Neutral Citation Number: [2026] EWHC 1509 (TCC)

Case No: HT-2026-000123

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT

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

Date: 23/06/2026

Before:

MR JUSTICE EYRE

- -

Between :

DEERNS UK LIMITED	**Claimant**
- and -	
VDC LHR11 LIMITED	**Defendant**

- -
- -

Samuel Townend KC (instructed by **Brabners LLP**) for the **Claimant**
Justin Mort KC (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendant**

Hearing date: 5th June 2026

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Approved Judgment

This judgment was handed down remotely at 12:00 noon on 23rd June 2026 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Mr Justice Eyre:

Introduction.

1. By a consultancy agreement of 23rd April 2025 ("the Contract") the Defendant engaged the Claimant ("the Consultant") to provide engineering consultancy services in relation to a development at Chandos Park Estate, London NW10.

2. In these proceedings the Claimant seeks payment of £910,501.71 plus VAT. It contends that this sum is due following the Defendant's failure to serve timely pay less notices in respect of two applications for payment. The Claimant says that the Contract, properly interpreted, failed to provide for a final date for payment as required by s110(1)(b) of the Housing Grants, Construction and Regeneration Act 1996 ("the HGCRA"). As a consequence, the relevant provisions of the Scheme for Construction Contracts ("the Scheme") applied. The effect was, the Claimant says, that the final date for payment was 17 days after the relevant due date and any pay less notice had to be served not less than 5 days before that date. Although the Defendant served pay less notices in respect of the Claimant's applications they were after the dates provided for by the Scheme and so, the Claimant says, out of time.

3. The Defendant disputes the Claimant's interpretation of the Contract. It says that when the Contract is properly interpreted it is to be read as having provided a final date for payment which was compliant with the HGCRA. Accordingly, the contractual terms were not superseded by the provisions of the Scheme with the consequence that the Defendant's pay less notices were within time.

4. The Defendant supplements its argument as to the proper interpretation of the Contract with a number of further contentions which were a series of fall-back positions in the event that the court did not accept the Defendant's interpretation argument. First, it said that the parties' dealings had given rise to an estoppel by convention which had the effect that the Contract had been operated in a way which was compliant with the HGCRA and that the Claimant was estopped from contending that there was non-compliance. In that regard the Defendant also submitted that the assertion of an estoppel meant that the case was not suitable for determination by way of a Part 8 claim but should, instead, be adjourned (potentially after determination of the interpretation issue) for the estoppel issue to be decided after pleadings, disclosure, and the exchange of further evidence with provision for cross-examination. Next, the Defendant said that, even if the Contract did not comply with the HGCRA with the consequence that the Scheme was to apply, the Scheme was to be applied in such a way as to cause the minimum change to the terms agreed by the parties. It said that, when that was done, the effect would be that its pay less notices were to be regarded as having been served timeously. Finally, the Defendant said that there were serious doubts as to the Claimant's solvency and that these warranted a stay on the execution of any judgment in the Claimant's favour in the light of the potentially substantial claim which the Defendant had against the Claimant.

5. It follows that it will be necessary to consider:

   i) The proper interpretation of the terms of the Contract.

ii) Whether the Contract provides a final date for payment meeting the requirements of the HGCRA.

iii) If not, whether an award in the Claimant's favour should await determination of the Defendant's estoppel argument following further particularisation and a further exchange of evidence.

iv) Whether, if the estoppel argument is addressed at this stage, the asserted estoppel is established and has the effect that the Contract is to be seen as compliant with the HGCRA.

v) How the Scheme is to be applied if it is applicable here.

vi) Whether execution of any judgment in favour of the Claimant should be stayed.

The Relevant Terms of the Contract.

6. Clause 7 of the Contract addressed the terms of payment. Sub-clauses 7.2 and 7.3 are of note for current purposes and, with original emphasis, provided that:

> "7.2 The Fee shall (subject to VDC's rights of set-off and deduction) be payable in the instalments stated in Schedule 1 (the '**specified dates**'). The application date for payment of each instalment shall be the specified date in Schedule 1 and the Consultant shall submit an invoice on or before the relevant application date. The due date for payment of each instalment shall be the specified date in Schedule 1. The Consultant's invoice shall state the amount the Consultant considers due to him as at the due date and the basis on which such amount has been calculated (the '**Notified Sum**') and shall be accompanied by such documents, receipts and vouchers as may reasonably be required by VDC. The final date for payment shall be 30 days after the relevant due date save that if the Consultant invoice is issued late, the final date for payment shall be postponed by the same number of days by which the Consultant's invoice is late.
>
> 7.3 If VDC intends to pay less than the Notified Sum, VDC shall not later than five days before the relevant final date for payment give notice to the Consultant of that intention (a '**Pay Less Notice**') specifying the amount VDC considers to be due to the Consultant at the date the notice is given and the basis on which that amount has been calculated. Where such notice is given, VDC shall pay the Consultant not less than the amount stated as due in that notice on or before the final date for payment. If no Pay Less Notice is given in respect of any invoice, VDC shall pay the Notified Sum on or before the final date for payment."

7. At paragraphs 6 and 6.1, Schedule 1 said:

> "6. The Fee shall be calculated on a time charge basis as follows, provided always that such charges are intended to be incurred as set out in the Calculation of Service Fee including Resource Schedule (Numbered Document 4) and any material deviations from such schedule shall be subject to clause 8.1 and only payable to the extent that additional fees are agreed under clause 8.1:

6.1 subject to paragraph 6 above, the number of hours worked by the Consultant shall be multiplied by the Hourly Rates, such hours to be worked during Business Hours."

8. At paragraph 7 that schedule provided that:

> "The Fee shall be paid by instalments as follows:
>
> The Consultant shall submit its monthly invoices to VDC in accordance with the Schedule of Valuation Dates (Numbered Document 10). If Valuation Dates are not stated (or if the schedule of Valuation Dates has expired), the Consultant shall invoice the VDC at the end of each month for Services performed during that month."

9. The Defendant placed considerable weight on the Schedule of Valuation Dates and I have appended that at Appendix 1.

10. The Contract uses the word "invoice" at different points. There is reference to the "Consultant's Invoice" at two points in clause 7.2 and it is the late issuing of that invoice which causes the final date for payment to be postponed. Then, paragraph 7 of Schedule 1 provides for the Consultant to submit monthly invoices in accordance with the Schedule of Valuation Date. Next, the heading of column F of the Schedule of Valuation Dates is "Consultant issues invoice to Employer". That is to occur on the dates in that column which have been calculated as 2 days after issue of the Payment Notice by the Employer's Agent. The parties are agreed that the reference to the Consultant's Invoice in clause 7.2 is not a reference to the Column F invoice. Instead, it is to be read as a reference to the Column B payment application by the Consultant. That interpretation is clearly correct.

The Relevant Notices.

11. The sum claimed by the Claimant is the total of the amounts which it contends are due pursuant to applications for payment numbers 7 and 8. The relevant due dates for those were 4th February 2026 and 6th March 2026 respectively. The Claimant says that the effect of the application of Scheme was that the final dates for payment were 21st February and 6th March respectively, meaning that any pay less notices were to be served by 16th February and 18th March. The pay less notices were in fact served on 27th February and 25th March.

12. The chronology was helpfully set out in Mr Townend KC's written submissions for the Claimant thus:

	Application 7	Application 8
Application	28th January (£943,587.77)	27th February (£873,080.45)
Due Date	4th February	6th March
Payment notice issued by VDC	9th February (£555,855.60)	11th March (£354,616.11)

Pay Less Notice date (if Agreement amended by the Act)	16th February	18th March
Final Date for Payment (if Agreement amended by the Act)	21st February	23rd March
Pay Less Notice issued by VDC	27th February	25th March
Pay Less Notice date (if Agreement not amended by the Act)	1st March	31st March
Final Date for Payment (if Agreement not amended by the Act)	6th March	5th April

The Applicable Law.

13. Section 109 of the HGCRA provides for a party to a construction contract to be entitled to instalments, stage payments, or periodic payments thus:

> "(1) A party to a construction contract is entitled to payment by instalments, stage payments or other periodic payments for any work under the contract unless—
>
> (a) it is specified in the contract that the duration of the work is to be less than 45 days, or
>
> (b) it is agreed between the parties that the duration of the work is estimated to be less than 45 days.
>
> (2) The parties are free to agree the amounts of the payments and the intervals at which, or the circumstances in which, they become due.
>
> (3) In the absence of such agreement, the relevant provisions of the Scheme for Construction Contracts apply.
>
> (4) References in the following sections to a payment provided for by the contract include a payment by virtue of this section."

14. It is against the background of s109 and the entitlement to instalments, stage payments, or periodic payments that sub-sections 110(1) and (3) provide that:

> "(1) Every construction contract shall—
>
> (a) provide an adequate mechanism for determining what payments become due under the contract, and when, and
>
> (b) provide a final date for payment in relation to any sum which becomes due.
>
> The parties are free to agree how long the period is to be between the date on which a sum becomes due and the final date for payment.
>
> …
>
> (3) If or to the extent that a contract does not contain such provision as is mentioned in subsection (1), the relevant provisions of the Scheme for Construction Contracts apply."

15. Section 111 addresses the requirement to pay the notified sum and makes provision for pay less notices as follows:

> "(1) Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.
>
> …
>
> (3) The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.
>
> …
>
> (5) A notice under subsection (3)—
>
> (a) must be given not later than the prescribed period before the final date for payment, and
>
> (b) in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.
>
> (6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).
>
> (7) In subsection (5), 'prescribed period' means—
>
> (a) such period as the parties may agree, or
>
> (b) in the absence of such agreement, the period provided by the Scheme for Construction Contracts."

16. Under the heading "Final date for payment" paragraph 8 of the Scheme says:

> "(1) Where the parties to a construction contract fail to provide a final date for payment in relation to any sum which becomes due under a construction contract, the provisions of this paragraph shall apply.
>
> (2) The final date for the making of any payment of a kind mentioned in paragraphs 2, 5, 6 or 7, shall be 17 days from the date that payment becomes due."

17. In *Rochford Construction Ltd v Kilhan Construction Ltd* [2020] EWHC 941 (TCC) Cockerill J, as she then was, considered the circumstances in which a contract did or did not provide a final date for payment.

18. The relevant term in that case said:

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

19. At [12] Cockerill J pointed out that there was in fact no payment schedule. At [56] she concluded that the contractual arrangements were "unworkable" in the absence of a payment schedule and in light of the provision for the payment certificate to be issued with the invoice. She explained that "pegging the final date to service of an invoice, which is itself pegged to a payment certificate, is simply impractical".

20. Having reached that conclusion Cockerill J held that the Scheme applied regardless of the legal arguments as to the interpretation and effect of s110(1). However, she went on to consider those legal arguments explaining that "with some diffidence" she would have accepted the defendant's submissions in that regard. She summarized those arguments as being that s110 "required a final date for payment provision to fix a time period, albeit that might itself depend on an event to fix the due date". Having referred to the distinction between the wording of s110(1)(a) and (b) Cockerill J said, at [58]:

> "That, [counsel for the defendant] submitted and I accept, suggests that while a due date can be fixed by reference to, say, an invoice or a notice, the final date has to be pegged to the due date, and be a set period of time, and not an event or a mechanism. That also makes a degree of sense given that it will be important for the payer to be exactly certain how much time he or she has in which to serve a payless notice, the final date for payment being the date which is critical to that step."

21. Having referred to s109 and ss110(1)(a) and (1)(b) Cockerill J said, at [61], "The inference is that the possibility to peg final date of payment to an event rather than a fixed period was never considered acceptable under the Act".

22. The same issue was addressed by HH Judge Stephen Davies, sitting as a judge of the High Court, in *Lidl Great Britain Ltd v Closed Circuit Cooling Ltd* [2023] EWHC 2243 (TCC), [2023] BLR 629.

23. The relevant provision in that case provided that the final date for payment was to be as set out in the applicable payment schedule. The schedule, in turn, said that the final date for payment was to be "21 days following (a) the Due Date; or (b) receipt of the Contractor's valid VAT invoice in the sum due by the Employer …; whichever is the later".

24. At [86] Judge Stephen Davies identified the relevant issue as being:

> "… whether a contract term which provides for a final date for payment other than by reference to a specified period between the due date and the final date for payment is compliant with section 110(1)(b)."

25. At [104] the judge pointed out that although the part of Cockerill J's judgment in *Rochford* in which she addressed the effect of s110 was strictly obiter it was "a careful and reasoned decision on the law, which was a separate and an independent basis for finding as she did".

26. Then, at [105], Judge Stephen Davies said that the material facts were the same in *Lidl* as in *Rochford* in that "the final date for payment may be entirely dependent on the date of [the contractor's] invoice, which is not therefore set solely by reference to the due date".

27. Having considered various earlier authorities the judge explained that Cockerill J's decision was not inconsistent with them and then said:

> "122. Moreover, with respect I am satisfied that the decision in *Rochford* is correct for the reasons given by Cockerill J in her judgment. Counsel for Lidl did not in their written submissions articulate any basis for contending that the decision was wrong. They did refer me to the reasons given by Edwards-Stuart J

> in *Volkerlaser* for saying that it made sense for the contractor to be required to provide a VAT invoice and they did submit that requiring a contractor to submit an invoice is not obviously and inherently objectionable in the same way as are the provisions rendered unenforceable by the amendments to the Act, where the due date for payment depends upon occurrences under a separate contract. Whilst I accept all of these points, they do not in my view sufficiently engage with the key point articulated by Cockerill J in *Rochford* and repeated by counsel for 3CL in this case, which is that there is a very obvious and compelling difference between the wording used and the plain intent of section 110(1)(b) when compared with that of section 110(1)(a) and, that on a proper analysis, that is because the *only* discretion intended to be and actually given in the former case is for the parties to agree the length of the time period between the due date for payment and the final date for payment. If it was open to a paying party to include a provision which required the fulfilment of some further condition between the due date for payment and the final date for payment, that would have the effect of driving a coach and horses through the wording and the clear intention of this part of the Act, which is to allow the parties a wide discretion as regards when payments become due under a contract, constrained only by the requirement that it be an adequate mechanism and the specific anti-abuse provisions of section 110(1A) and (1D), but in contrast a much narrower and more circumscribed discretion as regards the final date for payment – only as to the length of the period between the due date and the final date.
>
> 123. I can see that the potential for abuse is not present to anything like the same extent where, as in this case and in the *Volkerlaser* case, the only additional requirement is for the contractor to serve a VAT invoice as well. However, if the way in which Parliament has decided to address this problem is to introduce a blanket prohibition on party autonomy as regards the ascertainment of the final date for payment save as to the length of the period, it is not for the courts to allow parties to agree terms which go beyond that narrow limit simply because they do not appear to have the same potential for abuse."

28. Before me both sides accepted that the law was as stated in *Rochford* and *Lidl,* namely that a contract which does not provide for an identified and fixed period between the due date for payment and the final date for payment fails to provide for a final date for payment for the purposes of s110(1). It is open to parties to have a mechanism which varies the due date for payment but they must provide for a fixed period (the length of which is open to the parties) between the due date for payment, whenever and however that date is established, and the final date for payment.

29. In considering the application of those principles it is necessary to have regard to the entitlement to instalments, stage payments, or periodic payments given by s109. It is also to be remembered that, as Coulson LJ explained in *Bennett (Construction) Ltd v CIMC MBS Ltd* [2019] EWCA Civ 1515 at [67], the purpose of the HGCRA "was to provide for certain minimum, mandatory standards so as to achieve certainty and regular cash flow". An element in the requisite certainty is for the parties to know from the outset that the final date for payment in respect of any instalment will always be an identified and fixed period after the due date for payment.

30. The primary dispute here was as to whether the Contract properly interpreted fell foul of those principles. However, Mr Mort KC for the Defendant did place some weight on the words of Judge Stephen Davies where he referred, in [122],

to "a provision which required the fulfilment of some further condition between the due date for payment and the final date for payment". Based on those Mr Mort contended that what was not permitted was an additional step or mechanism after the due date for payment which would have the effect of decoupling the final date for payment from the due date. On that basis he said that a provision relating to events before the due date for payment would not be subject to the same objection. I do not accept the argument. The words used by Judge Stephen Davies were apt in the circumstances of *Lidl* where the contractor's invoice could only affect the final date for payment when that invoice came after the due date for payment. However, it is not only such provisions which fail to provide a final date for payment for the purposes of s110(1). A provision whereby an event before the due date for payment left that date unaltered but modified the final date for payment would be equally deficient and would be equally contrary to the "blanket prohibition of party autonomy as regards the ascertainment of the final date for payment". This follows as a consequence of the reasoning of both Cockerill J and Judge Stephen Davies. In that regard it is of note that, at [61], Cockerill J explained that the crucial flaw was the pegging of the final date for payment to an event rather than a fixed period. There is no indication in her judgment that the difficulty would be obviated if the event was before rather than after the due date for payment. Similarly, at [105], Judge Stephen Davies identified the deficient provision as being one which made the final date for payment dependent on something other than the due date for payment. It matters not whether the event having that effect is before or after the due date for payment. The same conclusion follows when regard is had to the purpose of this part of the HGCRA and to the need for certainty. Provision for the final date for payment to move because of an event occurring before the due date would be just as inimical to that purpose and just as destructive of certainty as the provision with which Judge Stephen Davies was concerned.

The Interpretation of the Relevant Terms.

31. Mr Mort contended that when interpreting the Contract I should give priority to the Schedule of Valuation Dates. He submitted that the Schedule should be seen as setting out a mechanism for calculation of the various relevant dates. That mechanism was set out in the formulae at the top of columns C to H. It was the Defendant's case that as a consequence the due date for payment would vary depending on the date when the Claimant's payment application was issued but that the interval between the due date for payment and the final date for payment would not vary but would remain at 30 days. This was said to follow from the application of the "c + 30" formula to the due date for payment with the column C figure depending on the date of the payment application and being calculated using the "b + 7 days" formula.

32. Mr Mort relied on a number of factors in support of that interpretation. He submitted that the Contract and the Schedule of Valuation Dates could be seen not to have been drawn up together. In those circumstances the Schedule of Valuation Dates should be regarded as the fruit of actual negotiation between the parties and as an expressly agreed arrangement. That was demonstrated by the identification of particular dates and the setting out of a particular method of calculation. In addition, Mr Mort pointed to the HGCRA as providing part of

the context of the Contract. He said that the parties should be regarded as having intended to reach an agreement which complied with the provisions of that Act. In that regard he relied on the decision of Edwards-Stuart J in *Manor Asset Ltd v Demolition Services Ltd* [2016] EWHC 222 (TCC) and the judgment of Coulson LJ in *Bennett*. He said that the former was relevant as demonstrating that where there are two potential interpretations of a provision in a construction contract that which results in the contract being compliant with the HGCRA should be adopted. The latter was authority for the propositions that the terms imposed by the HGCRA should only be applied where it was necessary to do so in order to achieve the objectives of the Act and in the way that does least violence to the parties' agreement.

33. Mr Townend submitted that the approach to be taken was rather less complex. The Contract could and should be read as a whole with a view to ascertaining the intention of the parties. He submitted that there was no basis for according priority to the Schedule of Valuation Dates and that it was not necessary to do so in order adequately to interpret the Contract. Mr Townend said that the approach in *Bennett* was relevant when the court was considering the way in which the provisions in the HGCRA were to be applied to an agreement. It did not, however, assist in the prior exercise of interpreting the agreement with a view to seeing if it contained the provisions which the Act required to be contained. He accepted that where there were two equally legitimate interpretations of a contract that which meant the contract was lawful and/or compliant with the HGCRA should be adopted but did not accept that there were two equally legitimate interpretations of the Contract and submitted that it was not open to the court to adopt a strained reading of a contract so as to forestall the operation of s110(3).

The Approach to be taken to interpreting the Contract.

34. The starting point for the interpretation of any contract is well-established and not contentious. The court is to seek to ascertain the intention of the parties and to do so by considering the objective meaning of the language used when read in context. The relevant context will, primarily, be the contract in question read as a whole but will include the wider context of the parties' dealings and any relevant statutory framework. Where there are a number of plausible interpretations the court is to engage in an iterative process of testing the competing interpretations against the context and the commercial consequences. Where, however, there is only one legitimate interpretation of the language used when read in context, that interpretation is to be applied regardless of what might be thought to be undesirable consequences. It is against that background that I turn to consider the particular points made as to the approach to be adopted in interpreting the provisions here.

35. I do not accept Mr Mort's argument that some form of priority or precedence is to be given to the Schedule of Valuation Dates above the terms of clause 7.2. That schedule is referred to in Schedule 1 which is, in turn, referred to in clause 7.2. It is not to be seen as having been agreed in some separate or superior way. There are some minor infelicities in the drafting. Thus, clause 7.2 suggests that the dates will be specified in Schedule 1 whereas in fact that schedule then refers to the Schedule of Valuation Dates. Similarly, when referring to the Schedule

of Valuation Dates, Schedule 1 contemplates the possibility that it may not state the valuation dates whereas they are, in fact, spelt out in the former schedule. In addition, the same word "invoice" was used in different documents to refer to different documents. Those are minor glitches of the kind which frequently arise in the drafting of complex documents and are reflective of oversights in proof-reading or cross-referencing of the documents. They do not warrant giving one or other element priority over the another – at least not where they can sensibly be read together and as being consistent in substance.

36. In *Manor Asset* Edwards-Stuart J said at [56] and [57]:

> "56. It seems to me that it goes without saying that the hypothetical reasonable person described in the authorities would expect the amendment to be lawful and, if there was more than one way of reading it, would read it in a way that did not infringe any relevant legislation or which would undermine the purpose of the contract. Mr Lewis effectively accepted this, because [in] his skeleton argument he said, at paragraph 36.1:
>
> > 'It is a principle of construction that where a contract is capable of having two alternative meanings, one of which is lawful and the other unlawful, the former interpretation is to be preferred. This is based on a proposition that the parties are unlikely to have intended to agree to something unlawful or that the court should lean against an interpretation that produces unreasonable consequences.'
>
> 57. Mr Lewis cited authority for this proposition, namely Lewison on The Interpretation of Contracts, 6th edition, at paragraph 7.11. The authorities there cited clearly support the proposition, which I accept as correct."

37. That principle and guidance on its application is set out at paragraph 7.119 and following of the current (eighth) edition of *Lewison*.

38. I respectfully agree with the principles and approach set out by Edwards-Stuart J. However, they are dependent on the contract in question being properly capable of interpretation in more than one way. Edwards-Stuart J was not suggesting that a strained or artificial reading should be adopted if the otherwise appropriate interpretation had the effect of triggering potentially adverse consequences under applicable legislation.

39. The fact that the HGCRA requires a construction contract to contain particular provisions (here provision for a final date for payment) is part of the context. It has, however, only limited weight and cannot justify adopting a strained reading of the Contract.

40. It is of note that the HGCRA provides that if a construction contract does not contain the necessary provisions then the terms of the Scheme are to apply. This is a very different approach from that where legislation or a rule of law provides that a contract containing particular terms or falling to be interpreted in a particular way is unlawful and is to be struck down or invalidated without anything standing in its place. Instead, the Act provides a mechanism for supplementing a contract to make up for the deficiencies and has the consequence that the parties' dealings continue but under fuller provisions. The policy considerations which justify adopting a reading which avoids infringing relevant legislation have less force in such circumstances than they would if the

alternative to a particular reading were to be the striking down of the contract without any replacement.

41. Although the approach set out by Coulson LJ in *Bennett* is very relevant to the questions of the effect of incorporating the provisions of the Scheme and of how such incorporation is to be achieved it does not assist in the question of how the Contract is to be interpreted. At [2] Coulson LJ explained that there were two issues in that case. The first was whether there was compliance with the HGCRA and the second, which only arose if there was non-compliance, was the mechanism by which the Scheme was to be incorporated into the contract in question. The passages on which Mr Mort relied addressed the second issue and not the first. At [45] Coulson LJ concluded that the contract complied with the Act. He went on to consider the mechanism by which the Scheme would have been incorporated if there had been non-compliance. It was in that context that, having concluded that "piecemeal incorporation" of the terms of the Scheme was permissible, he said:

> "54. Accordingly, I regard it as settled law that, where payment provisions do not comply with s.109 or s.110 of the Act, Part II of the Scheme applies, but only to the extent that such implication is necessary to achieve what is required by the Act.
>
> …
>
> 66. It follows from the above that the right replacement option (paragraph 7 of Part II of the Scheme) does the least violence to the agreement between the parties. The adoption of the least damaging option also happened in *Alstom v Jarvis*. Furthermore, the importance of the parties' original agreement, notwithstanding the provisions of the Act, was stressed by the Court of Appeal in *Grove Developments v Balfour Beatty*. It seems to me that, when dealing with Part II of the Scheme, these are matters which should be central to the court's considerations.
>
> 67. That links to a wider point about the underlying purpose of the Act. As previously noted, in relation to payment provisions, the purpose of the Act was to provide for certain minimum, mandatory standards so as to achieve certainty and regular cash flow. Save in perhaps exceptional circumstances, it was not designed to delete a workable payment regime which the parties had agreed and replace it with an entirely different payment regime based on a radically changed set of parameters. It seems to me that could only happen where the regime which had been agreed was so deficient that wholesale replacement was the only viable option. That is plainly not this case."

42. Coulson LJ's guidance in that regard will be very relevant if the Contract is found to be non-compliant with the result that the Scheme applies but it does assist in the prior exercises of, first, interpreting the Contract and, second, assessing whether, on the correct interpretation of the Contract, there is compliance.

43. It follows that the Contract is to be interpreted by reference to the starting point I have summarized above without according priority to the Schedule of Valuation Dates and only leaning in favour of a compliant interpretation if that and a competing interpretation are equally legitimate as readings of the language used when seen in context.

The Application of that Approach.

44. I am satisfied that the effect of the Contract, properly interpreted, is that the dates by reference to which instalment payments are to be made and the due dates for payment are fixed but that the final date for payment can vary depending on the date of the Claimant's payment application. Although not identical to the term considered by Judge Stephen Davies in *Lidl,* clause 7.2 of the Contract has a similar effect.

45. Clause 7.2 is in clear terms. It refers to various "specified dates" which are to be the dates set out in Schedule 1 which in turn refers to the Schedule of Valuation Dates. The due date for payment is to be the date found by applying Schedule 1. The clause provides expressly for the final date for payment to be postponed if the Consultant's invoice is "late". However, it makes no reference to any variation of either the period to which the instalment is to relate or the due date for payment. In the absence of such a reference those dates are unaltered even in the event of the late issue of the payment application.

46. It is relevant to note in this context the provision made in clause 7.2 as to the calculation of the payment application. That is to be in the amount which the Consultant "considers due to him as at the due date". That amount can only be identified and calculated if the due date is a date which is identifiable separately from the payment application. The Contract did not provide for payment applications to be issued at the Consultant's discretion and in amounts which the Consultant considered due at the date of the applications. Instead, in a wholly conventional way, it provided for a series of monthly instalments calculated by reference to calendar months with there being fixed dates by reference to which the instalments were to be valued; fixed dates by when the payment applications were to be made; and for the due dates for payment which were to be fixed dates falling after the dates by when the relevant payment application should have been made.

47. The reference to the payment application being "issued late" is also significant. That provision only makes sense if there is a date by which the payment application should be issued and in relation to which it can be said to be late. One of the difficulties with the Defendant's interpretation of the Contract is that it fails to take this into account. The Defendant's interpretation would mean that both the reference in clause 7.2 to the "relevant application date" and that in the Schedule of Valuation Dates to the "interim valuation date" were to be read as references solely to the date on which the Claimant happened to make the payment application. That is not a legitimate reading of clause 7.2 and it fails to recognise that the Schedule of Valuation Dates clearly envisages that the Interim Valuation Date is a date which can be identified separately from and which is not dependent on the issuing of a payment application by the Claimant.

48. It would have been possible for the Contract to provide that the due date was to be a particular period after the issue of the payment application. That was not done, instead clause 7.2 defined the due date as the "specified date in Schedule 1".

49. I will deal below with the Defendant's argument based on the formulae in the Schedule of Valuation Dates. Subject to that argument I am satisfied that the proper interpretation of the Contract is clear. When clause 7.2, Schedule 1, and the Schedule of Valuation Dates are read together the Contract provides for monthly instalments by reference to periods of calendar months with calculation being made by reference to particular dates at the end of each month and with the due dates for payment being fixed dates after those dates. There is provision for a series of fixed dates by when the payment applications were to be made. Clause 7.2 provided for what was to happen if the payment application was late. That was to be the movement of the final date for payment but not of any other date. Accordingly, the effect of clause 7.2 is that both the interim valuation dates and the due dates for payment are fixed dates separate from and unaffected by the timing of the payment applications. Conversely, the determination of the final dates for payment is dependent on the date of the payment application because they are liable to be postponed if the payment application is issued late.

50. In short, the parties have agreed a series of fixed dates. Having done that, they then made provision for one of those, the final date for payment, to move if the payment application is issued late but not for the others to be changed. The payment application may be issued late but must still be in relation to a particular monthly period and that period and the due date for payment are unaffected by the late issue of the application (which lateness is to be assessed by reference to the interim valuation date as set out in the Schedule of Valuation Dates).

51. The Schedule of Valuation Dates is not inconsistent with this interpretation. Rather, by laying down a series of fixed dates, it is consistent with this interpretation and, as I just have explained, the Defendant's interpretation does not take adequate account of the provisions of that schedule. Clause 7.2 provides for the postponement of one of the dates in those series of dates (the final date for payment) but not the others. The Defendant's argument is that the formulae at the heads of the columns are to be read as applicable to each month and to each payment application. That would have the consequence of there being a fresh calculation each month albeit one in which the final date for payment was always 30 days after the due date for payment which in turn would always be 7 days after the date of the payment application. It would have been possible for the parties to agree such an arrangement but that is not what clause 7.2 provides. The presence of the formulae in the Schedule of Valuation Dates does not alter that position. The formulae show how the dates have been calculated but do not, of themselves and without more, indicate that there is to be a fresh calculation of the dates each month. The formulae would be used for calculation in the event of the expiry of the dates in the schedule but even then there would remain scope for the final date for payment to be postponed even though the due date for payment remained fixed. That would be the effect of the provision in paragraph 7 of Schedule 1 that if the dates had expired the payment application was to be at the end of each month (it is to be remembered that the agreement was for instalments calculated by reference to the work done each month). That would still leave open the possibility of the application being issued "late" with the consequences provided for in clause 7.2 coming into effect.

52. Adoption of the Defendant's interpretation would amount to a wholesale re-writing of the parties' agreement. That interpretation not only fails to give effect to the wording of clause 7.2 but it also fails adequately to reflect the Schedule of Valuation Dates. Adoption of the Defendant's approach would amount to substituting for the clear provisions of clause 7.2 and the dates identified in the Schedule of Valuation Dates a different provision. That would be that the due date for payment and the final date for payment are both to be determined by reference to the formulae in the Schedule of Valuation Dates with the starting point being the date when a payment application was issued rather than a particular valuation date. It would substitute for the identified valuation dates in column B the proposition that the starting point of the calculation was to be whichever date on which a payment application was made. That was not the agreement which the parties made.

53. This is not a case where there are two equally legitimate interpretations where it is open to the court to adopt that which avoids any failure to comply with the HGCRA. Instead, the position is that there is one correct interpretation and that is to be adopted.

54. It follows that the Contract provides for the final date for payment to be postponed if the payment application is issued after the date provided for in the Schedule of Valuation Dates but makes no provision for any movement in the due date for payment in those circumstances. As a consequence, it is possible for the final date for payment to be more than 30 days after the due date for payment and for the interval between the due date for payment and the final date for payment to vary.

Compliance of the Contract with the HGCRA.

55. The Contract differs from that which Judge Stephen Davies was considering in *Lidl* in that the payment application could still be late but may be before the due date. Its effect is otherwise similar because a payment application made late but before the due date for payment would nonetheless have the consequence that the final date for payment was postponed. I have explained at [30] above why I do not accept Mr Mort's argument that there is a distinction between events occurring before and after the due date for payment.

56. As a consequence, the final date for payment is not determined solely by reference to the due date for payment but is dependent on a different event which is the date when the payment application is issued. It follows that applying the approach set out in *Rochford* and *Lidl* the Contract fails to provide a final date for payment as required by s110(1).

57. In those circumstances the effect of s110(3) is that the relevant provisions of the Scheme apply.

The Defendant's Estoppel Arguments.

58. It was common ground that the operation of a statute cannot be excluded by an estoppel. It follows that it would not be open to the Defendant to argue that the Claimant was estopped from invoking the HGCRA if it were otherwise applicable. The estoppel on which the Defendant relies is said to have a rather

different effect. The Defendant says that the parties operated the payment provisions of the Contract in a way which was, in fact, compliant with the HGCRA. It says that the Claimant was estopped from contending that the Contract was to be operated in a different way. As a consequence, the Defendant says, the Contract is to be seen as compliant with the HGCRA and, in particular, as having made provision for a final date for payment as required by the Act.

59. Benedict Capocci acted as Commercial Manager on behalf of the Defendant in relation to the works at the Chandos Park Estate. At [4.3] of his witness statement Mr Capocci says that he believed that the Claimant and the Defendant had a common understanding as to the operation of the Contract and that the Defendant relied on that understanding when operating the Contract. At [4.4] – [4.6] Mr Capocci said:

> "4.4 To be clear, I believe that the Defendant's understanding of how the Consultancy Agreement operates was correct and consistent with the Construction Act. However, if the Defendant is wrong about that, I understand from the Defendant's solicitors, CMS, that the Defendant seeks to rely on an argument based on estoppel. I further understand from the Defendant's solicitors that in circumstances where there is to be a substantial dispute of fact, and an issue of estoppel, then those proceedings are generally not considered suitable for Part 8.
>
> 4.5 The Defendant would like the opportunity to develop its case on estoppel, and I understand from the Defendant's solicitors that that would involve pleadings, disclosure, witness evidence from both parties as to their understanding of the operation of the payment provisions, and an opportunity to cross examine those witnesses.
>
> 4.6 The Defendant has relied on the common understanding between the parties as to the operation of the payment provisions under the Consultancy Agreement throughout the life of the Project. It is on the basis of that common understanding that the Defendant has paid the Claimant during the Project and issued its Pay Less Notices."

60. At [4.7] Mr Capocci set out three elements of the common understanding for which he contended. The first two are uncontentious and related to the meaning of "invoice" and of "the application date for payment" for the purpose of clause 7.2. It is the third element which is contentious and which Mr Capocci expressed thus at [4.7.3]:

> "If the Claimant submitted its Application for Payment late (i.e., after the Interim Valuation Date), the parties treated the later submission date as the Interim Valuation Date for the purposes of the Payment Schedule, and the recalculated the subsequent dates in the Payment Schedule accordingly (i.e., the Due Date in Column C would be calculated as plus 7 days from the later Application for Payment date, and the Final Date for Payment in Column H would be 30 days from the revised Due Date)."

61. Mr Capocci put the same point in slightly different terms at [4.12] where he said:

> "As I explained above, I understood that both parties had a Common Understanding that the above wording from Clause 7.2 simply confirms that there was a discrepancy between (i) the Interim Valuation Date in Column B of the Payment Schedule, and (ii) the date the Application for payment is actually

> submitted, then it is the later date that shall be used to calculate the Final Date for Payment. The Defendant relied on the Common Understanding as to the operation of the payment provisions under the Consultancy Agreement and the Defendant issued its Pay less Notices on that basis."

62. Mr Capocci referred to the history of various of the payment applications and made further references to the alleged common understanding. However, it is of note that he does so in somewhat general terms. Thus, at [4.7] he said that "from all my dealings with the Claimant during the Project I believe that the Claimant operated on the basis that it shared the same understanding as the Defendant as to how clause 7.2 … and the Payment Schedule operated". Then, at [4.15] he says "from my experience during the Project … both parties understood [that where the application for payment was late the final payment date was to be recalculated]". The only details which Mr Capocci gave of the way in which the Claimant's sharing of the understanding was demonstrated were at [5.2] and [5.3] where he said:

> "5.2 During the Project, the Claimant usually submitted its Application for Payment late after the Interim Valuation Date (sometimes by weeks). In those circumstances, the parties treated that later Application for Payment as the Interim Valuation Date for the purposes of the Payment Schedule and adjusted the schedule accordingly.
>
> 5.3 For example, in respect of Application 5/Valuation 8:
>
> 5.3.1 The Interim Valuation Date in the Payment Schedule was listed as 29 October 2025.
>
> 5.3.2 The Claimant submitted its Application for Payment on 20 November 2025, 22 days later than the Interim Valuation Date.
>
> 5.3.3 The other steps in the Payment Schedule were therefore pushed back, The Due date became 27 November 2025 (20 November 2025 plus 7 days) and the Final date for Payment was due by 27 December 2025. Payment was actually made early by the Defendant on 22 December 2025 in advance of that date.
>
> 5.3.4 I note that the revised date for the Claimant to submit its post valuation invoice was 4 December 2025 and the Claimant submitted its invoice on that date. This illustrates the Claimant's understanding of how the payment provisions operated."

63. Ian Carlisle, the Claimant's managing director, addressed Mr Capocci's statement in his responsive witness statement. He denied that there was any such common understanding. Mr Carlisle annexed a table showing the dates of the various notices and contended that these showed that there was no common understanding in the terms alleged by the Defendant.

64. Akenhead J summarized the law on the operation of an estoppel by convention in *Mears Ltd v Shoreline Housing Partnership Ltd* [2015] EWHC 1396 (TCC), 160 Con LR 157 at [49] in these terms:

> "From the cases, one can conclude that the relevant law on estoppel by convention is:

(a) An estoppel by convention can arise when parties to a contract act on an assumed state of facts or law. A concluded agreement is not required but a concluded agreement can be a 'convention'.

(b) The assumption must be shared by them or at least it must be an assumption made by one party and acquiesced in by the other. The assumption must be communicated between the parties in question.

(c) At least the party claiming the benefit of the convention must have relied upon the common assumption, albeit it will almost invariably [be] the case that both parties will have relied upon it. There is nothing prescriptive in the use of 'reliance' in this context: acting upon or being influenced by would do equally well.

(d) A key element of an effective estoppel by convention will be unconscionability or unjustness on the part of the person said to be estopped to assert the true legal or factual position. I am not convinced that 'detrimental reliance' represents an exhaustive or limiting requirement of estoppel by convention although it will almost invariably be the case that where there is detrimental reliance by the party claiming the benefit of the convention it will be unconscionable and unjust on the other party to seek to go behind the convention. In my view, it is enough that the party claiming benefit of the convention has been materially influenced by the convention; in that context, Goff J at the first instance in the *Texas Bank* case determined that this is what is needed and Lord Denning talks in these terms.

(e) Whilst estoppel cannot be used as a sword as opposed to a shield, analysis is required to ascertain whether it is being used as a sword. In this context, the position of the party claiming the benefit of the estoppel as claimant or indeed as defendant is not determinative or does not even raise some sort of presumption one way or the other. While a party cannot in terms found a cause of action on an estoppel, it may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on the estoppel, it would necessarily have failed.

(f) The estoppel by convention can come to an end and will not apply to future dealings once the common assumption is revealed to be erroneous."

65. The position was set out succinctly by O'Farrell J in *C Spencer Ltd v MW High Tech Projects UK Ltd* [2019] EWHC 2547 (TCC), [2019] BLR 643 at [67] where she said:

> "Where parties to a transaction proceed on the basis of a shared underlying assumption on which they have conducted their dealings between them, neither will be allowed to depart from that assumption, even if it is shown to be wrong, when it would be unfair or unjust to do so in all the circumstances".

66. It is necessary to consider (a) whether the allegation of an estoppel by convention should be addressed at this stage or be determined after fuller pleading and consideration of evidence (with a consequent delay of the determination as to relief) and (b) whether, if the issue is addressed, the estoppel asserted by the Defendant is established and operates as a defence to the claim. Although logically distinct, those issues are closely related. If it can be seen now

that, even if it were to be established, the asserted estoppel would not affect the position and consideration of the first question would become unnecessary. Moreover, as will appear from the authorities to which I refer below, the first question requires a degree of assessment of the strength of the estoppel argument. A party asserting an estoppel and contending that the determination of that question should await further particularisation and evidence has to provide sufficient material to enable the court to be satisfied that it has a good enough prospect of establishing the asserted estoppel to justify that course.

67. Mr Townend contended that the question of the estoppel can be determined now. He submitted that the question will turn on the objective interpretation of the parties' dealings in relation to the submission and treatment of payment applications. It is not suggested that there were oral dealings supplementing these and Mr Townend's position was that the court could, at this stage, safely and properly conclude that there was no substance in the Defendant's contention. Mr Mort says that the fact that Mr Carlisle has provided a witness statement in which he says that Mr Capocci's account of the understanding is not correct and where he provides material in support of that contention demonstrates there is a factual dispute the resolution of which requires identification of the issue in pleadings, disclosure, and provision for the cross-examination of witnesses.

68. In *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 353 there had been an assertion of an estoppel by convention. In relation to that Stanley Brunton LJ said at [77] and [78]:

> "77. This case proceeded under CPR Part 8. In general Part 8 proceedings are wholly unsuitable for the trial of an issue of estoppel. Once such a claim is disputed, save in exceptional cases, the proceedings will cease to comply with CPR Part 8.1(2)(a), since they will cease to be proceedings in which the parties do not seek the court's decision only on questions which are 'unlikely to involve a substantial dispute of fact'. A disputed claim of estoppel should be carefully pleaded. I strongly endorse the contents of the note at paragraph 8.0.2 of the White Book:
>
> > 'In essence, the Pt 8 procedure, is in general terms designed for the determination of relevant claims without elaborate pleadings. If the procedure is misused, the defendant can object and equally the court of its own motion, and as part of its function to manage claims, will order the claim to proceed under the general procedure and allocate a track and give appropriate directions.'
>
> 78. In the present case, the parties should have agreed or applied for directions for the exchange of pleadings on the estoppel issue. Pleadings would have clarified precisely how Ros Roca put its case and what facts were in dispute. In the event, this Court has been able to determine the issue of estoppel on the basis of the judge's findings of fact. However, his determination of the factual issues would have been easier, and the risk of injustice less, if the parties had pleaded their respective cases."

69. In *ISG Retail v FK Construction Ltd* [2024] EWHC 878 (TCC) Neil Moody KC, as he then was, sitting as a deputy High Court Judge, was addressing a claim for a declaration arising out of an adjudication process. Mr Moody accepted the defendant's argument that "the arguments on waiver and estoppel [were] likely

to involve substantial disputes of and that they need to be properly pleaded out". In light of that conclusion he declined to grant the declarations sought.

70. However, all will depend on the particular circumstances. It is to be noted that Stanley Brunton LJ was purporting to set out a general but not a universal rule. It is necessary to consider with care what the issues in any given case in fact are and to assess whether there is actually a factual dispute which is inappropriate for determination in Part 8 proceedings.

71. Thus, in *C Spencer* O'Farrell J addressed the issue of whether the raising of an issue of estoppel meant the dispute before her was unsuitable for Part 8 proceedings in this way, at [72] and [73] (emphasis added):

> "72. I do not accept Mr Hargreaves QC's submission that this issue would be unsuitable for Part 8 determination. In general, Part 8 proceedings are unsuitable for the trial of an issue of estoppel: *ING Bank* … per Stanley Burnton LJ at paragraph 77. That is because such issues require careful and precise formulation, and identification of the matters in dispute. In most cases, that is best done through pleadings using the Part 7 procedure. Further, many cases of estoppel involve substantial disputes of fact. <u>However, where the court is concerned with enforcement of the payment and adjudication provisions in the Act, designed to promote cashflow during construction projects through swift interim resolution procedures, it is not sufficient for a party to rely on a vague, unparticularised issue to derail such enforcement</u>.
>
> 73. MW has not identified any relevant issue of fact that is in dispute. The history and basis of earlier interim payments is a matter of documentary record, as are the abortive adjudication reference in respect of interim application 31 and the reason for withdrawal. The exchanges between the parties in regard to interim application 32 are likewise a matter of documentary record. It is not suggested by MW that there were oral meetings or agreements that are pertinent to the issue and require oral evidence to be given. The court has before it the relevant material to determine the question."

72. As Judge Stephen Davies said in *Lidl* at [40]:

> "[T]here is no principle that the mere raising of an estoppel by convention argument makes the case unsuitable for Part 8 determination. The question is whether there needs to be a resolution of contested factual evidence."

73. In that case there were "limited and uncontested contemporaneous documents" on the basis of which Judge Stephen Davies was able to determine the estoppel issue.

74. It is against that background that I turn to the circumstances here. I do so on the footing that, as explained above, the Contract failed to provide a final date for payment because although the interim valuation date and the due date for payment remained fixed the final date for payment could vary.

75. The common understanding asserted by Mr Capocci at [4.7.3] of his witness statement is that despite the terms of the Contract the due date for payment could move and would be 7 days after the date of the payment application (at least if that was late) but that the final date for payment would always be 30 days after the due date.

76. I will proceed on the footing that the arrangement set out by Mr Capocci at [4.7.3] would be compliant with s110(1) of HGCRA as explained in *Rochford* and *Lidl*. That is on the basis that it would amount to a mechanism for determining the due date for payment which could move and which could be a varying period after the interim valuation date but with the final date for payment always being 30 days after the due date. It is possible that there would be scope for argument that such an arrangement would not comply with ss109 and 110 but that need not be considered further here.

77. For the following reasons I have concluded that the Defendant has failed to establish a sufficient case to justify the estoppel issue being put off for determination after the exchange of pleadings and further evidence and that the estoppel argument fails.

78. It is important to keep in mind that the estoppel which is being asserted, and which would be needed for there to be compliance with the HGCRA, would amount to the parties proceeding on the footing that the Contract operated in accordance with the interpretation advanced by Mr Mort and which I have rejected above. That would involve a structured arrangement whereby if the Claimant's payment application was made after the interim valuation date in the Schedule of Valuation Dates then there would be a recalculation of the other dates in the Schedule in accordance with the formulae at the top of the columns with the consequence that the final date for payment was always 30 days after the due date for payment as varied. That would amount to taking the actual date of the payment application as the relevant datum point instead of the interim valuation date stated in the Schedule.

79. Such an arrangement and understanding would be different from a failure by the Claimant to take the point that a particular pay less notice had been issued late. Moreover, the fact that the Claimant did not contend that particular pay less notices had been issued late would not, without more, be indicative of such an arrangement. Instead it could readily be explicable as the consequence of an acceptance that the late issue of a payment application had prevented the Defendant from issuing a pay less notice in time and an acknowledgement that in such circumstances it was not open to the Claimant to say that the pay less notice was late.

80. Mr Capocci's assertion of the common understanding is advanced in vague and unparticularised terms. He does not suggest that there were any oral dealings in which led to the understanding or in which it was communicated (let alone say when and between whom such oral exchanges took place). Nor does he suggest that there was correspondence to this effect but rather that it is to be derived from the payment applications and the exchanges which followed them. Mr Capocci does not explain the form which the Defendant's reliance on the common understanding is said to have taken nor how that reliance was communicated to the Claimant save to refer at [5.3] to the timings of the dealings in relation to application 5/valuation 8. On analysis, however, the highest that evidence comes to is that the Claimant's post valuation invoice happened to be submitted on the date which would be the date for its submission if the timetable had been recalculated in the way for which the Defendant

contends. The invoice itself does not give any indication that it was being submitted on 4th December 2025 for that reason.

81. The asserted common understanding would involve the parties proceeding on a basis which was radically different from the terms of the Contract. Although express contemporaneous articulation that they were doing so is not required for there to be an estoppel by convention, some acknowledgement that they were doing so could have been expected. As a matter of common sense rather than law, the extent to which an alleged common understanding involves a departure from expressly agreed terms will be relevant to the evidence which will be needed before the court can be satisfied on the balance of probabilities that there was such an understanding. A modest departure from the agreed terms is inherently more likely than a radical one or, at least, the more radical the departure the more it is to be expected that one or other party would note the point expressly. Here, the alleged common understanding would amount to a marked departure from the terms of the Contract in relation to an important matter but it is not suggested that there was an express acknowledgement of this.

82. In *Mears* at [49(b)] Akenhead J explained that the shared assumption must be communicated between the parties. Here, Mr Capocci does not suggest that there was any express communication of the understanding but, instead, indicates that the communication is to be derived from the parties acting in a particular way. In context the contention has to be that the actions which the Defendant took in response to the Claimant's payment applications are to be seen as having communicated the alleged understanding. As I will now explain I do not read the exchanges between the parties as having that effect.

83. I have been provided with a substantial quantity of contemporaneous documents. The first consequence of that is that it is possible to see the parties' dealings and to form a clear view as to those dealings without any need for further evidence or elaboration. The second is that the dealings as shown in the documents do not demonstrate that the Defendant acted on the basis of the alleged understanding and still less do they demonstrate that the understanding was shared by the Claimant.

84. The common understanding which is asserted would have been substantiated if the history showed that when the Claimant issued a payment application late it accompanied that with a covering message of some kind setting out its understanding of the revisions to the timetable which flowed from that late submission. The same effect could have been achieved if the Defendant had responded to such a late payment application with a reply setting out its understanding of the revised timetable and if the Claimant had acquiesced in that revision. Mr Capocci does not suggest that there were any exchanges along those lines. Moreover, Mr Carlisle has exhibited a bundle of payment applications and of the consequent exchanges. Those do not contain any exchanges approaching those which would be needed to demonstrate the alleged common understanding.

85. It is of note that Mr Capocci does not, even in the sketchiest of terms, explain the form which any further evidence would take.

86. It is apparent that there was a degree of informality in the parties' dealings and that neither side always held the other rigorously to the terms of the Contract. Such a history does not demonstrate that there was an estoppel by convention let alone one in the terms alleged by the Defendant amounting to a restructuring of the Contract.

87. In reaching this conclusion and in finding that the Defendant has not shown adequate grounds to justify the estoppel issue being put off for determination after further pleadings and further evidence I am mindful that the purpose of the HGCRA is to promote cashflow during the course of construction contracts and of the cautionary note sounded by O'Farrell J in *C Spencer* as quoted above.

The Application of the Scheme.

88. Mr Mort invoked the approach of Coulson LJ in *Bennett* at [54], [66], and [67] which I have quoted above. In light of that approach Mr Mort submitted that the piecemeal application of the Scheme was permissible; that workable payment regimes were not to be struck down; and that the provisions agreed by parties should only be replaced by those of the Scheme to the extent that it is necessary in order to achieve the purposes of the HGCRA. As a consequence he contended that the appropriate course was for the court to treat the final date for payment here as having been an unextendible period of 30 days after the due date for payment. Such a course would mean that the Defendant's pay less notices had been issued in time.

89. The course proposed by Mr Mort has considerable attraction. The parties here clearly contemplated a 30-day period between the due date and the final date for payment. The substitution for that period of the 17 days provided for in the Scheme is a marked reduction and it is arguable that it gives the Claimant something of a windfall. Attractive though that course would be I have concluded that it is not open to me as a matter of law.

90. The first and most important reason for this is as follows. The effect of the decisions in *Rochford* and *Lidl* is that the Contract failed to provide a final date for payment. S110(3) is clear that where a final date for payment has not been provided then the Scheme applies. Paragraph 8 of the Scheme is then in clear and direct terms. It provides unequivocally that where a contract does not provide a final date for payment a final date of 17 days is imposed. As Judge Stephen Davies explained in *Lidl* at [123] Parliament has placed limits on party autonomy in this context. Where the parties contract on terms which do provide a final date for payment they are free to fix the interval between the due date for payment and that date. Where they fail to provide a final date then Parliament has imposed a solution. The court has no power to impose a different solution.

91. The second and related reason is that Mr Mort's approach would involve imposing on the parties a regime different from that which they agreed (which was a 30-day interval but one which was liable to be extended) and different from that laid down in the Scheme (with a 17-day period). There is no basis for doing that. To do so would amount to redrafting the parties' agreement in such a way as to result in an agreement which would have been compliant with the HGCRA if it had been agreed by the parties in the first place. That is different

from a piecemeal application of the Scheme. The HGCRA provides for the imposition of the Scheme in these circumstances it does not empower the court to redraft the parties' agreement and still less does it empower the court to vary the periods laid down in the Scheme where it applies.

92. It follows that paragraph 8 of the Scheme applies with the consequences that the final date for payment is 17 days after the due date and that the Defendant's pay less notices were out of time.

The Defendant's Application for a Stay of Execution.

93. The Defendant invokes CPR r83.7(4)(a) and seeks a stay of execution of any award in favour of the Claimant.

94. It was common ground that, as Mr Mort submitted, the principles which HH Judge Coulson QC, as he then was, articulated in *Wimbledon Construction Company 2000 Ltd v Vago* [2005] EWHC 1086 (TCC) as applying to applications to enforce adjudication awards are equally applicable to "smash and grab" applications such as the present. Those principles were set out in the following terms at [26] with (d) – (f) being of potential relevance here:

> "In a number of the authorities which I have cited above the point has been made that each must turn on its own facts. Whilst I respectfully agree with that, it does seem to me that there are a number of clear principles which should always govern the exercise of the court's discretion when it is considering a stay of execution in adjudication enforcement proceedings. These principles can be set out as follows:
>
> a) Adjudication (whether pursuant to the 1996 Act or the consequential amendments to the standard forms of building and engineering contracts) is designed to be a quick and inexpensive method of arriving at a temporary result in a construction dispute.
>
> b) In consequence, adjudicators' decisions are intended to be enforced summarily and the claimant (being the successful party in the adjudication) should not generally be kept out of its money.
>
> c) In an application to stay the execution of a summary judgment arising out of an Adjudicator's decision, the Court must exercise its discretion under Order 47 with considerations a) and b) firmly in mind (see **AWG**).
>
> d) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances within the meaning of Order 47 rule 1(1)(a) rendering it appropriate to grant a stay (see **Herschell**).
>
> e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted (see **Bouygues** and **Rainford House**).
>
> f) Even if the evidence of the claimant's financial position suggested that it is probable that it would be unable to repay the judgment sum when it fell due, that would not usually justify the grant of a stay if:

(i) the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made (see **Herschell**); or

(ii) The claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator (see **Absolute Rentals**)."

95. The Defendant says there are substantial sums owed to it by the Claimant. Mr Capocci asserts that on a true valuation there will be a balance owing to the Defendant. In addition he says that the Defendant has a damages claim of the order of £25 - £30m against the Claimant in relation to design issues.

96. It is said that the Claimant is insolvent alternatively that its position is so weak that if the Defendant were to be ordered to pay it the amount claimed and were subsequently successful on the true valuation and/or the damages claim then the money would have been lost and would not be recouped. In that regard the Defendant referred to the Claimant's financial statements for the year ended 31st December 2024. These show a net equity of £611,289 (down from £744,484 the preceding year). Addressing the going concern status of the Claimant the statements said at [1.2]:

> "At the time of approving the financial statements, the director has a reasonable expectation that the company has adequate resources to continue in operational existence for the foreseeable future.
>
> The company is dependent upon the continued support from the ultimate controlling party, Deerns Groep B.V., who have provided written confirmation that they will act in a prudential manner about the decision if and when to claim back any portion of funding provided in order that this action would not preclude other creditors of Deerns UK Ltd to be paid in full."

97. In addition, the Defendant points to the comments made by the Claimant's solicitors when writing to the court on 7th May 2026 and pressing for an expedited hearing. At [2.4] – [2.7] those solicitors said:

> "2.4 The Defendant's approach has therefore put the Claimant under extreme financial pressure in circumstances where the LHR11 Project has been the Claimant's main revenue. Put simply, the Claimant has been starved of cash flow since December 2025.
>
> 2.5 The Claimant has and continues to receive numerous demands for payment from various subcontractors engaged by the Claimant on the LHR11 Project and is under increasing pressure from them. However, the Claimant has not received payment from the Defendant in order to pay any monies which are due down the chain. One subcontractor has now issued a money claim in the Civil National Business Centre against the Claimant.
>
> 2.6 Due to heavy reliance on the income that comes from such a large project, the Claimant is also struggling to meet the ongoing operational running costs of the business.
>
> 2.7 A hearing in May 2026 and a declaration in the terms sought by the Claimant, including payment of the sum of £910,501.71 plus VAT and interest, will allow the Claimant to pay its Creditors in full (to the extent that monies are properly due) and likely avoid an insolvency process at

> this time. It is imperative that the Claimant's financial position is stabilised as soon as possible and thus a hearing beyond May 2026 will create additional risk for both the Claimant in terms of an insolvency process and its Creditors in terms of not being paid in full for its services. There is an increasing risk of insolvency as time passes beyond the end of May with a steep trajectory of risk rising during June 2026, which can become critical at any moment."

98. In response to Mr Capocci's evidence Mr Carlisle has exhibited certificates showing that the Claimant has professional indemnity insurance (albeit on my reading limited to £10m). Mr Carlisle accepts that work on the development at Chandos Park Estate was a major project for the Claimant taking up a lot of its time and resource with the consequence that the termination of the Claimant's engagement by the Defendant and the failure to make any further payment since January 2026 have had a significant adverse effect on its cashflow. It maintains that nonetheless the Claimant remains a going concern and points to other work which the Claimant has obtained and other projects on which it hopes to be engaged.

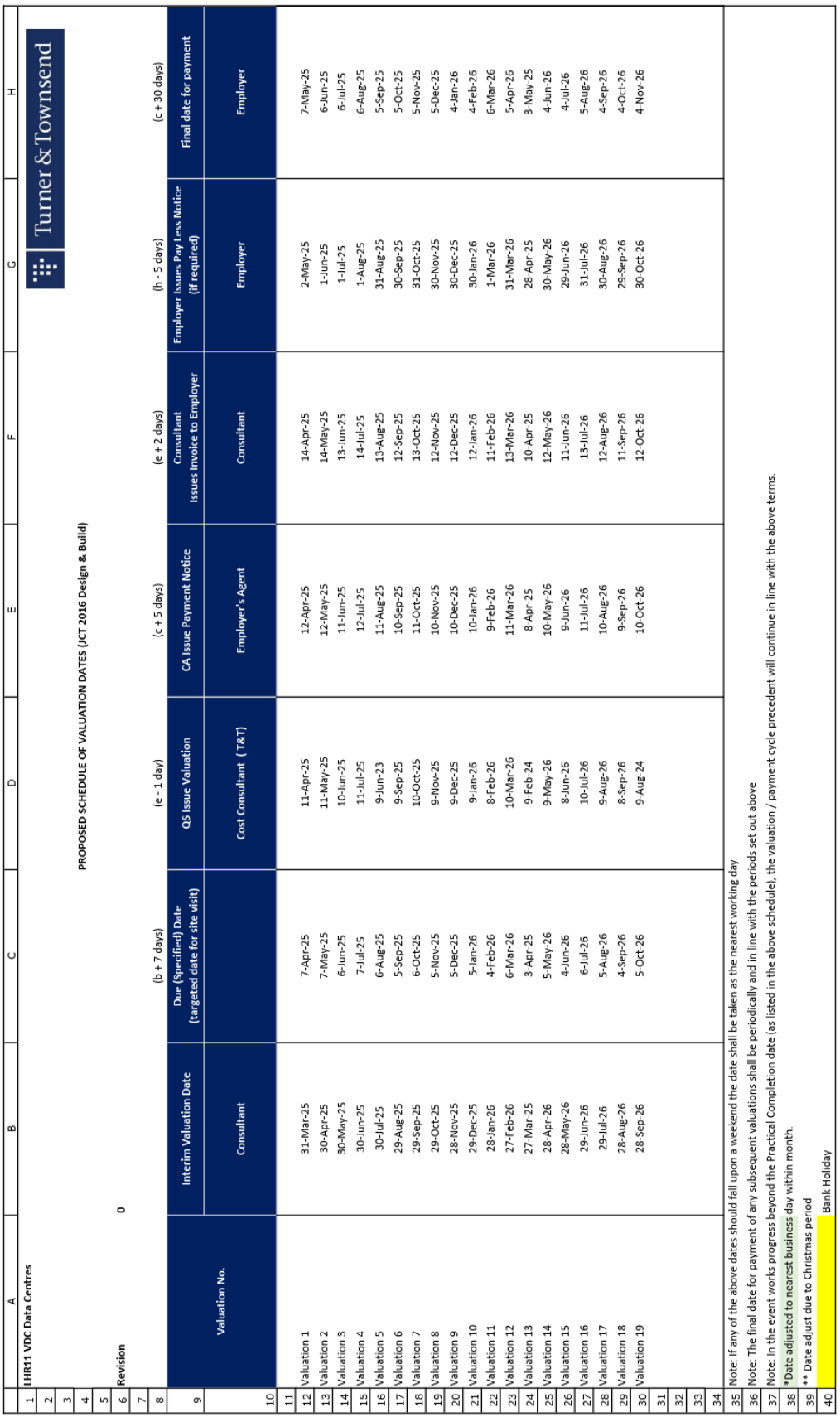
99. Supplementing Mr Carlisle's, evidence Mr Townend pointed out that not only are the Defendant's cross-claims disputed but also they have not yet progressed beyond the stage of initial correspondence and no pre-action protocol letter has yet been served. Mr Townend also submitted that both limbs of [26(f)] of the *Wimbledon Construction Co v Vago* principles were satisfied here.

100. In my judgement grounds for a stay have not been established. It is apparent that the Claimant has a real need for the sums now claimed. Although it is solvent the net equity is comparatively modest in light of the sums potentially at stake and it may be that the claims being advanced by the Defendant will exceed the extent of the Claimant's insurance cover. The Claimant is nonetheless a going concern and the Defendant's cross-claims are a very long way off being established. I am satisfied that the [26(f)] factors apply in that the Claimant's financial position is not materially worse than it was at the time when the parties entered the Contract and that the Defendant's failure to pay the sums which are due as a consequence of my findings has played a significant part in the Claimant's financial difficulties. The application for a stay is, therefore, refused.

Conclusion.

101. Subject to submissions as to the form of any order there will be judgment for the Claimant in the amounts claimed.

Appendix 1 – Schedule of Valuation Dates.



LHR11 VDC Data Centres

PROPOSED SCHEDULE OF VALUATION DATES (JCT 2016 Design & Build)

Turner & Townsend

Revision 0

Valuation No.	Interim Valuation Date	Due (Specified) Date (targeted date for site visit)	QS Issue Valuation	CA Issue Payment Notice	Consultant Issues Invoice to Employer	Employer Issues Pay Less Notice (if required)	Final date for payment
	Consultant		Cost Consultant (T&T)	Employer's Agent	Consultant	Employer	Employer
		(b + 7 days)	(e - 1 day)	(c + 5 days)	(e + 2 days)	(h - 5 days)	(c + 30 days)
Valuation 1	31-Mar-25	7-Apr-25	11-Apr-25	12-Apr-25	14-Apr-25	2-May-25	7-May-25
Valuation 2	30-Apr-25	7-May-25	11-May-25	12-May-25	14-May-25	1-Jun-25	6-Jun-25
Valuation 3	30-May-25	6-Jun-25	10-Jun-25	11-Jun-25	13-Jun-25	1-Jul-25	6-Jul-25
Valuation 4	30-Jun-25	7-Jul-25	11-Jul-25	12-Jul-25	14-Jul-25	1-Aug-25	6-Aug-25
Valuation 5	30-Jul-25	6-Aug-25	9-Jun-23	11-Aug-25	13-Aug-25	31-Aug-25	5-Sep-25
Valuation 6	29-Aug-25	5-Sep-25	9-Sep-25	10-Sep-25	12-Sep-25	30-Sep-25	5-Oct-25
Valuation 7	29-Sep-25	6-Oct-25	10-Oct-25	11-Oct-25	13-Oct-25	31-Oct-25	5-Nov-25
Valuation 8	29-Oct-25	5-Nov-25	9-Nov-25	10-Nov-25	12-Nov-25	30-Nov-25	5-Dec-25
Valuation 9	28-Nov-25	5-Dec-25	9-Dec-25	10-Dec-25	12-Dec-25	30-Dec-25	4-Jan-26
Valuation 10	29-Dec-25	5-Jan-26	9-Jan-26	10-Jan-26	12-Jan-26	30-Jan-26	4-Feb-26
Valuation 11	28-Jan-26	4-Feb-26	8-Feb-26	9-Feb-26	11-Feb-26	1-Mar-26	6-Mar-26
Valuation 12	27-Feb-26	6-Mar-26	10-Mar-26	11-Mar-26	13-Mar-26	31-Mar-26	5-Apr-26
Valuation 13	27-Mar-25	3-Apr-25	9-Feb-24	8-Apr-25	10-Apr-25	28-Apr-25	3-May-25
Valuation 14	28-Apr-26	5-May-26	9-May-26	10-May-26	12-May-26	30-May-26	4-Jun-26
Valuation 15	28-May-26	4-Jun-26	8-Jun-26	9-Jun-26	11-Jun-26	29-Jun-26	4-Jul-26
Valuation 16	29-Jun-26	6-Jul-26	10-Jul-26	11-Jul-26	13-Jul-26	31-Jul-26	5-Aug-26
Valuation 17	29-Jul-26	5-Aug-26	9-Aug-26	10-Aug-26	12-Aug-26	30-Aug-26	4-Sep-26
Valuation 18	28-Aug-26	4-Sep-26	8-Sep-26	9-Sep-26	11-Sep-26	29-Sep-26	4-Oct-26
Valuation 19	28-Sep-26	5-Oct-26	9-Aug-24	10-Oct-26	12-Oct-26	30-Oct-26	4-Nov-26

Note: If any of the above dates should fall upon a weekend the date shall be taken as the nearest working day.

Note: The final date for payment of any subsequent valuations shall be periodically and in line with the periods set out above

Note: In the event works progress beyond the Practical Completion date (as listed in the above schedule), the valuation / payment cycle precedent will continue in line with the above terms.

*Date adjusted to nearest business day within month.

** Date adjust due to Christmas period

Bank Holiday