, the correction of which he said could not be made, relates to the Contract Sum. As set out above, the Contract Sum is £26,164,049.28. As he points out, the proposed CSA described in the table within Schedule 10 is £25,710,050.28. That is the figure used to compute the weekly rate for liquidated damages in the second of each pair of columns, using the percentage contained in the first of each pair of columns.

65. Mr Hanna's submission was that it was unclear whether the liquidated damages should be based on the % rates in the daily column applied to the actual Contract Sum or based on the lump sums contained in the weekly rate column, even though they had been calculated on a CSA that was different from the one ultimately agreed.

66. Mr Mort suggested there was no error to correct here and that, on a proper construction of the Contract, the parties simply agreed the weekly lump sums contained in the table within Schedule 10.

67. I accept Mr Mort's submission on this point. For the reasons given above, it is obvious that the table within Schedule 10 was drawn up as a proposal. At that time the proposed CSA was different from the one ultimately agreed, as can be seen from the contract documents. Reasons for those changes also appear in the CSA forming part of the Contract. Despite the appreciation of the parties that the CSA had changed from that current at the date when the table was prepared, they nonetheless included the table in that form. If the parties had intended the lump sums to change, to reflect the new CSA, they would doubtless have done so. Moreover, if the intention had been to set the applicable LADs at a daily rate, there would have been no need to compute the weekly rate. In my judgment, as is clear from the clause immediately below the table, the applicable rate is a weekly one, not a daily one, albeit that the damages can be levied pro rata for part of a week. The conclusion that the parties have agreed weekly rates for late completion of each Milestone Date is consistent with the application of a weekly cap, albeit that is not conclusive.

68. Mr Mort is also right to point out that Buckingham's case in these proceedings is internally inconsistent because it seeks to cap Peel's right to claim damages in the sum of £1,928,253.77, which is the sum expressed in Schedule 10 as 7.50% of the CSA as it then was. If the actual Contract Sum were used, the cap would have been in a different amount. Irrespective of the legal argument, considered in Part 2 below, as to whether the cap operates in respect of general damages, it is common ground that liquidated damages are capped at £1,928,253.77. I cannot see how it would be sensible to construe the Contract as giving rise to individual lump sum rates for liquidated damages calculated by reference to one proposed Contract Sum and a cap in respect of those same damages calculated by reference to the actual but different Contract Sum. The parties would surely have applied the applicable percentage to the same CSA.

69. Once again, it follows that it has been possible to find an interpretation of the provisions which gives effect to the intention of the parties and there is no uncertainty about the applicable rates for liquidated damages. It is the weekly lump sums set out in the table which apply. That is irrespective of the fact that, mathematically, they may have been computed by reference to an earlier proposal in respect of the Contract Sum and were not updated to reflect the Contract Sum subsequently agreed.

70. Accordingly, there is no error as such. The liquidated damages were correctly computed by reference to Buckingham's proposed CSA.

Partial Possession

71. I now turn to Mr Hanna's second point relating to the alleged unenforceability of Schedule 10 by reason of its failure to provide a workable scheme in respect of partial possession.

72. A sub-set of the law in respect of liquidated damages concerns the issue of partial possession, which particularly arises in the field of construction contracts. Contracts often provide for a client to take partial possession of a completed element of a construction project (e.g., certain office floors within a given building or one block in a multi-block development) before the remainder has been completed. Ordinarily, contracts which make provision for partial possession also provide a regime for an

adjustment to be made to the applicable rate of liquidated damages to reflect partial possession. In respect of partial possession, there have been cases in which the courts have been asked to determine whether the provisions for adjustment of the applicable damages are operable and/or whether they are penal. Alternatively, whether the absence of any such provision makes the liquidated damages unenforceable.

73. O'Farrell J conducted a comprehensive review of those issues in Eco World Ballymore Embassy Gardens Co Ltd v Dobler UK Ltd [2021] EWHC 2207 (TCC) at [67] to [83]. In that case the contract was a JCT Construction Management Trade Contract. It permitted EWB to take over part of the Works prior to practical completion but made no provision for relief from liquidated damages in such circumstances. It was contended that in such circumstances, the provisions were void and unenforceable. At [68], O'Farrell J said:

> *"It is important not to elevate statements of general principle into an inflexible rule of law. The above extracts do not state that liquidated damages provisions will never be enforceable where sectional completion or partial possession is used without any related reduction in the liquidated damages payable; they identify the potential danger of failing to draft effective provisions to respond in such circumstances. In each case, it is necessary to construe the relevant provisions of the contract in question, adopting the established rules of contractual interpretation, to determine whether they give rise to a liquidated damages regime that is certain and enforceable."*

74. Having reviewed Bramall & Ogden v Sheffield City Council (1983) 29 BLR 73 and Taylor Woodrow Holdings Ltd v Barnes & Elliott Ltd [2004] EWHC 3319 (TCC) she continued at [74] and [75]:

> *"[74] Thus, in the cases above, the courts did not reject, as automatically fatal, the concept of one rate of liquidated damages for late completion of the works where there is sectional completion or partial possession; rather, the express provisions in each case simply did not work because of errors in drafting.*
>
> *[75] As a matter of construction, the provisions in this case are reasonably clear and certain. There is one completion date for the whole of the Works. Liquidated damages are payable at the rate set out in the Trade Contract Particulars for failure to complete the whole of the Works by the completion date. There is no reduction in the rate of liquidated damages where partial completion is achieved or the employer takes over part of the Works prior to practical completion. Such provisions are capable of being operated. The Contract in this case does not give*

> *rise to the difficulties found in Brammell v Ogden or Barnes & Elliott that rendered the provisions void and unenforceable."*

75. She also went on to consider whether the liquidated damages provision was extravagant, exorbitant or unconscionable: see [83]. As I have said, that issue does not arise in the present case.

76. Not long after, the issue arose again in Mansion Place Ltd v Fox Industrial Services Ltd (No.2) [2021] EWHC 2972. In that case, as in the present one, clause 2.34 provided for partial possession. It was argued that the provision for liquidated damages was unenforceable both because it was penal, which does not arise here, and on the separate grounds of uncertainty by reference to Bramall & Ogden case. Unlike the contract in Eco World, the parties had made provision for a reduction in the rate of liquidated damages. The issue was whether it was workable. At [97] and [98], Eyre J said:

> *"[97] Here clause 2.34 did provide for a reduction in the rate of liquidated damages. The question for me is whether on a proper construction the provisions of clauses 2.29 and 2.34 when read together with the balance of the Contract are clear and capable of being applied. I have regard to the fact that in Bramall & Ogden v Sheffield City Council HH Judge Hawser QC found particular terms inoperable. The terms in question were not identical to those here and so I have to consider whether the difficulties which were present in that case and which prevented operation of the provisions are present here. I have to do so in the light of the circumstances as they were at the commencement of the Contract and I do not accept the Claimant's argument that whether a particular term is operable or not is to be judged in the light of the circumstances as they happen to have turned out in the course of the performance of the Contract.*
>
> *[98] I do, however, agree with the Claimant that the Contract sets out a mechanism which is clear and which can be operated effectively. The Contract Particulars set out a value to be attributed to each Section. The liquidated damages are to be paid at a rate calculated by reference to the number of bedrooms and so forth but that is not a rate per unoccupied bedroom but per bedroom, kitchen and so forth in each section. That is a matter which is capable of being determined. Clause 2.34 provides a mechanism for calculating the reduction to be applied to that rate and that reduction can then be calculated and applied. The position stated shortly is that clause 2.29.2.1 provides for liquidated damages at the rate set out in the Contract Particulars and clause 2.34 in turn provides for a proportionate reduction in that rate together with a means of calculating that proportion. At worst the mechanism might be thought somewhat cumbersome but it is capable of being operated."*

77. Whilst each case depends on the provisions which the parties have chosen to agree, it is notable that in neither of these cases in respect of partial possession did the argument on uncertainty or inoperability succeed. In the first case, there was no provision for a reduction at all. In the second case, the Judge concluded that the mechanism was, at worst, cumbersome but was capable of being operated.

78. On behalf of Buckingham, Mr Hanna submitted that the parties must have intended to allow partial possession to be taken since that was provided for in clauses 2.30 to 2.34. He pointed out that these clauses envisaged partial possession of all of the Works or, in a contract which provides for sectional completion, for partial possession of a Section. In this case, he contended that Sectional Milestones (as the parties described them in Schedule 10) were intended to equate to "Sections" but that, contrary to clause 2.34, the parties had failed to provide any means of calculating the value that the Relevant Part bears to the relevant Section Sum as shown in the Contract Particulars. The result was that the provisions must fall entirely, as they did in Taylor Woodrow Holdings. Mr Hanna made the point that some items, such as testing and commissioning, fell into more than one milestone. He gave further examples of difficulties that would arise in calculating the reduction by reference to the milestones. In sum, he argued that there was a drafting error or omission in that the parties failed to provide a formula that gives effect to their common intention that partial possession of a Section could be taken in return for a proportional reduction in liquidated damages.

79. Mr Mort's response was that clauses 2.30 to 2.34 did not refer to Milestone Dates and did not need to. The Contract did not provide for completion by Sections. His submission was that if partial possession of the Works was taken by reference to the scope set out in a given Milestone, the amount of liquidated damages for delay as shown in Schedule 10 should be reduced in proportion to the Relevant Part by simply not further applying that element of the Milestone damages. To that end, he submitted that "rate" in clause 2.34 should be read as "rates" given that Section 10 contains multiple rates. In any event, he submitted that the regime was workable and sensible.

80. Once again, it is material to record that there is no contention by Buckingham that the provision is penal by reason of it allowing partial possession to be taken without requiring a proportionate reduction in liquidated damages for the part taken into

possession. Rather, the issue is whether the formula for such reduction is capable of implementation.

81. I agree with Mr Mort that this Contract did not provide for sectional completion. In my view, the parties well understood this. On multiple occasions within the Contract Particulars they stated "Sections do not apply". Moreover, no Sections are identified or described in the Fifth Recital which is key for the application of the defined term of "Sections". By contrast, the parties did provide a regime for the achievement of Milestone Dates as expressly set out in clause 2.29A. Milestone Dates, rather than Sectional Milestones, are referred to throughout the Conditions. Conventionally the achievement of a Milestone is a step along the way but involves no transfer of possession of the works comprised within that Milestone in the way that completion of a defined Section would do. There is provision for early access which could be put to use in respect of a completed Milestone[4]. In my judgment, the descriptions within the table of "sectional milestones" does not turn them into Sections. At most, it is perhaps an inelegant expression.

82. If Mr Hanna is right that some work (such as drainage) cuts across different Milestones that makes it less, not more, likely that each Milestone was to be regarded as a separate Section capable of independent completion.

83. It follows from this that clause 2.34 could only ever be engaged when part (or parts) of the whole of the Works is taken consensually pursuant to clause 2.30. The reference to Sections within these clauses is irrelevant.

84. In one sense, that is an end to Mr Hanna's point, contingent as it was on the argument about sections. However, if it is relevant to consider clause 2.34 more widely, I cannot accept Mr Mort's submission that the reference to "rate" is intended to mean "rates" in respect of each of the liquidated damages. Nor can I accept as sufficient his answer that the regime works perfectly well if partial possession is taken of the scope of work falling within a given Milestone. In both cases, that is because there is no prior assumption within clause 2.30 that the part of the Works that may be taken into possession will coincide with the entire scope of work falling within a given Milestone.

[4] I have not seen the Early Access Areas.

It may do but it need not. Moreover, the submission may assume that each Milestone necessarily equates to a physical scope of work rather than a condition to be achieved.

85. Where part of the Works is taken into partial possession pursuant to clause 2.30, described as "the Relevant Part", clause 2.34 of the JCT form anticipates that a valuation of the work contained within the Relevant Part will be carried out which is then expressed as a proportion of the whole Contract Sum. That proportion is then applied to the single rate of liquidated damages provided in clause 2.29 for the late completion of the whole of the Works. Where clause 2.34 states "as shown in the Contract Particulars", that is a reference to the relevant Section Sum, for which provision is specifically made in the Contract Particulars. The valuation of the work contained within the Relevant Part is then applied to the applicable Section Sum, as distinct from the whole Contract Sum. In this case, the parties confirmed sections did not apply.

86. I have earlier concluded that the parties did not intend the liquidated damages regime for late completion of the whole of the Works in clause 2.29 should have any legal effect. I reach the same conclusion in respect of clause 2.34. Since clause 2.34 was only ever intended to apply to the single rate of liquidated damages payable pursuant to clause 2.29, it follows that there is no applicable rate of liquidated damages stated in the Contract Particulars in respect of the Works. In my judgment, it would be wrong to treat the reference to liquidated damages in clause 2.34 as meaning those damages provided for in clause 2.29A.

87. It follows that, although this is a case in which clause 2.30 permits partial possession to be taken in respect of a part of the Works, clause 2.34 does not apply to reduce liquidated damages for the simple reason that there are none to be reduced. Clause 2.34 is no more effective than clause 2.29. This is, therefore, a situation which is not comparable to that which arose in <u>Eco World</u> (partial possession with no provision for reduction in respect of applicable damages) or <u>Mansion Place</u> (partial possession with a cumbersome but workable provision for reduction). Nonetheless, the result is that the regime for liquidated damages in clause 2.29A is unaffected by the scheme for reduction set out in clause 2.34.

Conclusion in respect of Part 1

88. In conclusion, none of the arguments advanced by Buckingham in respect of the provision for liquidated damages in clause 2.29A succeed. The provisions are certain and enforceable.

89. I have not, so far, considered the clause in Schedule 10 which both parties described as the waiver clause. This is the clause appearing immediately below the table under the heading: "GENUINE PRE-ESTIMATE OF LOSS". In circumstances where Buckingham might have been contending that the rates for liquidated damages in Schedule 10 were penal, the effect of this clause could potentially have been significant. However, Mr Mort properly accepted that, where the issue concerned potential uncertainty there is a conceptual difficulty with a submission that the waiver clause should be able to rescue that which the court had otherwise concluded was too uncertain to have legal effect. For that reason, the waiver clause is irrelevant.

Part 2 – The cap on general damages

90. It may be said that, in the circumstances just identified, it is unnecessary for the court to consider Buckingham's contention that any liability it may have for general damages for delay is capped at the amount stated in Schedule 10, namely £1,928,253.77. However, the parties made submissions in respect of this argument irrespective of the outcome and, for that reason, it is appropriate for the court to address it, albeit briefly.

91. This issue was recently considered by O'Farrell J in Eco World-Ballymore Embassy Gardens Company Ltd v Dobler UK Ltd [2021] EWHC 2207 (TCC). In that case the court found that the provision for liquidated damages was neither void nor penal but went on to consider whether, if it had been, it would operate as a limitation of liability clause. The court held that it did: see paragraphs [97] to [116]. Having reviewed the textbooks and authorities, O'Farrell J said:

> *"[110] This issue was considered in the context of an option to acquire shares, rather than a liquidated damages provision and the Supreme Court did not expressly consider whether a penalty clause could operate as a cap on general damages. However, as Mr Rigney submits, if a penalty were held to operate as a cap, it would not be wholly unenforceable. Therefore,* Cavendish Square *provides persuasive support for the view that if a liquidated damages*

provision is void for uncertainty or as a penalty, it is wholly unenforceable and the employer's entitlement to general damages will not be subject to a cap.

[111] However, it does not follow that such provision will have no contractual effect; even where a liquidated damages clause is found to be wholly unenforceable as a penalty, it may on a true construction be found to operate as a limitation of liability provision.

…

[116] Each clause must be construed in accordance with the established principles of contractual interpretation summarised above. In my judgment, clause 2.32.1 and the Trade Contract Particulars would operate as a limitation of liability provision, even if the liquidated damages were void or a penalty. Having regard to their Lordships' opinions in Cavendish Square, the agreed damages of £25,000 per week would fall away as unenforceable but the court would strive to give effect to the separate part of the provision containing an express limitation on liability at 7% of the final Trade Contract Sum. A literal reading of the provision suggests that the 7% cap would apply only to the liquidated damages and not to any general damages. However, the objective understanding of the parties in the commercial context of the Contract would be that the provision served two purposes: first, to provide for, and quantify, automatic liability for damages in the event of delay; second, to limit Dobler's overall liability for late completion to a specific percentage of the final contract sum. The clear intention of the parties was that Dobler's liability for delay damages would be so limited."

92. Mr Hanna submitted that I should follow the approach in Eco World and that the provision was indistinguishable from that in the present case.

93. Mr Mort submitted that conclusions in respect of this issue may depend on the reasons why the court held the provision to be unenforceable. He submitted it was impossible to separate the cap provision from the liquidated damages regime, pointing to the following features: the cap was on "maximum LADs" which meant that was not only its literal but its only meaning; both the liquidated damages and the cap were calculations based on a percentage of the Contract Sum, meaning they were both part of a single regime. General damages would never be calculated as a proportion of the Contract Sum. He also submitted that the last part of the waiver clause (sub-paragraph (b)) demonstrates that the parties did not anticipate there would be any liability to pay general damages at all. Therefore, it would be wrong to attribute an intention to the parties to provide for what would happen if the liquidated damages regime was, in part, unenforceable.

94. In response, Mr Hanna submitted that a number of these points could equally have been said in Eco World and yet the court concluded the cap operated as a separate limitation of liability clause. He submitted the waiver clause only applied where the provision was unenforceable as a penalty and, for that reason, had no impact on the present analysis. He said it would also be stretching the waiver clause too far to apply it in this context.

95. I agree with O'Farrell J at [110] that Makdessi provides persuasive support for the view that if a liquidated damages provision is void it is wholly unenforceable.

96. I also agree with O'Farrell J that the question which next arises is whether, on a proper construction of the clause in question, it also operates as a parallel general limitation of liability provision which could be enforced even if the liquidated damages were void or penal. For these purposes one simply has to consider whether the language of the provision was broad enough to encompass any alternative liability that could arise in respect of general damages. That question is determined by reviewing the particular clause in question on traditional principles. That is what O'Farrell J did at [116] in respect of the clause before her. Approached in that way, limited benefit is to be gained from seeing how a different clause in a different contract was interpreted. At best, Eco World demonstrates that it is possible in principle for a clause to operate as a general limitation of liability provision even though it is literally expressed as applicable only to liquidated damages.

97. Notably in the present case, there is no contention that the weekly limit of £200,000 operates as a limit on liability in respect of general damages. The focus is entirely on the expression:

> "Cap on Maximum LADs 7.5% £1,928,253.77"

98. In my judgment, the language of the provision is quite clear. As was emphasised in Arnold v Britton at [17] the meaning is most obviously gleaned from the language used. The cap is "on Maximum LADs", not on anything other than LADs. There is nothing within clause 2.29A (the key provision which triggers the application of Schedule 10) which suggests that any alternative liability for any general damages would be capped. If the suggestion is that the cap within Schedule 10, rendered operative by clause 2.29A,

should operate as a cap for breach of an entirely different obligation, such as clause 2.3, that would be a most surprising place in which to find it located. Instead, the cap sits within a Schedule exclusively concerned with Milestone Dates and individual rates for liquidated damages applicable thereto. Both are the product of clause 2.29A and, in line with Makdessi, should stand or fall together. No part of Schedule 10 is concerned with liability for general damages. Both the individual rates for liquidated damages and the cap are expressed as percentages of the Contract Sum and, to that extent, form part of a single scheme. Given the clarity of the words used by the parties in this case, I see no basis for concluding that the clause should serve the additional function of operating as a cap on Buckingham's overall liability for delay arising from breach of that or some other provision.

99. Another way of approaching this issue could be to impute to the parties the specific background knowledge that, contrary to what would have been their primary intention, the regime of liquidated damages was not enforceable. I accept Mr Mort's submission that, in this context, it could well be material to know why the regime was not enforceable (i.e., penal or void for uncertainty) and whether the unenforceable feature impacted part or all of the clause. There is nothing in the language of the Contract which points clearly in either direction as to what the parties would have intended in any of these situations and, of course, I have made no finding that the clause was inoperable. In those circumstances, I do not consider that this alternative approach assists in the present case.

100. I accept Mr Hanna's submission that the waiver clause does not apply in the resolution of this issue. As its heading suggests, the clause is relevant where the issue between the parties concerns genuine pre-estimates of loss, rather than inoperability through uncertainty. It does not indicate what approach the parties necessarily intended in respect of the cap if a part of the Schedule was found to be unenforceable because it is void.

Conclusion in respect of Part 2

101. For the reasons given, I do not consider that there is any cap on liability for general damages for delay, whether in the sum of £1,928,253.77 or otherwise.

Next steps

102. I will leave it to the parties to draw up an appropriate order reflecting the matters set out above. All consequential matters including costs can be dealt with on an occasion separate from the handing down.