



FK obtains TKO in latest dispute between serial litigants

In *ISG Retail Limited v FK Construction Limited* [2024] EWHC 878 the Technology and Construction Court (TCC) considered the latest dispute between these “*serial litigants*” (as they were described by the Judge, Neil Moody KC). We have looked at the decision in one of the several previous actions between the same parties [here](#).

In this latest ‘instalment’ of the saga, the TCC found that proceedings commenced by ISG using the procedure set out in Part 8 of the Civil procedure Rules were not suitable for Part 8 since the proceedings were likely to give rise to substantial disputes of fact, and FK’s arguments had real prospects of success.

Background

ISG Retail Limited (“**ISG**”) was the main contractor on a scheme in Avonmouth, Bristol known as Project Barberry. FK Construction (“**FK**”) were engaged under a sub-contract for the roofing and cladding works.

A dispute arose following FK’s Application for Payment 21. The matter was referred to well-known construction adjudicator Matthew Molloy. As part of his decision, Mr Molloy determined that FK was entitled to an extension of time (“**EoT**”) of 188 days and associated prolongation costs of £198,000 (the “**Molloy Decision**”).

Subsequently ISG brought a Part 8 claim for a final determination of a key issue underlying those elements of the Molloy Decision (for reasons linked to other ongoing adjudications and litigation between the parties, neither party had sought summary judgment to enforce the Molloy Decision itself). In short, ISG contended that compliance with clause 9(5) of the sub-contract (the “**Delay Clause**”) was a condition precedent to entitlement to EoT, which FK had not fulfilled.

For its part, FK denied that the Delay Clause was a condition precedent, alternatively said that it had complied with the term, and, in the further alternative, said that ISG was estopped from relying on the Delay Clause and/or had waived its entitlement to rely on it.

As to suitability of the proceedings for Part 8, ISG contended that there were two short points to be determined, namely whether the Delay Clause was a condition precedent, and whether it had been breached. FK alleged that to the contrary, the case involved examination of a great deal of factual material and was wholly unsuitable for Part 8. ISG responded that FK was “*obfuscating the issues*” by deploying “*every conceivable argument*” in a bid to persuade the court not to decide the case on a Part 8 basis.

Held

The Judge found that FK had an arguable case on waiver and estoppel which had a real prospect of success. He therefore concluded the proceedings were not suitable for Part 8 determination and declined to make any of the declarations sought by ISG.

Guidance on the use of Part 8

The Judge referred to the salient points in *Berkeley Homes (South East London) Limited v John Sisk and Son Limited* [2023] EWHC 2152 which provides guidance on the correct approach to Part 8 proceedings:

- The proceedings should not involve substantial disputes of fact (CPR 8.1(2));
- The court may order the claim to continue as if the claimant had not used the Part 8 procedure and give directions it considers appropriate (CPR 8.1(4)); and
- The Part 8 procedure is designed for determination of claims without elaborate proceedings (see the *White Book* 8.0.1; and

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ING Bank NV v Ros Roca SA [2012] 1 WLR 472).

Substantial Dispute of Fact

ISG's argument that FK had not fulfilled the Delay Clause was disputed by FK.

FK argued that the Early Warning Notices (EWNs) it had provided amounted to compliance with the Delay Clause. FK also argued it had, in addition, held periodic progress reviews. The Judge accepted notification may not always be given in the same way and considered this aspect of the dispute was too elaborate to be dealt with under the Part 8 procedure.

Secondly, FK contended that on receipt of the EWNs and other forms of notification, a "reasonable recipient" would have objectively understood these to have complied with the Delay Clause. Following *Mannai Investment Co v Eagle Star Life Assurance Co Ltd*, FK argued this should be set within the context of contemporaneous discussions and meetings between the parties. Again, the Judge agreed with FK that it was inappropriate for this defence to be considered in Part 8 proceedings on account of it being likely to elicit substantial disputes of the facts between parties.

Waiver and Estoppel

Despite estoppel having been dealt with in Part 8 proceedings previously, this was deemed appropriate only where the argument had "no real prospects of success" (as was the case in [CLS Civil Engineering Limited v WJG Evans and Sons](#) – more information concerning that decision can be found [here](#)).

In the present case, it was decided (as was the case in *ING v Ros Roca*) that:

"In general Part 8 proceedings are wholly unsuitable for the trial of an issue of estoppel."

The Judge then considered FK's waiver argument and decided that this was also unsuitable for Part 8

determination. As provided for in *Sleaford Building Services v Isoplus Piping Systems Ltd [2023]*:

"[45] ...FK has an arguable case of waiver and/or estoppel which has a real prospect of success. It is clear to me that the arguments on waiver and estoppel are likely to involve substantial disputes of fact and that they need to be properly pleaded out. ..."

Analysis

The case provides further illustration of the relatively narrow scope of Part 8 CPR. While Part 8 proceedings might have been thought suitable to determine an apparently self-contained issue as to whether the contractual term was a condition precedent which had been breached, the ability of the Defendant to identify arguments which were likely to involve substantial disputes of fact and had a real prospect of success led the Judge to conclude that the use of Part 8 was, on further analysis, inappropriate.

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