Case No: HT 2016 000063
Neutral Citation Number: [2016] EWHC 557 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/03/2016

Before :

THE HON. MRS JUSTICE CARR DBE

- -

Between :

JAWABY PROPERTY INVESTMENT LIMITED **Cla**

- and -

First Defe

(1) THE INTERIORS GROUP LIMITED

Second

(2) ANDREW STEPHAN GEORGE BLACK **Defe**

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Mr Anthony Speaight Q.C. (instructed by **Eversheds LLP**) for the **Claimant**

Mr James Bowling (instructed by **Fenwick Elliott LLP**) for the **Defendants**

Hearing dates: 9th March 2016

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Judgment

The Hon. Mrs Justice Carr DBE :

Introduction

1.
By this Part 8 claim the Claimant ("JPIL") seeks declaratory relief against the First Defendant ("TIG") in relation to certain payment obligations under a construction contract entered into between JPIL and TIG ("the Contract") for works at Holborn Tower, High Holborn, London WC1 ("the Property") and a related Escrow Agreement ("the Escrow Agreement"). JPIL is the current freehold owner of the Property, which is a high rise office block.

2.
JPIL initially also sought injunctive relief against TIG and the Second Defendant ("Mr Black"), TIG's sole director, to restrain him from signing and to restrain TIG from presenting a statutory declaration so as to trigger payment from an Escrow Account ("the Escrow Account") the subject of the Escrow Agreement.

3.
The sum in issue is £1,109,214.09. TIG is currently unable to pay to its subcontractors monies properly due to them. If payment is released, then Mr Black expects the company to continue and to continue successfully. But it cannot survive without the receipt of these monies. There is evidence of financial difficulties on the part of TIG in the past. JPIL suggests that TIG's current financial difficulties cannot be attributable, at least not exclusively, to non-payment by JPIL. There is a real "insolvency risk" that any payment received by TIG will be used to pay creditors unrelated to the Contract. TIG is currently subject to a winding-up petition presented by an unpaid creditor. A hearing of that petition has been adjourned from 8th March 2016. In these circumstances, this matter has proceeded as a matter of urgency and on an expedited basis.

4.
The ultimate question for the Court is whether there has been a "default" within the meaning of the Escrow Agreement. JPIL contends that TIG is not entitled to trigger payment from the Escrow Account on two grounds :

a)
A valuation sent by TIG by email for Valuation 7 on 7th January 2016 ("the Valuation") was not a valid Interim Application within the meaning of Clause 4.8.1 of the Contract;

b)
Alternatively, if, contrary to JPIL's case, the Valuation was a valid Interim Application, then an email and attachments sent by Ashford Property Services Limited ("APS"), JPIL's Agent under the Contract, on 18th January 2016 ("the 18th January email") constituted a valid Pay Less Notice as required under clause 4.9 of the Contract and was served not later than 5 days before the final date for payment.

5.
JPIL seeks final declarations reflecting the above. It is apparent from this that, whilst Mr Black is joined to the proceedings for the purpose of injunctive relief, the substantive dispute is between JPIL and TIG. Equally, given that JPIL seeks final declaratory relief to the effect that there has not been a default event under the Contract, JPIL's claim for injunctive relief effectively falls away. There is no suggestion that, this dispute having arisen, TIG has taken steps to make a call on the Escrow Account, despite the straitened circumstances in which it finds itself. JPIL realistically does not pursue its claim for injunctive relief in the circumstances.

6.
TIG regards JPIL's objections as spurious excuses to deny TIG payment of monies, if necessary from the Escrow Account. Its position is that it made a valid Interim Application in response to which no valid Pay Less Notice was served. It seeks a mandatory injunction requiring payment of the monies from JPIL or alternatively from the Escrow Account.

7.
Evidence on the claim has been served as follows :

a)
For JPIL : statements from Mr Jonathan Bowley of JPIL's solicitors, Eversheds LLP ("Eversheds"), and Mr Christopher Millican of APS;

b)
For TIG : a statement from Mr Black.

8.
To the extent that the parties have attempted to go into the wider merits of their disputes under the Contract, I ignore such matters for present purposes. Mr Millican, for example, goes into significant detail on the accuracy of the Valuation, suggesting that it is a gross overvalue. This is not accepted by TIG. Such matters are either not relevant or not suitable for consideration in this limited Part 8 procedure. Additionally, there is a degree of factual dispute as to whether or not there was an agreed system between the parties for the purposes of Interim Applications under the Contract, namely as to what was an acceptable form and manner of interim payment application. Mr Black says that there was. Mr Millican says that there was no agreement to alter the payment provisions in the Contract. APS simply followed the pragmatic course of fitting in as best it could with what TIG was choosing to do. Neither party suggested that there should be cross-examination, or that the claim should be taken outside the Part 8 procedure (although TIG made it clear that, were I to find that the issues could not be concluded properly within the procedure, I should find against JPIL). So far as the witness evidence is concerned, I proceed below on the basis of such evidence as is not contested. Thus, for example, it has not been disputed by JPIL that APS requested TIG to prepare summary sheets in a certain way after Valuation 4, and TIG complied with that request. Beyond that, I proceed on the basis of what the documents themselves show.

The Contract

9.
The Contract was entered into originally between Tekxel Limited ("Tekxel") and TIG on 31st July 2015 for the refurbishment of the ground and main reception, and floors 2, 3, 4, 6, 7, 8 and 11 of the Property. The contract was novated subsequently from Tekxel to JPIL. It was on the standard JCT 2011 Design and Build Contract Conditions with amendments. The works are split into ten sections, with each section having a sectional completion date and rate of liquidated damages for late completion. Works to floors 1 and 10 were added as a variation. The Contract sum was £4,077,966.78.

10.
By Article 3, save to the extent that JIPL might otherwise specify by notice to TIG, APS has "full authority to receive and issue applications, consents, instructions, notices, requests or statements and otherwise to act for [JPIL] under any of the Conditions".

11.
By Article 14 TIG's obligations are conditional on an Escrow Agreement in an agreed form being executed by the parties and Eversheds LLP, solicitors formerly acting for Tekxel and now for JPIL, confirming that the Minimum Deposit Balance had been deposited in the Escrow Account. Such confirmation was given.

12.
Clause 1.7 (as amended) provides materially as follows :

"Any notice, approval, request or other communication to be given by either Party under this Contract shall be sufficiently served if sent by hand, by fax or by post to the registered office, or if there is none then the last known address of the Party to be served…"

13.
Clauses 4.8 to 4.10 (as amended) provide materially as follows :

"Contractor's Interim Applications and Due Dates

4.8.1 In relation to each Interim Application, the Contractor shall make an application to the Employer (an ‘Interim Application’) in accordance with the following provisions of this clause 4.8, stating the sum that the Contractor considers to be due to him and the basis on which that sum has been calculated…

4.8.3 Where Alternative B applies, for the period up to practical completion of the Works, Interim Applications shall be made as at the monthly dates specified in the Contract Particulars for Alternative B up to the date of practical completion or the specified date within one month thereafter. Subsequent Interim Applications shall be made at intervals of 2 months (unless otherwise agreed), the last such application being made upon the expiry of the Rectification Period or, if later, the issue of the Notice of Completion of Making Good (or, where there are Sections, the last such period or notice). The due date in each case shall be the later of the specified date and the date of receipt by the Employer of the Interim Application.

4.8.4 Interim Applications may be made before, on or after completion of the relevant stage or the monthly date and shall be accompanied by such further information as may be specified in the Employer’s Requirements.

Interim Payments – final date and amount

4.9.1 The final date for payment of an Interim Payment shall be 30 days from its due date.

4.9.2 Not later than 5 days after the due date the Employer shall give a notice (a “Payment Notice”) to the Contractor in accordance with clause 4.10.1 and, subject to any Pay Less Notice given by the Employer under clause 4.9.4, the amount of the Interim Payment to be made by the Employer on or before the final date for payment shall be the sum stated as due in the Payment Notice.

4.9.3 If the Payment Notice is not given in accordance with clause 4.9.2, the amount of the Interim Payment to be made by the Employer shall, subject to any Pay Less Notice under clause 4.9.4, be the sum stated as due in the Interim Application.

4.9.4 If the Employer intends to pay less than the sum stated as due from him in the Payment Notice or Interim Application, as the case may be, he shall not later than 5 days before the final date for payment give the Contractor notice of that intention in accordance with clause 4.10.2 (a “Pay Less Notice”). Where a Pay Less Notice is given, the payment to be made on or before the final date for payment shall not be less than the amount stated as due in the notice.

4.9.5 If the Employer fails to pay a sum, or any part of it due to the Contractor under these Conditions by the final date for its payment, the Employer shall, in addition to any unpaid amount that should properly have been paid, pay the Contractor simple interest on that amount at the Interest Rate for the period from the final date for payment until payment is made. Interest under this clause 4.9.5 shall be a debt due to the Contractor from the Employer.

4.9.6 Acceptance of a payment of interest under clause 4.9.5 shall not in any circumstances be construed as a waiver of the Contractor’s right to proper payment of the principal amount due, to suspend performance under clause 4.11 or to terminate his employment under section 8.

Payment Notices, Pay Less Notices and general provisions

4.10.1 Each Payment Notice under this Contract shall specify the sum that the Party giving the notice considers to be or have been due at the due date in respect of the relevant payment and the basis on which that sum has been calculated.

.2 A Pay Less Notice:

.1 (where it is to be given by the Employer) shall specify both the sum that he considers to be due to the Contractor at the date the notice is given and the basis on which that sum has been calculated.

.2 (where it is to be given by the Contractor) shall specify both the sum that he considers to be due to the Employer at the date the notice is given and the basis on which that sum has been calculated.

.3 A Payment Notice or a Pay Less Notice to be given by the Employer may be given on his behalf by the Employer's Agent or by any other person who the Employer notifies the Contractor as being authorised to do so.

.4 In relation to the requirements for the giving of notices under section 4 and the submission of a Final Statement, it is immaterial that the amount then considered to be due may be zero.

.5 Notwithstanding his fiduciary interest in the Retention as stated in clause 4.16 the Employer is entitled to exercise any rights under this Contract of withholding or deduction from sums due or to become due to the Contractor, whether or not any Retention is included in any such sum under clause 4.18."

14.
Thus in summary :

a)
TIG is to make monthly an Interim Application for Payment, here on the 8 th of each month;

b)
Whichever was the later of the monthly "specified date" or the actual date of receipt of the Interim Application was called the "due date" by reference to which time for other steps was fixed;

c)
The final date for payment was 30 days after the due date;

d)
Not later than 5 days after the due date JPIL was to give a Payment Notice stating the sum that TIG considered to be due. If no such notice was given, then the interim payment was to be the amount in TIG's Interim Application, subject to any Pay Less Notice given by JPIL;

e)
A Pay Less Notice was to be given not later than 5 days before the final date for payment.

15.
The Employer's Requirements provided at paragraph 460:-

"INTERIM PAYMENTS

*Application by Contractor: If made under Conditions of Contract clause 4.9 include details of amounts considered due together with all supporting information."

16.
Since Clause 4.9 deals with payment notices given by the employer rather than the contractor, JPIL suggests that the reference to "4.9" is an obvious clerical error and should be read as "4.8".

17.

The Employer's Requirements provided at paragraph 480:-

"LABOUR AND EQUIPMENT RETURNS

* Provide for verification at the beginning of each week in respect

of each of the previous seven days.

* Records must show:

- The number and description of craftsmen, labourers and

other persons directly or indirectly employed on or in

connection with the Works or Services, including those

employed by subcontractors.

- The number, type and capacity of all mechanical, electrical

and power-operated equipment employed in connection

with the Works or Services."

18.
At the same time as the Contract was entered into, the parties entered into the Escrow Agreement with Eversheds, consistent with Article 14. It provided for Tekxel to deposit £1million in a designated account to be held by Eversheds. Eversheds was instructed irrevocably to hold this sum as a security against any failure by Tekxel to pay sums properly due. By a separate novation contract, JPIL was substituted for Tekxel in the Escrow Agreement.

19.
The directly relevant clause of the Escrow Agreement is Clause 3.3 :

"Within 7 business days after receipt by Eversheds of the following documents from the Contractor…

3.3.1 a statutory declaration sworn by a Director of the Contractor stating that a Default has occurred and has continued for a period of 7 days after receipt by the Employer of a notice specifying the Default and requiring its remedy and stating the amount due for payment and unpaid from the Employer to the Contractor under the Contract (having regard to any Pay Less Notice) and, where no Payment Notice has been issued pursuant to the Contract, a statement to that effect; and

3.3.2 either (i) a certified copy of the Payment Notice issued pursuant to the Contract in respect of that amount…or, where no Payment Notice has been issued, a certified copy of the relevant Interim Application issued by the Contractor pursuant to the Contract in respect of that amount…or (ii) a certified copy of any decision of an adjudicator or judgement of any court evidencing a sum due to the Contractor and in each case together with a certified copy of any Pay Less Notice Eversheds shall, and the Employer irrevocably instructs, directs and authorities Eversheds to pay from the funds deposited in the Escrow Account to the Contract the amount of the relevant sum demanded to the extent that there are sufficient funds standing to the credit of the Escrow Account at such time."

"Default" was defined as "a failure by the Employer to pay the whole or any part of any sum properly due under the terms of the Contract by or on the final date for payment thereof."

20.

By Clause 3.8 Eversheds was irrevocably instructed to meet a Clause 3.3 demand without further reference to the parties. After any payment JPIL was obliged (by Clause 4) to restore the level of the Escrow Account to £1million.

The relevant chronology of events

21.
TIG commenced works on 8th June 2015, in advance of the Contract being signed.

Valuations 1 to 6

22.
All of TIG's previous payments (on Valuations 1 to 6) were made under the following procedure. TIG would send a valuation to Mr Simon Brown or Ms Rachel Hodge of APS by email. Attached were Excel spreadsheet valuations in a similar format, with detailed back-up sheets followed by a statement of the final sum applied for (or total work done) at the conclusion. From Valuation 5 onwards, there was a summary sheet followed by detailed back-up sheets. Mr Black says that this was done at APS' request. As already indicated, this is not denied by Mr Millican, though he denies any formal agreement as such. The first valuation was sent under cover of an email dated 14th July 2015 requesting APS to issue a certificate for invoicing purposes. Thereafter, the covering email would refer to the valuation for APS' "approval" or "consideration". Each of Valuations 1 to 6 valued TIG's works up to the due date (of the 8th of each month).

23.
Upon receipt of these documents, APS would then "walk the job" with TIG to assess and check the work done. APS would take a marked up document away. On each occasion APS then issued a Certificate of Payment, accompanied by detailed Excel spreadsheets showing how the assessment had been made. APS' valuations were invariably at variance with (and lower than) those of TIG, JPIL say, on average by 57%. I do not accept that this figure is helpful or representative, in the sense that it is skewed by one very high variance of 213% on the first interim payment application. TIG states that APS consistently undervalued TIG's work and that there is no question of any windfall here. In any event, these are not matters for my determination now.

24.
Upon issue of a Certificate of Payment, TIG would then issue an invoice in the relevant sum.

Pay Less Notices

25.
JPIL issued two formal Pay Less Notices under the Contract, one on 2nd December and one on 23rd December 2015. Each was a formal document headed "Pay Less Notice" and stated that it was made pursuant to clause 4.9 of the Contract and s. 111(3) to (5) of the Housing Grants, Construction and Regeneration Act 1996 (as amended) ("the Act"). It gave notice of what JPIL considered to be due at the date of notice, together with a breakdown of how the sum was calculated.

The Valuation

26.
On 5th January 2016 Ms Hodge of JPIL emailed Mr Raja of TIG under the subject heading "Holborn Tower- Valuation" as follows :

“Please can you issue me your valuation tomorrow morning so that I can review it prior to our meeting on Monday.”

27.
On 7th January 2016 Mr Raja responded by email with the same subject heading as follows :

“Please see our initial assessment for Valuation 007, this is based upon Progress update and onsite review carried out earlier this week.

If you could kindly confirm a time for Monday’s meeting, I can ensure that it does not clash with prior diarised meetings.”

28.
The Valuation was in the total gross sum of £2,352,937.29, as set out in a summary sheet and attached spreadsheets. Although, as indicated above, JPIL suggests that it is a gross overvalue, it is important to note that there is no suggestion that the Valuation was anything other than bona fide. There is no suggestion of fraud.

29.
On 11th January 2016 Ms Hodge and Mr Raja “walked the job”.

30.
On Friday 15th January 2016 Mr Brown of APS emailed Mr Raja (at 1413 hours) as follows :

“Please find attached our Certificate for Payment No 7 in the amount of £-124,604.00. VAT is not applicable in relation to this Certificate for Payment.

As the “Payment now due to the contractor exclusive of VAT” is a negative figure, there is no payment due and therefore no need for you to raise a corresponding invoice.”

31.
The negative figure was based on a total gross valuation of £1,634,540. The accompanying Certificate for Payment contained no breakdown of that figure, or any accompanying backup documentation. It is common ground that this response was too late to be a valid Payment Notice.

32.
Mr Raja responded by email to Mr Brown on the same day (copied to Ms Hodge and others) (at 1737 hours) as follows :

“We have not yet been issued copies of the mutual “hand mark-up” as prepared/noted by Rachel from the Valuation 007 as undertaken on Monday 11th Jan 2016?

…

This Certificate effectively states that your previous Valuation 006 was incorrect and you have at some stage mis-valued the work, if we have a negative figure? Can you please explain your logic with this?

At worst the Valuation should be £0 i.e. no value/no progress since the last valuation, yet whilst we were on site we have ceilings on Level 6 being completed (Chris was also onsite for clarity and would have noted this).”

33.

Ms Hodge was not working on the Friday 15th January 2016. Returning to work on Monday 18th January 2016 after the weekend, Ms Hodge sent Mr Raja the 18th January email (at 1040 hours) :

“Please find attached the marked-up record of our site walk round last week, and the corresponding excel valuation assessment.

The progress is as agreed on site and variations are included as discussed on site….The Materials on Site included in last month’s assessment was £244,785; this month is £158,187, a difference of £86,598.

Since I do not receive a build-up for the windows claimed by TIG, I carry out a pro-rata reconciliation of the progress on site against the build-up of costs included in the post-tender figure included in the contract sum. A copy of my reconciliation is included in the assessment (as was last month’s). I mistakenly included Levels 5 and 9 in last month’s assessment, and this is corrected in this month’s resulting in reduction of £85,172 against the windows element.”

34.
Mr Millican suggests that this email was an email sent as part of APS’ “regular practice to provide detailed pages of explanation”. Usually this was done on the same day as the certificate was supplied. But on the Friday Ms Hodge was not at work. There is no evidence from Ms Hodge on this point. It seems to me fanciful to suggest that Ms Hodge’s email was simply part of “APS’ regular practice” and not in any way related to Mr Raja’s queries. First, there is no suggestion that there was any other response to Mr Raja’s email of 15th January 2016. Secondly, Ms Hodge responds not only to Mr Raja’s request for the marked-up record but also expressly to Mr Raja’s point that the Certificate effectively stated that APS’ Valuation No 6 was incorrect, confirming that indeed it was.

35.
Mr Millican suggests that it is significant that TIG did not issue an invoice for payment on the Valuation. I cannot see any significance in this, given the contents of the Certificate of Payment, and APS’ indication on 15th January 2016 to TIG that no invoice was required.

36.
The deadline for any Pay Less Notice was 2nd February 2016.

37.
On 8th February 2016 TIG’s solicitors gave notice of intention to suspend performance under clause 4.11 of the Contract and Notice of Default under Account and Escrow Agreement. Eversheds’ response of 12th February 2016 was not to challenge the validity of TIG’s payment application, but rather to contend that the 18th January email plus attachments constituted a valid Pay Less Notice. By letter dated 16th February 2016, however, Eversheds also took issue with the contention that TIG had served a valid Interim Application.

38.
JPIL commenced this claim on 18th February 2016.

The Law

39.
The interim payment provisions in the Contract reflect the requirements of s. 110A and s. 111 of the Act. Their effect is to require an employer at periodic intervals to pay “the notified sum” by a final date for payment, irrespective of whether or not that sum in fact represents a correct valuation of the

work to date. If an employer fails to give relevant notice, irrespective of whether this is by mistake, administrative oversight or any other reason, then a sum for which the contractor has applied becomes immediately contractually payable, even if it is wrong in valuation terms.

40.
The consequences of such a failure can of course have severe consequences, as this Court has recognised, particularly where, as here, there is no contractual provision for interim repayments of any overpayments and where, as here, there is a risk of contractor insolvency. Reference can be made readily by way of example to the judgment of Coulson J in Caledonian Modula v Mar City Developments [2015] BLR 694 at paragraph 37 :

“In the UK (unlike other jurisdictions with mandatory construction adjudication, such as Malaysia) the employer's failure to serve a payless notice within a short period challenging the payee's notice can have draconian consequences. A failure to serve a notice in time will usually mean a full liability to pay. That is what the run of recent TCC cases on this topic, including ISG v Seevic College [2014] EWHC 4007 (TCC) and Galliford Try Building Ltd v Estura Ltd [2015] EWHC 412 (TCC) , are all about. But it seems to me that, if contractors want the benefit of these provisions, they are obliged, in return, to set out their interim payment claims with proper clarity. If the employer is to be put at risk that a failure to serve a payless notice at the appropriate time during the payment period will render him liable in full for the amount claimed, he must be given reasonable notice that the payment period has been triggered in the first place.”

41.
Also of relevance is the judgment of Akenhead J in Henia Investments v Beck Interiors [2015] BLR 704 at paragraph 17 :

“I consider that the document relied upon as an Interim Application under clause 4.11.1 must be in substance, form and intent an Interim Application stating the sum considered by the Contractor as due at the relevant due date and it must be free from ambiguity. In this context, the Interim Application should be considered in the same light as a certificate. If there are to be potentially serious consequences flowing from it being an Interim Application, it must be clear that it is what it purports to be so that the parties know what to do about it and when.”

42.
Guidance on what is a “certificate” can be found in Minster Trust Ltd v Traps Tractors Ltd [1954] 1 WLR 963. There Devlin J (as he then was) commented (at 981 to 982) in the context of a certificate of quality to satisfy a contract of sale that :

“…A document which has to be handled in commerce must be in a form which leaves no reasonable doubt about its nature…I think that a certificate of this sort must, to satisfy the contract, be unambiguous and readily understandable…”

43.
The requirement for “form”, “substance” and “intent” has often been repeated in the authorities (see for example Token Construction v Charlton Estates [1973] BLR 48). In construing the document or documents relied upon, the exercise is to assess it against its contextual setting how it would have informed a reasonable recipient - see Mannai Ltd v Eagle Star Ass. Co. Ltd [1997] AC 749 (per Lord Steyn at 772H).

44.

There are instances where it can be found that an employer has waived the need for contractor compliance with strict contractual requirements and/or that an estoppel by convention has arisen between the parties. A useful summary of the well-known requirements for an estoppel by convention to exist can be found in The Law of Waiver, Variation and Estoppel (3rd Ed 2012 Wilken & Ghaly) at paragraph 10.01 :

“(i) It is not enough that the common assumption upon which the estoppel is based is merely understood by the parties in the same way. It must be expressly shared between them.

(ii) The expression of the common assumption by the party alleged to be estopped must be such that he may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party an understanding that he expected the other party to rely on it.

(iii) The person alleging the estoppel must in fact have relied upon the common assumption, to a sufficient extent, rather than merely forming his own independent view of the matter.

(iv)That reliance must have occurred in connection with some subsequent mutual dealing between the parties.

(v) Some detriment must thereby have been suffered by the person alleging the estoppel, or benefit thereby have been conferred upon the person alleged to be estopped, sufficient to make it unjust or unconscionable for the latter to assert the true legal (or factual) position.”

45.
Both parties referred me in this context to the recent decision of Edwards-Stuart J in Leeds City Council v Waco Limited [2015] EWHC 1400. There it was held (at paragraph 43) that the irregularity constituted by the making by a contractor of monthly applications up to three or four business days after the contractual valuation date had been waived by the employer. The employer had paid out on ten such irregular applications over a period of eleven months or so. Rejection of such an irregular application after 8 or 9 months would not have been permissible as being inconsistent with the course of conduct which had by then been established. Edwards-Stuart J referred (at paragraph 29) to the well-known passage in the judgment of Denning LJ (as he then was) in Charles Rickards ltd v Oppenheim [1950] 1 KB 623 where he said this :

“If the defendant, as he did, led the plaintiffs to believe that he would not insist on the stipulation as to time, and that, if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to the time against them. Whether it be called wavier or forbearance on his part, or an agreed variation nor substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it.”

46.
Later in the judgment and now addressing events in the post practical completion period and a single payment of a premature application, Edwards-Stuart J held (at paragraph 53) :

“... I do not consider that that, by itself, amounted to any form of implied representation that it would waive a similar irregularity in the future: one swallow does not make a summer.”

Was the Valuation a valid Interim Application?

47.

JPIL contends that the Valuation was not a valid Interim Application triggering the Interim Payment procedure for two reasons :

a)
The email of 7th January 2016, being an email only, did not comply with the requirements for service prescribed by Clause 1.7 (as substituted by amendments to the standard form); and/or

b)
The terms of the email were insufficient to constitute an Interim Application under Clause 4.8.1.

48.
As to the first ground, JPIL suggests amended Clause 1.7 expressly required an Interim Application (being an “other communication”) to be served by hand, fax or post. This was a deliberate choice of the parties which agreed to delete Clause 1.7 of the JCT Standard Conditions (which expressly permitted service of notices or other communications by email). The Valuation was only ever received by email and was thus invalid.

49.
This point can be disposed of shortly as one lacking any merit. First, Clause 1.7 as substituted by the parties is silent on the question of electronic communications. It does not expressly prohibit electronic service. Nor does it do so impliedly. Clause 1.7 as substituted sets out deeming provisions for other modes of service which were absence from the original Clause 1.7. I accept the submission for TIG that it would need clear and express words for service electronically to be impermissible.

50.
If I am wrong in that construction, then in any event APS (on behalf of JPIL) waived any requirement for hard copy service by its dealings with TIG on Valuations 1 to 6, all of which were sent by email. Alternatively JPIL is estopped from asserting that notification by email is invalid by reason of the parties’ course of conduct, which extended over months and on a significant number of valuations. APS clearly had authority to act on behalf of JPIL in relation to the mode of service under Article 3 of the Contract. It would be unconscionable to allow JPIL to resile from the convention in this regard now.

51.
As to the second ground JPIL contends that :

a)
The Valuation did not describe itself as an Interim Application. It did not mention Clause 4.8.1. It did not apply for anything;

b)
In breach of the express terms of Clause 4.8.1 the Valuation did not state that TIG considered that a sum to be due to it;

c)
It was described as an “initial” assessment, indicating a degree of provisionality;

d)
The attachment did not contain all the information which would support the claim. It contained no more than a set of percentages. There were no supporting documents, such as invoices from suppliers and the like, or applications or build-ups from sub-contractors;

e)
There is insufficient to satisfy the contractual requirement to show the basis on which the valuation had been calculated.

52.
JPIL contends that nothing on the facts comes close to showing that TIG's valuations were being accepted by or on behalf of JPIL as documents triggering the potentially dramatic effects of a formal interim application under Clause 4.8.1. And in any event, any previous waivers will not bind JPIL in respect of the (subsequent) Valuation. Reliance in this regard is placed on the remarks of Edwards-Stuart J in Leeds City Council v Waco Uk Ltd (supra) (at paragraph 53). As an additional obstacle, JPIL suggests that APS did not have ostensible authority to bind JPIL to any contractual variation.

53.
TIG submits that there is no requirement under Clause 4.8.1 for any particular labelling in order for a document to be an Interim Application. The Valuation was an application and for payment (and treated as such by APS). There was no obligation on APS to produce a Certificate of Payment by way of a Payment Notice unless an Interim Application had been made. The fact that the Valuation provided a gross, rather than a net valuation is nothing to the point. APS never previously required the net sum to be shown. In any event, it would simply mean that APS had over-claimed, something which could be corrected by a Certificate of Payment or Pay Less Notice. The application itself would not be invalidated. As for compliance with the Employer's Requirements, this was not a point raised on any of the earlier Valuations. In any event, paragraph 460 of the Employer's Requirements only requires supporting information, not documentation. Paragraph 480 is wholly irrelevant.

54.
There is force in JPIL's submission that TIG has not identified with any precision the scope of the convention upon which it relies. However, it can be said loosely that the parties' previous course of dealing established a convention that (email) applications in the form of Valuations 1 to 6 (as amended at APS's request) would be treated and accepted by APS on behalf of JPIL as sufficient and valid interim applications for the purpose of Clause 4.8.1 of the Contract. This is not a case of a single swallow, but rather a significant number of separate valuations being treated in the same way. There was a sufficient course of dealing. I do not accept that reliance on such a course of dealing amounts to deploying the principles of estoppel in some impermissible way as a sword and not a shield, as JPIL suggests. TIG relies on an estoppel as an answer to JPIL's contention that the Valuation was invalid.

55.
As to the question of APS' authority, ignoring the question of APS' actual authority, on which I have no direct evidence except for Article 3 of the Contract, by Article 3 JPIL held APS as having "full" authority not only to receive and issue applications and requests but also "otherwise to act for the Employer under any of the Conditions". This authority was thus very broad and sufficiently wide to authorise APS to bind JPIL by its course of dealings in relation to TIG's Valuations. Without more, it would thus be unconscionable to allow JPIL to act inconsistently with that course of dealings to the extent that TIG had relied on it and acted to its detriment.

56.
The problem for TIG, however, is that the presentation of the Valuation on 7th January 2016 did not follow the usual pattern and was materially different to that adopted on previous occasions :

a)

Firstly, the Valuation was sent in response to a request from APS on (Tuesday) 5th January 2016 for a valuation to be issued the next day;

b)
TIG did not meet that deadline request, only sending the Valuation across on (Thursday) 7th January 2016;

c)
Critically, and unlike any previous valuation, the Valuation was described only as TIG's "initial" assessment. This made it clear that the Valuation was not TIG's firm or final assessment. Thus it was not (and cannot objectively be construed as) a statement by TIG of what it considered was due to it for the purpose of Clause 4.8.1 of the Contract but rather only of what it considered it might be due, subject to further consideration. When pressed by the Court as to the import of the phrase, TIG's contention was that the word "initial" meant that it was TIG's "first" valuation, intended to "get the ball rolling" for valuation purposes. Again, this is a very far cry from a statement by TIG of the sum that it considered to be due to it for the purpose of clause 4.8.1 of the Contract and such as to carry the draconian consequences of the payment regime that follows;

d)
The impression of provisionality (and haste) is reinforced not only by the error in the summary sheet (where the sheet incorrectly described the gross total as being for Valuation 6 not 7) but more significantly by the fact that the Valuation did not value the works beyond 5th (or 7th) January. The attachment to the mail was entitled : "Copy of Section Split Valuation (007) to 05 Jan." The summary sheet stated that the valuation was for works carried out up to and including 7th January. The difference in the dates of 5th and 7th January is apt without more to lead to confusion. But the real significance is that, whichever date is adopted, the valuation, unlike all previous valuations, did not go up to and include valuation of the works up to the due date (of 8th January).

57.
For these reasons, the Valuation did not comply with Clause 4.8.1. It did not state what TIG considered to be due to it. It was an initial assessment only. There is no, nor could there be, any suggestion that a mere statement by a contractor of what he considered might be due to him is sufficient for Clause 4.8.1 purposes. The reasonable recipient of the Valuation would not have regarded it as unambiguously informing it that this was an Interim Application for the purpose of Clause 4.8.1. Beyond that, there is no relevant course of dealing upon which TIG can fall back. However informal the format accepted by the parties historically, this was not a situation that had arisen before. The scope of such convention as existed between the parties did not extend to acceptance of an "initial" assessment as a valid Interim Application.

58.
The subsequent conduct of the parties is irrelevant to this question of construction. But in any event the fact that APS treated the Valuation in the same way as it had others does not undermine this conclusion. It is clear that throughout APS was proceeding not with an eye to the contractual detail, but rather the aim of progressing the valuation process.

59.
Whether or not this conclusion can be said to lead to a harsh result for TIG, this is an area where, as the authorities make clear, there is little scope for latitude. If a contractor wishes to have the benefit of the interim payment regime such as that contained in the Contract, then its application for interim payment must be in substance, form and intent an interim application stating the sum considered by

the contractor as due at the relevant due date and it must be free from ambiguity. The Valuation here was not such an application.

Did the 18 th January email and attached documents Certificate a valid Pay Less Notice?

60.
My conclusion on the first issue renders it unnecessary to determine this second issue. However, in deference to the arguments advanced, I address it for the sake of completeness, albeit briefly.

61.
It is common ground that there was no timeous Payment Notice by JIPL. Thus, if the Valuation was a valid Interim Application, the sum specified in it would have become contractually payable unless there was a valid Pay Less Notice. Time for service of a Pay Less Notice here expired on 2nd February 2016.

62.
JPIL contends that, if the Valuation is to be treated as a valid Interim Application, then the mirror image of the arguments in TIG's favour apply in JPIL's favour on the 18th January email. Thus, for example, the absence of formality, labelling and more detailed financial information should not be held against JPIL. And if, as TIG suggests, the 18th January email can be treated as part of a Payment Notice, JPIL asks forensically why it cannot equally be treated as an effective Pay Less Notice. JPIL submits that there should be parity in applying an equally purposive approach to the construction of the 18th January email as to the Valuation. Indeed, there should be a more generous approach to the 18th January email, given that the consequences of a Pay Less Notice are far less draconian. When the 18th January email is looked at together with the previous email from APS to TIG on 15th January 2016 as a package, it can be seen that it was a Pay Less Notice for the purpose of Clause 4.10 of the Contract.

63.
In my judgment, the short answer to JPIL's case is that, objectively construed, it is clear that the 18th January email was not intended to be a Pay Less Notice. Whatever arguments there may be about the appropriateness of fine textual analysis to such a notice (see Thomas Vale Construction v Brookside Syston Ltd [2009] 25 Const LJ (at paragraph 43)), it is, as set out above, an essential requirement for the service of a contractual notice that the sender has the requisite intention to serve it. The senders' intention is a matter to be assessed objectively taking into account the context.

64.
Objectively constructed, the 18th January email was intended :

a)
to provide APS' mark-up of the Valuation, which both parties were aware was not a Payment Certificate. The parties were clear as to the difference between the two types of document (see APS' email to TIG of 13th October 2015 regarding its mark-up on Valuation 4). Equally, the required breakdown of the Payment Certificate cannot have been intended to be also a Pay Less Notice. They are, as TIG points out, different documents under different clauses with different effects; and

b)
to provide an explanation of the Certificate of Payment of 15th January 2016.

65.

Each of these matters was as had been requested by TIG in its email of 15th January 2016, to which the 18th January email was a response. There was no other response to TIG's pressing email of 15th January 2016. The 18th January email was not intended to be a Pay Less Notice.

66.
In this context, it is highly significant that the form of the 18th January email is completely different to the Pay Less notices that were served previously on behalf of JPIL. So, unlike the position pertaining to interim applications where the parties' practice was to treat TIG's valuations as interim applications, there was no equivalent practice to treat email communications such as that of the 18th January 2016 as Pay Less Notices. On the contrary, JPIL's practice was to issue a formal Pay Less Notice when one was intended. I do not consider that the fact that the formal Pay Less Notices contained additional information (in the shape of notifications of deductions to be made of liquidated damages) diminishes the force of this point.

67.
JPIL seeks to rely on a suggestion that TIG has previously accepted informal Pay Less Notices – on payment cycles 3 and 4. On these cycles, Payment Notices were served out of time, yet TIG did into make a call under the Escrow Agreement. This seems to me to be very a long way off proving an established course of dealing or acceptance of the type contended for by JPIL. The issue in each cycle was one of procedural lateness, not substance. Further, the documents in question were Payment Notices and not Pay Less Notices (even if there are no other documents that could be identified as Pay Less Notices). But most importantly, the most that can be said is that TIG did not take the opportunity to make a call on the Escrow Account. As TIG submitted, there could be a myriad of reasons for a decision not to do so. TIG's silence cannot be treated as any acceptance of validity as submitted by JPIL.

68.
For these reasons, I would have concluded that the 18th January email was not a valid Pay Less Notice.

Conclusion

69.
For these reasons I conclude that TIG did not make a valid Interim Application within the meaning of clause 4.8.1 of the Contract on 7th January 2016 and thus no default event has occurred within the meaning of the Escrow Agreement.

70.
I invite the parties to draw up an order reflecting the above and to agree all consequential matters, including costs, so far as possible.