THE HIGH COURT

[2024] IEHC 114

[2020 2502 P]

BETWEEN

NATIONAL PAEDIATRIC HOSPITAL DEVELOPMENT BOARD

PLAINTIFF

V.

BAM BUILDING LIMTED

DEFENDANT

Judgment of Mr. Justice Michael Quinn delivered on the 27th day of February 2024

(Discovery of documents)

1. On 14 August 2017, the parties entered into a contract for the construction by the Defendant of a new children's hospital at the St. James Hospital Campus in Dublin 8.

2. The contract divided the works into two phases. Phase A was the basement, substructure, underground and enabling works. Phase B comprises the superstructure and all other works.

3. The Plaintiff seeks a declaration of validity of an instruction given by it to the Defendant on 8 January 2019 ("the Instruction Date") to commence the Phase B Works. The validity or otherwise of the Phase B Instruction is of central importance for both the timing and the final cost of the project.

4. The contract provided that Phase A works would commence on 2 October 2017. Clause 9.1.3 provided that the Phase B Works would commence when the Plaintiff issued the Phase B Instruction. I shall return to the terms of that clause in more detail later. However, the importance of a valid Phase B Instruction is as follows: -

(a) it obliges the Defendant to commence the Phase B Works and to proceed diligently to substantial completion by a programme of dates provided for in the contract.

(b) it records the 'Adjusted Contract Sum' and 'Guaranteed Maximum Price' under the contract.

(c) the Defendant could commence the Phase B Works and receive payments in respect of those works only after the Phase B Instruction has been given.

(d) prior to the giving of a valid Phase B Instruction the Plaintiff is not prohibited from seeking tenders or engaging with other contractors for all or part of the Phase B Works.

5. The Plaintiff claims that the Instruction was validly given and that the necessary preconditions for doing so, identified in Clause 9.1.3 had been complied with.

6. The Defendant says that the Plaintiff purported to issue the Phase B Instruction on 8 January 2019 at a time when the preconditions for doing so had not been complied with. In particular it asserts that a pre – Phase B Engagement Process which required final coordination of the design for the Phase B Works had not been completed.

7. This judgment relates to an application by the Defendant for an order for discovery of documents. The parties have reached agreement as to a number of categories, but disputes

remain in relation to two categories and disputes as to the date range applicable to discovery remain in respect of eight categories.

The contract

8. Clause 9.1.3 of the contract is of such central importance to the case and to the identification of issues relevant to discovery that it is appropriate to quote the clause in full. The second sub-paragraph below is the most important for the issue I am determining.

9. Clause 9.1.3 provides as follows: -

"*On the Starting Date [2 October 2017], the Contractor shall start the Phase A Works under the contract, provided that the Contractor may start the Enabling Works and Works under the Letter of Intent prior to the Starting Date.*

The Contractor shall start the Phase B Works under the contract when so instructed by the Employer's Representative [Provided that the Adjusted Contract Sum has first been ascertained by the Parties or determined by the Expert], the Employer's Representative may issue such an instruction at any time after the Starting Date. (On this application the parties have attached no importance to the parenthesis, and treat the proviso has applicable).

The Contractor shall, unless the Employer's Representative directs otherwise, proceed regularly and diligently in order to achieve substantial completion of the Works and each Section by its Date for Substantial Completion.

For the avoidance of doubt, the Contractor shall not commence and shall not have an entitlement to commence or receive payment for the Phase B Works unless and until instructed to commence in writing by the Employer's Representative.

Nothing in this Contract shall prohibit the Employer from seeking tenders for all or part of the Phase B Works and/or Facility Maintenance Services and/or engaging

another contractor to carry out Phase B Works and/or Facility Maintenance Services prior to an instruction to the Contractor to start the Phase B Works.

If, after the end of the first nine (9) months after the Starting Date, the Employer's Representative instructs the contractor to proceed with the Phase B Works (subject to sub – Clause 10.7.2) there shall be added to the Contract Sum an amount for the expenses for the Contractor's procurement team (excluding profit and loss of profit and any costs associated with the Works) unavoidably incurred by the Contractor to provide the support and cooperation required by the Employer from the end of the first nine months after the Starting Date until the conclusion of the pre – Phase B Engagement process".

10. It was envisaged that the pre – Phase B engagement process would last for no more than nine months. The relevance of the last sub – paragraph quoted above is that if this process took longer than nine months, as it did, the Plaintiff would compensate the Defendant for expenses associated with the extended time.

11. The Plaintiff's case is that it complied with the proviso *"that the Adjusted Contract Sum has first been ascertained by the Parties or determined by the Expert"*, in that the Adjusted Contract Sum was ascertained prior to giving the Phase B Instruction. The Defendant says that the Adjusted Contract Sum and Guaranteed Minimum Price cannot be ascertained unless the design of Phase 2 is complete, and says that this had not occurred on or before 8 November 2019.

12. The contract contains two appendices which are said to be relevant to the giving of the Phase B Instruction. Appendix 2 governs the Pre – Phase B Engagement Process, with an exhibit which is described as the "Process for Determination of Adjusted Contract Sum". Appendix 3 is described as governing the "Adjusted Contract Sum and Guaranteed Minimum Price".

13. The Adjusted Contract Sum is defined as the Phase A Initial Price (as adjusted prior to issuing the Phase B Instruction) plus the "Ascertained Phase B Final Sum".

Chronology

14. Since there are disputes as to the date range for 8 categories of discovery, the chronology is important.

15. Following the signing of the contract on 14 August 2017 and commencement of works, the parties engaged to progress the pre – Phase B engagement process.

16. The Plaintiff says that in a meeting on 1 November 2018, attended by representatives of both parties, the Adjusted Contract Sum and Guaranteed Maximum Price were ascertained by agreement.

17. On 2 November 2018, the Plaintiff emailed the Defendant confirming a "record of the agreement" which recorded the Adjusted Contract Sum at €887,722,679.76 and the Guaranteed Maximum Price at €909,915,756.2.

18. The parties engaged further over the following weeks and on 29 December 2018, the Plaintiff issued a draft of the Phase B Instruction. It says that on 2 January 2019 the Defendant replied on the draft with "a single comment to correct a typographical error".

19. A meeting of the parties took place on 8 January 2019. The Plaintiff says that the final document to comprise the Phase B Instruction was updated in the course of that meeting, culminating in the issue of the Phase B Instruction letter that evening.

20. The Phase B Instruction is a letter to the Defendant dated 8 January 2019 from the Plaintiff's Representative, Claire White, a director of O'Connell Mahon Architects. It confirms that the Plaintiff, the Defendant and certain named sub-contractors "have now completed the Pre-Phase B Engagement Process".

21. The letter continues:

> *"BAM and the Employer each have acknowledged and accepted that:*

(a) the Adjusted Contract Sum under the Main Contract is €887,772,697.10; and

(b) the Guaranteed Maximum Price under the Main Contract is €909,915,764.53.

The Adjusted Contract Sum under the Main Contract and the Guaranteed Maximum Price under the Main Contract is in respect of the works which are the Works described in the Works Requirement in the Main Contract (being the contract of 14 August 2017) as amended by the documents listed in Schedule One."

22. The Instruction identifies the Date for Substantial Completion as 29 August 2022.

23. The Plaintiff relies on the Phase B Instruction letter as a record in writing of the following: -

(a) that the parties had completed the Pre – Phase B Engagement Process;

(b) that the parties have acknowledged and accepted the Adjusted Contract Sum and the Guaranteed Maximum Price;

(c) that the Defendant had acknowledged and accepted that documents listed in the schedule to the letter "reflect the agreed basis of the Adjusted Contract Sum";

(d) that each of the Adjusted Contract Sums (including adjusted contract sums for sub-contractors) referred to in the Instruction included a number of provisional sums set out in pricing documents and that the scope programme and preliminaries for these items were agreed by each party.

Events after 8 January 2019

24. Representatives of the parties attended a "collaboration workshop" on 17 and 18 January 2019. The Defendant says that in the course of this meeting it became clear to it for the first time that certain aspects of the design of the project were not complete.

25. In a meeting on 19 February 2019, the Defendant informed the Plaintiff that it intended to challenge the validity of the Phase B Instruction.

26. On 24 May 2019, the Defendant gave notice to the Plaintiff pursuant to the dispute resolution clause in the contract (Clause 13.2) that it intended to refer to conciliation a dispute as to whether the conditions for issue of a valid instruction under Clause 9.1.3 were satisfied. The Defendant claimed that the design of the project had not been sufficiently advanced to allow the issuance of the Phase B Instruction.

27. On 30 July 2019, the Defendant gave formal notice referring the dispute to conciliation.

28. On 13 November 2019, the Conciliator issued his recommendation. On 29 November 2019, the Defendant notified the Plaintiff that it was dissatisfied with the recommendation, stating the following: -

> "*The matters in dispute are as follows:*
>
> *We say that, when the Employer's Representative purported to instruct us to proceed with the Phase B Works on 8 January 2019, the conditions prescribed by the contract for issue with such an instruction were not satisfied. You say that they were".*

29. On 1 April 2020 these proceedings issued.

The claim

30. The Plaintiff says that the condition required by Clause 9.1.3 prior to the issue of the Phase B Instruction was the ascertainment or determination of the Adjusted Contract Sum and that this had been duly ascertained by agreement prior to the issue of the Instruction.

31. The Plaintiff says that in the alternative the Defendant is estopped from denying the validity of the Phase B Instruction and/or has acquiesced to the Phase B Instruction and is bound by it. It relies in particular on correspondence, meetings and telephone calls between the parties between the meeting of 1 November 2018 and the Instruction date of 8 January 2019.

32. The Plaintiff refers also to the fact that between 10 January 2019 and 2 April 2020 the Defendant submitted claims for payment in the amount of €185,248,542 relating primarily to Phase B Works. It says that under the contract, the Defendant is only permitted to carry out or receive payment for Phase B Works after the delivery of a valid Phase B Instruction.

Defence

33. The Defendant disputes the Plaintiff's characterisation of events and its interpretation of Clause 9.1.3.

34. The Defendant pleads that the Pre – Phase B Engagement Process involved not only the ascertainment of the Adjusted Contract Sum and Guaranteed Maximum Price but also the completion and final coordination of the design for the Phase B Works. It says that it was a fundamental feature of the contract that the Plaintiff would complete and coordinate the final design for Phase B Works prior to their commencement. Many of the disputed discovery categories relate to design matters.

35. The Defendant says that in the course of these exchanges it was given assurances that the design would be completed "imminently" (later particularised as meaning within two weeks). Reliance is placed on a phone call between the parties on 28 December 2018 in which it says that it was advised that all the issues it had raised would be addressed by the Plaintiff.

36. The Defendant pleads that the Plaintiff failed to complete or coordinate the design to the level required to enable the works to be executed in the manner envisaged in the contract or to comply with the requirements of Appendix 2 of the contract in relation to the provision of mock-ups, design completion, sign off on quantities, or the "Works Requirements" in relation to the completeness of a BIM model (building information model).

37. The Defendant pleads that it understands that one of the reasons for the failure of the Plaintiff to comply with these requirements was that there were periods in which the design

was not being progressed by the Plaintiff's design team due to disputes between the Design Team and the Plaintiff.

38. The Defendant claims also the following: -

(a) that the Plaintiff purported to freeze the design of the Phase B Works twice, namely on 9 March 2018 and 17 August 2018, and that it was required to calculate the Adjusted Contract Sum based on that "frozen design".

(b) that the Defendant engaged with the Plaintiff to agree the Adjusted Contract Sum, but that the figure cited in the Instruction was not a lump sum, or the basis of a Guaranteed Maximum Price as envisaged by the contract.

(c) that in the engagement relied on by the Plaintiff the Defendant could only price what was then before it, namely the design which had been frozen in March 2018 and amended on 17 August 2018.

(d) that it was only at the collaboration workshop meeting of 17 and 18 January 2019 that the extent of the deficit in the design for the Phase B Works "began to emerge".

39. The Defendant denies that the only condition required to be satisfied prior to the issue of the Phase B Instruction was the ascertainment or determination of the Adjusted Contract Sum. It submits that the contract required the completion and final coordination of the design for Phase B Works prior to any instruction to commence same. Therefore, the determination of the Adjusted Contract Sum and Guaranteed Maximum Price at the amounts cited in the Instruction did not of itself entitle the Plaintiff to issue the Phase B Instruction.

Counterclaim

40. The Defendant claims that the Plaintiff is in breach of contract in failing to ensure that the design for the Phase B Works was completed or coordinated to the level required under the contract prior to issuing the instruction to commence the Phase B Works on 8 January 2019.

41. The Defendant says that the consequence of this breach is that it has been delayed in the construction of the works and has been unable to carry out the works in an efficient manner. It says that in order to properly plan the completion of the works, it required a complete and coordinated design. It says that this is required to enable procurement of materials, the allocation of resources and the sequencing of tasks.

42. The Defendant claims that the Plaintiff has wrongly sought to rely on Clause 4.11 of the contract conditions which requires the Defendant to give the Plaintiff's Representative at least ten working days advance notice of the date by which the Defendant requires any instructions.

43. The Defendant also invokes Clause 10.3 which is the mechanism by which a contractor makes claims arising from design changes or additions during the currency of the contract. It says that its entitlements in respect of any "change order" are being limited in a manner which would not arise if design had been complete prior to the Phase B Instruction.

44. The Defendant counterclaims for a declaration that the Plaintiff was not entitled to issue the Phase B Instruction on 8 January 2019, declarations referable to Clauses 4 and 10, and damages for breach of contract.

The first module

45. On 4 December 2020, an order was made by this Court (McDonald J.) that the trial of the proceedings be conducted in modules. The court ordered that the first module consist of the following issues only: -

(i) the matters pleaded in the Statement of Claim and the Defence (not the Counterclaim);

(ii) the following question: "Do the mechanisms for which Clauses 10 and/or 13 of the contract provide apply to claims arising from alleged design changes or additions that the Defendant contends in these proceedings ought, pursuant to the contract, to

have been covered by the design in respect of the Phase B Works provided by the Plaintiff as at 8 January 2019 and which the Defendant contends was not provided as at that date or subsequently".

46. Following the making of that order the parties exchanged requests for discovery of documents, limited to the issues to be determined in the first module. Arising from this correspondence, the Defendant's application for discovery orders was listed for hearing initially on 17 and 18 June 2021.

47. On 2 June 2021, on the application of both parties the dates for the hearing of the discovery motion were vacated and the motion, and the proceedings, were adjourned to facilitate certain discussions between the parties. On 12 October 2021 the proceedings were adjourned with liberty to re – enter.

48. On 17 July 2023, the proceedings and the discovery motion were re – entered.

49. The core issue in the first module is the Plaintiff's claim for a declaration that the Phase B Instruction dated 8 January 2019 is a valid and legally binding instruction to the Defendant to commence Phase B Works. The Plaintiff says that this is essentially a matter of construction of Clause 9.1.3, although it recognises that the plea of estoppel will engage factual matters.

Agreed categories of discovery

50. In cases where the parties have reduced the number of disputed categories, it is always informative to have regard to the categories on which the parties have reached agreement, which are as follows: -

"*Category 1*

All documents which record and/or refer to and/or evidence the engagement by the parties in the pre – Phase B engagement process and which record and/or refer to and/or evidence the agreement of and/or proposed agreement or attempted agreement

of the Adjusted Contract Sum (ACS) and/or the Guaranteed Maximum Price (GMP) and/or the completeness and/or coordination of the design for the Phase B Works and/or the GMB programme.

Date range: 1 September 2017 to 8 January 2019

Category 5(ii)

All documents which record and/or refer to and/or evidence the decision made to freeze the design of the Phase B Works on 9 March 2018 and the reasons for same.

Date range: 1 September 2017 to 17 August 2018

Category 5(iii)

All documents which record and/or refer to and/or evidence the decision made to freeze the design of the Phase B Works on 17 August 2018 and the reasons for same.

Date range: 1 September 2017 to 17 August 2018

Category 6(i)

All documents which record and/or refer to and/or evidence exchanges between the Plaintiff and the Department of Health and/or the Government regarding the issue of the Phase B Instruction.

Date range: 24 August 2018 to 8 January 2019

Category 6 (ii)

All documents which record and/or refer to and/or evidence the exchanges between the Plaintiff and the Department of Health and/or the Government as to the Adjusted Contract Sum and the GMP.

Date range: 24 August 2018 to 8 January 2019.

Category 6 (iii)

All documents which record and/or refer to and/or evidence the exchanges between the Plaintiff and the Department of Health and/or the Government as to the state of completion of the design for the Phase B Works.

Date range: 24 August 2018 to 8 January 2019.

Category 6 (iv)

All documents which record and/or refer to and/or evidence the Design Team refusing to progress design for the Works and the reasons for same.

Date range: 24 August 2018 to 8 January 2019

Category 7 (i)

All documents which record and/or refer to and/or evidence the calculation of and/or make up of the Adjusted Contract Sum of €887,722,697.10 and the GMP of €909,915,764.53.

Date range: 1 November 2018 to 8 January 2019

Category 7 (ii)

All documents which record and/or refer to and/or evidence the inclusion and calculation of provisional sums in the Adjusted Contract Sum of €887,722,697.10 and the GMP of €909,915,764.53.

Date range 1 November 2018 to 8 January 2019.

Category 8

All documents which record and/or refer to and/or evidence the Plaintiff's requests to the Defendant to extend the period for agreeing the Adjusted Contract Sum and the GMP and/or the period for the Pre – Phase B Engagement Process and the reasons for same.

Date range: 1 September 2017 to 8 January 2019

Category 9

All documents which record and/or refer to and/or evidence the decision of the Plaintiff to suspend and/or not instruct mock – ups to be built.

Date range 1 September 2017 to 8 January 2019

Category 12

All documents which record and/or refer to the organisation of, attendance at, and matters discussed and/or considered at the collaboration workshop of 17 and 18 January 2019.

Date range: 1 November 2018 to 19 February 2019

Category 13

All documents which evidence and/or record and/or refer to:

(a) Statements by Kevin Kelly and/or Peter McHale at a pre – tender briefing session on 31 May 2015 that design would be fully complete in order to establish the Adjusted Contract Sum and a robust Guaranteed Maximum Price.

(b) A statement made at a meeting on 23 May 2017 attended by members of the Plaintiff and the Defendant that design would be between 95% and 97.5% complete when the Adjusted Contract Sum was determined and prior to the issue of the Phase B Instruction.

Date range: 31 May 2015 to 14 August 2017

Category B (not sought in the original notice of motion but arises from an amended statement of claim)

All documents which record and/or evidence and/or refer to the authority of various members of the Design Team (including the Employer's Representative) to (a) discuss with and/or represent to the Defendant, during the course of the Pre – Phase B

Engagement Process the condition and/or completeness of the design for the Phase B Works.

Date range: 1 September 2017 to 30 July 2019".

51. Of the fourteen categories in respect of which full agreement has been reached, nine include material relevant to the design of the works.

52. Category 1 concerns engagement by the parties regarding the completeness and/or coordination of the design.

53. Categories 5(ii) and (iii) relate to the decisions to freeze design of the Phase B Works on 9 March, 2018 and 17 August, 2018.

54. Category 6(iii) relates to exchanges between the Plaintiff and Government regarding the state of completion of the design of Phase B.

55. Category 6(iv) relates to documents evidencing what is alleged to be "the Design Team refusing to progress the design for Works and the reasons for same".

56. Category 9 relates to a decision of the Plaintiff to "suspend and/or not instruct mock ups to be built".

57. Category 13 relates to statements alleged to have been made by the Plaintiff at particular meetings regarding the intended state of completion of design at the date of establishing the Adjusted Contract Sum and Guaranteed Minimum Price and prior to the issue of the Phase B Instruction.

58. Category B relates to documents concerning the authority of members of the Design Team to discuss design matters during the Phase B Engagement Process.

The 4 Projects Platform

59. The parties agreed that there is no requirement to make formal discovery of material which can be accessed in what is referred to as the 4 Projects Shared Platform. This is a platform, accessible continuously to both parties, into which there has been uploaded all

design documents relating to the project. This comprises a full audit trail of the design and revisions to the design including dates on which revisions were issued. It is a live common platform, and which is continuously updated as the works progress.

60. The defendant's solicitor, Ms. Gilmore, says that this will reduce the time and expense of a discovery exercise. She says that as of 14 September, 2023 there were 275,633 files on the platform.

61. Whilst this will be a matter for determination by the trial judge it is difficult to escape the conclusion that since the Defendant is relying on the fact of continuing evolution of the design and continuing requests for instruction relevant to design, this pattern must be apparent from the 4 Projects platform and the parties can make submissions at trial by reference to the evolution of design evidenced on the platform. This court has not been shown the form or content of the platform, and its significance for this issue will be a matter for the trial judge. But for the decisions I am required to make it is clear that a record of the design changes after the Instruction Date is available to both parties.

Principles informing discovery in this case

62. The court was referred to many of the leading authorities on discovery including *Tobin v. Minister for Defence Ireland and the Attorney General* [2021] IR 211, *Ryan v. Dengrove* [2022] IECA 155, *Chubb European Group SE v. Perrigo Company* [2022] IEHC 444, *IBRC v. Fingleton* [2015] IEHC 296 and of course the seminal case of *Compagnie Financiere Du Pacifique v. Peruvian Guano Co.* 1882 11 QBD 55. The basic principles relevant to this case are as follows.

63. Firstly, documents to be discovered must be relevant and necessary to the fair disposal of the case and the saving of costs.

64. Secondly, the test in *Peruvian Guano* is still relevant, namely that documents are relevant which could contain information which may – not which must – either directly or

indirectly enable the party requesting them to advance its own case or to damage the case of his adversary. This includes documents which "may fairly lead him to a train of inquiry".

65. Thirdly, relevance is determined by reference to the pleadings.

66. Fourthly, the traditional approach is that where relevance is established it will as a general rule follow that documents are necessary, although it is clear from Tobin that this presumed consequence can be rebutted by appropriate evidence.

67. Fifthly, on this application the court does not determine questions of admissibility of evidence. There is in this case a dispute as to the admissibility of evidence of events in the context of interpretation of the contract. Documents are not necessarily excluded from discovery because their admissibility or evidence is the subject of such a dispute.

68. Sixthly, proportionality may inform the scope of what should be ordered. There are three limbs to the question of proportionality. The first is that it engages a consideration of the extent to which documents are likely to advance the case of an applicant or damage the case of his opponent. As Fennelly J. put it in *Ryanair v. Aer Rianta CPT* [2003] 4 IR 264 "the public interest in the proper administration of justice is not confined to the relentless search for perfect truth".

69. The second limb of proportionality is to consider the scale of a case which includes the complexity and the value of the case, as discussed in *IBRC v. Fingleton* and *Chubb v. Perigo*.

70. The third limb concerns confidentiality. Of itself, confidentiality does not relieve a party from making discovery of relevant documents, but in an appropriate case it informs the balance when assessing whether discovery sought is proportionate.

Categories where only date range is in dispute.

71. Most of the categories the subject of this dispute relate to documents concerning the question of the state of the design for the Phase B Works as at 8 January, 2019. This issue has

three elements for determination at the trial. The first is what, as a matter of interpretation of the contract, was agreed to be the state of the design when the Phase B Instruction would be issued. The second is whether the Adjusted Contract Sum and Guaranteed Minimum Price were capable of being ascertained if the design were not as complete as was required by the contract. The third is whether the design was in the state it was required to be on 8 January 2019. The first two of these are clearly matters only of interpretation of the contract.

72. The Defendant submits that although determination of these questions will turn on the state of play as at 8 January, 2019, documents coming into existence thereafter are likely to be relevant and evidence facts as at that date. It says that information concerning evolution of the design after the Instruction Date and the complications and delays caused by what it says was incomplete design, all go to evidence the state of incompleteness on the Instruction Date.

73. The Plaintiff says that the Adjusted Contract Sum became determined by agreement before the Instruction was given and that this is the end of the matter.

74. The Plaintiff says the claims for damages for breach of contract in the counterclaim which derive from an allegation that the design was incomplete are claims to be determined on the hearing of the counterclaim in a later module of the case. It submits the court is only concerned with the matter of the contractual interpretation of whether Clause 9.1.3 permitted the giving of a valid Instruction once the Adjusted Contract Sum was determined. It submits that evidence which came into existence after 8 January, 2019 cannot be admissible as an aid to interpreting the provisions of the contract itself.

75. The Plaintiff acknowledges that documents may have come into existence after 8 January, 2019 which would evidence the "state of play" as at that date. In recognition of this it initially offered to make discovery of documents which came into existence up to 30 July 2019. This is the date on which the defendant formally referred the matter to conciliation. It is also six months after the date of the Instruction and over five months after the date on which

the dispute crystallised. It says that at a meeting as early as 19 February, 2019 (after the collaborative workshop of 17 and 18 January 2019) the Defendant advised the Plaintiff of its claim that the Phase B Instruction was invalid.

76. In submissions and at the hearing the Plaintiff extended its offer to 1 April, 2020, the date on which the proceedings were commenced, which it states is more than a full year after the dispute crystallised.

77. The Defendant initially submitted that the discovery should have no end date and should be an ongoing process, having regard to the evolution of the contract and of the design issues even to this day. At the hearing of this application it proposed an end date of the date of swearing of the affidavit of discovery.

78. The Defendant submits that because the categories of discovery considered below are agreed and disputed only as to date range this means that the Plaintiff accepts that discovery of the documents in these categories is both relevant and necessary and therefore that this is only a matter of proportionality. It says that evidence proffered by the Plaintiff as to the oppressively large volumes of documents in the "universe" covered by the categories sought. relates only to volumes of documents but is of no assistance regarding cost.

79. On this point, the Plaintiff does not accept that all of the documents in these categories are necessarily relevant, but it is willing to make the discovery of those categories provided the date range is limited as it proposes. It says that it has extended its offer, now to 1 April, 2020, to resolve the discovery dispute and in recognition of the fact that there may be relevant documents which came into existence up to that date. It says that the number of documents likely to be relevant to the status of the design on 8 January 2019 diminishes over the date range.

80. The Plaintiff submits that by 30 July, 2019, when the Defendant submitted the matter to Conciliation it must have been in possession of sufficient information including documents to make its case as to the invalidity of the Instruction.

81. Finally, the Plaintiff says that the later in time documents come into existence the more likely they are to attract legal privilege. That of itself is clearly not a reason to refuse discovery, although the Plaintiff says that the burden of reviewing such documents would be relevant to proportionality.

Affidavit evidence

82. Mr. Stephen Proctor, a partner in McCann Fitzgerald solicitors for the Plaintiff swore an affidavit on 28 July 2023 for the purpose of updating the court on the scale of the discovery being sought. He described the nature and scale of the searches which would have to be undertaken if the court were to determine that discovery should be made with no end date for the categories sought.

83. Mr. Proctor stated that a recent search on the Plaintiff's outlook mail server was carried out with a date range of 14 August, 2017 to 30 June, 2023. He says that the search uncovered a total of 2,018,760 documents. He says that a search was also carried out on the Plaintiff's document management system which returned over 202,542 documents and a further search on the outlook mail server of the Plaintiff's quantity surveyor Messrs. Linesight, which returned a further 75,995 documents. When combined these documents amounted to 2,297,297, and that this was before other third party's files were searched including those of the architect, civil and structural engineer and a mechanical and electrical consultant and the Employer's Representative. Mr. Proctor states "it is evident from the foregoing that the dataset that will have to be reviewed by the Plaintiff for relevance, even on the date when it was proposed, is vast. The contention that discovery should be conducted

without date ranges or cutoff dates is unworkable and will place an entirely disproportionate burden on the Plaintiff, leading to extortionate costs that are neither justified nor warranted."

84. Mr. Proctor says that the scale of documents being generated on a continuing basis in respect of the contract, is such that the discovery requested would be "voluminous and technical in nature, prohibitive and exponentially costly".

85. No information is provided by Mr. Proctor as to the levels of legal or other costs associated with making discovery. Information of this nature would be required if a court were to take a view that discovery sought was disproportionate from a costs perspective (see *IBRC v. Fingleton* [2015] IEHC 296 and *Chubb European Group SE v. Perrigo* [2022] IEHC 444.)

86. The Defendant's solicitor Ms. Kathy Gilmore, of A&L Goodbody points to the absence of any specific evidence or information as to the level of costs which would be incurred in complying with discovery. She refers also to the availability, and established recognition by this court of filtering methods such as Technology Assisted Review (TAR) or Continuous Active Learning (CAL) which she says would reduce the volume of potentially relevant documents which would be required to be reviewed manually.

General approach to date range

87. To order discovery with an end date of the date of swearing the affidavit, now in 2024, would impose a burden on the Defendant which is caused to a large extent by the two year pause in the proceedings. That pause was by mutual agreement between the parties, but, it is only the happenstance of that pause which would mean that an affidavit of discovery would be sworn in 2024 and not, as might otherwise have been the case in 2021 or at the latest in early 2022.

88. In paragraphs 51-58 above I have summarised the eight agreed categories which relate to documents evidencing the design of Phase B and its evolution.

89. The core focus of the first Module is to determine the 'state of play' as at 8 January 2019. Documents which evidence that position may have come into existence thereafter, but the likelihood of relevance diminishes as time passes. The defendant itself says that the extent of design incompleteness began to emerge on 17 and 18 January 2019. By 30 July 2019 the defendant was in possession of sufficient information to conclude, for its part, that the design was incomplete on the Instruction Day and to refer the dispute to conciliation. Having regard to this focus in the first Module, and the range of categories being discovered, both undisputed and subject to the 'date range' dispute, my conclusion is that I should approach the matter from the perspective that a proportionate discovery for this Module will extend to documents which come into existence on or before 1 April 2020, a period of 1 year and 2.5 months after the Instruction Date. I have considered below each category to examine whether any later date is appropriate, and found no such category.

Category 2

"all documents which record and/or refer to and/or evidence the state of completion and/or coordination of the design for the Phase B Works as of 1 November 2018 and as of 8 January 2019.

90. In her grounding affidavit (sworn 10 February, 2021) Ms. Gilmore refers to the number of requests for information issued by the Defendant between 8 January, 2019 and 17 November, 2020, being 2,367. She says that it is only as the works have progressed that the full extent of the deficiencies in the design "are becoming evident". She refers also to the existence of certain expert reports which are stated to post date 8 January, 2019. The court was not informed of the dates of those reports. They are referenced only to show that 8 January 2019 is not an appropriate end date for the discovery.

91. By the very latest on 30 July, 2019 the Defendant was in possession of sufficient information to advance to the dispute the point of making a reference to the Conciliator. It is

likely that it was in that position on a number of earlier dates. It says itself that it began to realise the design deficiency at the collaborative workshop on 17 and 18 January 2019.

92. In Category 6(iii) the Defendant will obtain discovery of documents evidencing communications with Government as to the state of completion of the design on 8 January 2019, limited to that date.

93. The 4 Projects platform is a record of the evolution of the design from 8 January, 2019.

94. The Defendant's case is that the design as of the Instruction Date was incomplete and that the Adjusted Contract Sum could not then be agreed or ascertained. The Adjusted Contract Sum was either validly ascertained by 8 January 2019 or it was not. Determining that question does not require a finding as to the precise scale of the deficiency, which is clearly a matter for the damages claim in a later module. It would be extraordinary, having regard to the contentious exchanges between the parties as early as 19 February 2019, if the most relevant documents pertaining to the status of the design on the Instruction Date did not come into existence within 12 months of that date.

95. The appropriate end date for this category is 1 April, 2020, being the date of commencement of the proceedings.

Category 3(i)

All documents which record and/or refer to and/or evidence any concerns expressed by the Defendants regarding the level of completeness and/or coordination of the design for the Phase B Works prior to and at the date of the issue of the Phase B Instruction and the consideration given and/or action taken by the Plaintiff and the Design Team to the said concern.

96. There are two elements to this category. The first relates to "concerns expressed by the Defendant". The second relates to "consideration given and/or action taken by the Plaintiff and the Design Team to the concerns".

97. As to the first element, namely "concerns expressed by the Defendant", again, it seems to me that the early identification and engagement of the Defendant on the issue of the state of design on the Instruction Date means that the end date proposed by the Plaintiff which allows for a period of over 12 months from the crystallisation of the issue is reasonable and proportionate.

98. The second element of this category is much wider, relating to the Plaintiff's "consideration given and/or action taken" in response to those concerns. As the case was described to the court, the design issues have continued to feature in the parties' engagement ever since January 2019 through to date. A category covering the Plaintiff's consideration and response to these matters which is open ended as to date would be oppressive and disproportionate. Obviously, records of the actions taken would post date the expression of concerns. Nonetheless, I am not persuaded that a further extension of the date for documents evidencing these is warranted. The period of over 12 months to 1 April 2020 is appropriate.

Category 3 (ii)

All documents which record and/or reference to and/or evidence any exchanges between the Plaintiff and the Design Team regarding the adequacy or completeness of the design for the Phase B Works as at 8 January, 2019.

99. Initially this category was fully resisted by the Plaintiff on the grounds that the module concerns the state of the design on the Instruction Date and not the state of the relationship between the Plaintiff and its Design Team. Other categories of discovery cover communications between the Plaintiff and its design team regarding the adequacy or completeness of the design at 8 January 2019, particularly Category 6(iv) which is an agreed

category. Category 6(iv), which relates to evidence of the Design Team refusing to progress design, is time limited to 8 January 2019. When the further period up to 1 April 2020 is added for this wider Category 3(ii) the combined effect is that there is no warrant to go beyond 1 April 2020.

100. This additional category should be limited by the end date of 1 April 2020.

Category 3 (iii)

All documents which record and/or refer to and/or evidence a request by the Defendant for "For Construction" or "Issue for Construction" or "IFC" documents in respect of the Phase B Works and any response to such requests by the Plaintiff and/or the Design Team

101. It is not disputed that after 8 January, 2019 requests were made by the Defendant for these types of instructions and that such exchanges and responses have continued throughout the currency of the contract. An obligation to discover such material on a rolling basis would be disproportionate and excessive.

102. A limited amount of these exchanges after the Instruction Date may be relevant to the state of affairs on that date. To extend the period for this category beyond 1 April 2020 would be excessive and clearly reach into events complained of in the counterclaim for damages. I shall apply the end date of 1 April, 2020.

Category 10

All documents which record and/or refer to and/or evidence the level of completeness of the Building Information Model (BIM) as at 8 January, 2019, but excluding the documents which make up the BIM model itself.

103. The Defendant pleads that under the terms of the contract the Plaintiff was not entitled to issue the Phase B Instruction until such time as "the BIM was developed to LOD 300 standard for all models". It claims that this precondition was not met.

104. The Plaintiff agrees that this category is relevant but subject only to the limitation of an end date of 1 April, 2020. It is said by Mr. Proctor, and not denied, that the Building Information Model is currently being used on the project. Therefore, material is being generated continuously in connection with that model.

105. A different category, A, considered below, relates to the relevance of the BIM Model from a contractual perspective. The issue cited by the defendant for this category 10 is the actual state of development of the BIM as of the Instruction Date and not any later. Again, the 14.5 month period after that date is sufficient for this category and I shall apply the end date of 1 April, 2020.

Category 11

All documents which record and/or referred to and/or evidence the telephone call of 28 December, 2018 between the Employer's Representative and Patrick Murphy of the Defendant.

106. The Defendant pleads that in this telephone call on 28 December, 2018 it was advised that "all the issues raised by the Defendant would be addressed separately point by point". The Plaintiff does not deny that such a telephone call was made but does not admit the Defendant's characterisation of the content of those discussions.

107. Both parties recognise that this phone call is important in the narrative of events leading up to the Instruction Date. If such a call was to have had such importance it is unlikely in the extreme that notes or other records thereof, if any, which came into existence after 1 April 2020 would add to contemporaneous notes or to notes made in the following 15 months.

108. 1 April 2020 is again the appropriate end date for this category.

Category A (a) All documents which record and/or evidence and/or refer to the alleged agreement that BIM would be dealt with outside of GMP.

Category A (b). All documents exchanged between the Plaintiff and the Design Team referring to dealing with BIM outside of the GMP.

109. This category arises from a plea introduced in the Amended Reply and Defence to Counterclaim delivered by the Plaintiff on 30 July, 2020 in which it is stated that "the parties agreed that BIM would be dealt with outside of GMP".

110. There is complete absence of clarity from both parties in the affidavits and submissions as to when it is stated that such an agreement was made. The nearest one finds is a quote from the reasons given by the Defendant for this request which state "the completion of BIM is an important part of the design of the Phase B Works and any request to remove it from the GMP or the perceived need to do so by the Plaintiff and/or the Design Team in advance of the issue of the Phase B Instruction is relevant to the issue of the state of completeness and coordination of the design for the Phase B Works" .

111. I infer from this extract that the Defendant considers this alleged agreement to have arisen from a request made before the Instruction Date. Based on that limited information, the controversy arises from events predating 8 January 2019 and again I shall apply the end date of 1 April, 2020.

Categories fully in dispute.

Category 4.

All documents which record and/or refer to and/or evidence the decision to adopt a phased approach to the construction of the Hospital and/or which record or refer to the level of design and/or construction to be completed within each particular phases. (sic).

112. This category may be divided in two. The first element relates to the decision to adopt a phased approach to the construction of the hospital. The evidence is that this decision was made as early as 2013, long before the Defendant became the preferred bidder or even attended a pre-tender briefing. More importantly, there is no dispute between the parties that a

decision was made to adopt a phased approach to the construction of the hospital. This was known to tenderers from the very outset.

113. There being no dispute as to this decision of 2013, I shall make no order for discovery of that element of the category.

114. The second element of this category is poorly phrased and extraordinarily general in its reference to "the level of design and/or construction to be completed within each particular phase". Unlike the first element of this category, it does not say that it seeks documents which record decisions made regarding the respective levels of design as between the phases. It refers only to "the level of design and/or construction to be completed within each phase".

115. In Ms. Gilmore's grounding affidavit she says that the Defendant was given assurances by the Plaintiff that the design of the Phase B Works would be a complete and coordinated design before the Phase B Instruction would issue. Category 13, which is a fully agreed category relates to statements and assurances on this subject alleged to have been made to the Defendant on 31 May, 2015 and on 23 May, 2017. The Defendant has been in a position to identify those as the dates on which such assurances were given.

116. If category 4 was intended to capture a wider range of assurances or an internal decision making process of the Plaintiff dealing with the design to be completed for each phase, it does not say so. To interrogate the evolution of the design, potentially as far back as 2013, by such a sweeping category of discovery is impermissible.

117. The Defendant submits that decisions taken by the Plaintiff as to the adoption of what level of design was to be completed within each phase will record or evidence whether this also was the understanding and intention of the Plaintiff when entering into the contract.

118. In *Brushfield Ltd v. Arachas Corporate Brokers Ltd & Ors* [2021] IEHC 263 McDonald J. restated the proposition that:

"*The process of interpretation of a written contract is entirely objective. For that reason, the law excludes from consideration the previous negotiations of the parties and their subjective intention or understanding of the terms agreed.*"

119. This is a classic case of a request for documents which go to the subjective intention of the plaintiff only.

120. I refuse to order discovery of this category.

Category 5 (i)

All documents which record and/or refer to and/or evidence the contractual obligations of the various members of the Plaintiff's design team to complete and coordinate the design for the Phase B Works.

121. The principal reason given for this category is the plea made in paragraph 14 of the defence:

"The Defendant understands that one of the reasons for the failure of the Plaintiff to comply with the requirements of Appendix 2, and the contractual requirements in relation to design more generally, is that there were periods in which the design was not being progressed by the Design Team due to disputes between the Design Team and the Plaintiff. Furthermore the Plaintiff further failed in the following respects:

- *The Plaintiff never adequately explained to the Design Team what was required of them in order to comply with the requirements of Appendix 2;*
- *The Plaintiff failed to appoint a member of the Design Team to be responsible for the coordination of the design;*
- *The Plaintiff failed to provide adequate resources to the Design Team and/or failed to ensure that the Design Team had adequate resources available to carry out the works necessary for compliance with Appendix 2; and*

- *The Plaintiff failed to ensure that the Design Team met the obligations hereinbefore pleaded".*

122. Those allegations are fully denied.

123. The Plaintiff has already agreed to give three categories of documents relevant to the Design Team:

1. In category 3 (ii), the Plaintiff will make discovery of "all documents which record and/or refer and/or evidence any exchanges between the Plaintiff and design team regarding the adequacy or completeness of the design for the Phase B Works as at 8 January, 2019";
2. In category 6 (iv) the Plaintiff has agreed to make discovery of "all documents which record and/or refer to and/or evidence the Design Team refusing to progress design for the works and the reasons for same."
3. The Plaintiff has agreed to make discovery of the contracts between it and the four firms which comprise the Design Team, redacted for commercial sensitivity. Paragraph 14 of the Defence relied on does not allege that the plaintiff varied the contractual obligations of the Design Team, which are governed by their contracts.

124. The documents which will be discovered and referenced in 1, 2 and 3 at para 123 above are the core materials which would evidence disputes between the Plaintiff and its design team which are said by the Defendant to have resulted in the refusals or delays alleged in para. 14 of the Defence.

125. Mr. Proctor says that the contracts between the Plaintiff and the Design Team members were made as far back as 2014. Therefore, this category would require discovery of documents evidencing the relationship between the Plaintiff and Design Team members over

a period in excess of 3 years before the Contract was entered into, all in the absence of any plea as to variations of those relationships.

126. The Plaintiff differentiates between the contractual obligations as between it and the Defendant on the one hand and the contractual obligations which prevail between it and its design team, and submits that the latter are not relevant to this case. That is an oversimplification. In matters relating to design, the Plaintiff is clearly reliant on the design team, and evidence as to what obligations it imposed on the design team must be relevant. However, it seems to me that the combination of the documents within the categories stated in paragraph 123 above, which include the very wide Category 3(ii), goes to the core of this issue. The contracts themselves are the primary source of the relevant obligations, and any refusal of the design team to progress design (Category 6(iv)) and other exchanges between the Design Team and the Plaintiff regarding adequacy or completeness of the design (Category 3(ii)) will cover the allegation in paragraph 14 of the Defence insofar as that paragraph relates to the issues in dispute in the case, namely the completeness or otherwise of design on the Instruction Date.

127. In circumstances where the specific categories 3(ii) and 6(iv) address the very issue which is identified in para. 14 of the defence and which is relied on as a reason for this category, it seems to me that the additional category 5(i) is unjustified and does not arise from the case as pleaded.

Conclusion.

128. There will be an order in respect of categories 2, 3 (i), 3 (ii), 3 (iii), 10, 11, A (a) and A (b) for discovery of the documents in the terms proposed and quoted above, with the end date in each case 1 April, 2020.

129. I shall refuse to order discovery of the documents identified in categories 4 and 5(i).

130. In submissions all of the focus was on the end dates. A number of different commencement dates were referenced in submissions and affidavits. I was not asked to adjudicate on commencement dates. I shall rely on the parties to identify proposed commencement dates in relation to these categories and if any dispute remains on that issue, I can determine it.

131. Reference has also been made in a number of the affidavits to the question of reciprocity. In particular it was said the Plaintiff's agreement to make discovery of documents up to 1 April, 2020 is conditional on the Defendant agreeing a corresponding end date in its discovery. No submissions were made on this point at the hearing. My preliminary view is that reciprocity should be afforded. If the parties are in dispute on this question for any category, I can hear submissions as required.