Claim No: HT-2020-000392

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)
[2021] EWHC 2207 (TCC)

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 03/08/2021

Before:

MRS JUSTICE O'FARRELL DBE

- -

Between:

ECO WORLD – BALLYMORE EMBASSY GARDENS COMPANY LIMITED	**Claimant**
- and -	
DOBLER UK LIMITED	**Defendant**

- -
- -

Andrew Rigney QC & Crispin Winser (instructed by DLA Piper UK LLP) for the **Claimant**
James Bowling (instructed by Fladgate LLP) for the **Defendant**

Hearing date: 26th January 2021
Further submissions: 18th & 30th March 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

"**Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Tuesday 3rd August 2021 at 10:30am"**

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Mrs Justice O'Farrell:

1. This is the hearing of a Part 8 claim for declarations as to the proper construction and effect of the liquidated damages provisions in a construction contract entered into between the Claimant ("EWB") and the Defendant ("Dobler"), in circumstances where EWB has taken over part of the works as completed.

2. EWB's position is that the liquidated damages clause is void and/or unenforceable. The contract permits EWB to take partial possession of the works in advance of practical completion but does not contain any mechanism for reducing the level of liquidated damages to reflect such early possession. In those circumstances, EWB is entitled to claim general damages for delay, including any substantiated damages above the contractual liquidated damages cap.

3. Dobler's position is that the liquidated damages clause is valid and operable. There is an effective mechanism for reducing liquidated damages when partial occupation is taken by EWB. Alternatively, if the liquidated damages clause is penal and void, general damages are nevertheless capped at the level of liquidated damages in the contract.

4. The parties agree that if the Part 8 Claim fails, judgment should be entered for Dobler without the need for enforcement proceedings.

The Contract

5. EWB is a property developer. Dobler is the UK subsidiary of the German curtain walling and glazing company, Dobler Metallbau GmbH.

6. By a contract in writing dated 11 July 2016, EWB engaged Dobler as Trade Contractor to carry out the design, supply and installation of the façade and glazing works for Building A04, part of a development of apartments known as Embassy Gardens Phase 2, Nine Elms, London SW8 5BA ("the Contract").

7. The Contract included the following documents:

   i) Articles of Agreement;

   ii) Trade Contract Particulars;

   iii) The JCT 2011 Construction Management Trade Contract ("the Conditions"), subject to a schedule of modifications.

8. The "Works" were defined in Clause 1.1 of the Conditions as:

> "the work referred to in the Agreement, as more particularly shown, described or referred to in the Trade Contract Documents, which is to be carried out by the Trade Contractor as part of the Project, including any changes made to that work in accordance with this Trade Contract."

9. The work referred to in the Agreement was:

> "the design, supply and installation of facade and glazing works (the "Works") for Building A04 as part of the design and construction of Buildings A03, A04 and A05, Embassy Gardens Phase 2, Nine Elms, London SW8 5BA (the "Project")."

10. Building A04 comprises three residential blocks arranged around a ground level courtyard:

    i) Block A is twenty-three storeys in height and provides one hundred and seventy-nine high value residential apartments and penthouses;

    ii) Blocks B and C provide eighty affordable housing units over ten-storeys.

11. The lump sum Contract price was £8,604,809, subject to adjustment in accordance with the terms of the Contract.

12. The Completion Period was defined in clause 1.1 of the Conditions as:

> "the period for completion of the Works or such works in a Section as stated in Part 3 of the Trade Contract Particulars (item 6) or as revised in accordance with these Conditions."

13. Part 3 of the Trade Contract Particulars set out the programme for the Works. Following design, procurement and materials delivery, the period required for execution of the Works on site, after the expiry of the period of notice to commence work, was fifty-four weeks.

14. The Contract did not contain any provision for the Works to be carried out or completed within Sections.

15. Clause 2.5 of the Conditions (as amended) stated:

> "The Works shall be carried out and completed in accordance with the programme details stated in Part 3 of the Trade Contract Particulars and regularly and diligently and in such order, and at such time or times and in such manner as the Construction Manager shall instruct, subject, as respects construction but not design work, to receipt by the Trade Contractor of notice to commence work in accordance with those particulars and subject to clauses 2.25 to 2.28. If the Trade Contractor is in breach of the foregoing he shall without prejudice to and pending the final determination or agreement between the parties as to the amount of such loss or damage (if any) suffered or to be suffered by the Employer in consequence thereof forthwith pay or allow to the Employer such sum as the Employer shall bona fide estimate as the amount of such loss or damage such estimate to be binding and conclusive upon the Trade Contractor until such final determination or agreement."

16. Clause 2.6 of the Conditions clarified that Dobler, as one of a number of trade contractors working on the project, would not have exclusive possession of any part of the site when carrying out its Works:

> "The Construction Manager shall permit the Trade Contractor to occupy so much of the site of the Project as is reasonably required for the execution of the Works, but such occupation shall not be exclusive and the Trade Contractor shall not object to the use or occupation of that part of the site by any other person engaged by the Employer on or in connection with the Project unless such use or occupation will or is likely to cause or contribute to any delay or obstruction of the Trade Contractor in the execution of the Works."

17. Clause 2.31 of the Conditions (as amended) stated:

> ".1 The Trade Contractor shall give the Construction Manager not less than 10 (ten) Business Days' notice of the date upon which the Trade Contractor considers that the Works in any Section will be complete. The Construction Manager and representatives of the Funder shall be entitled to inspect the Works …
>
> .2 The Construction Manager shall, within 10 (ten) Business Days of any inspection made pursuant to clause 2.31.1, notify the Trade Contractor of any outstanding matters which require to be attended to before the Works in the relevant Section can be considered to be complete in accordance with the Trade Contract Documents and the Trade Contractor shall attend to such matters …
>
> .3 The Construction Manager shall issue a certificate as to the date when practical completion of the Works shall be deemed to have taken place for all purposes of the Trade Contract …"

18. Clause 2.32.1 of the Conditions (as amended) contained provisions for liquidated damages to be payable in respect of late completion of the Works in the following terms:

> "2.32.1 If the Trade Contractor fails to complete the Works or works in a Section by the relevant Date for Completion of a Section or the Works, the Employer may, not later than 5 days before the final date for payment of the amount payable under clause 4.16, give notice to the Trade Contractor which shall state that for the period between the relevant Date for Completion of a Section or the Works and the date of practical completion of the Works or Section that:

> 2.32.1.1 he requires the Trade Contractor to pay liquidated damages at the rate stated in the Trade Contract Particulars, or lesser rate stated in the notice, in which event the Employer may recover the same as a debt; and/or
>
> 2.32.1.2 that he will withhold or deduct liquidated damages at the rate stated in the Trade Contract Particulars, or at such lesser stated rate, from sums due to the Trade Contractor.
>
> 2.32.2 If the Employer intends to withhold or deduct all or any of the liquidated damages payable, an appropriate Pay Less Notice must be given by or on behalf of the Employer. "

19. The Trade Contract Particulars specified the rate of liquidated damages applicable under the Contract:

> "The following rates of liquidated damages will apply for the first 4 weeks (inclusive) of delay in completion of the Works beyond the Date for Completion:
>
> • £nil per week or pro rata for part of a week.
>
> Liquidated damages will apply thereafter at the rate of £25,000 per week (or pro rata for part of a week) up to an aggregate maximum of 7% of the final Trade Contract Sum…"

20. Clause 2.33 (as amended) provided for EWB to take over part of the Works prior to practical completion of the whole Works:

> "If at any time or times prior to the date of issue by the Construction Manager of the certificate of practical completion for the Works or such works in a Section that the Employer wishes to take over any part or parts of the Works or such works in a Section, then, notwithstanding anything expressed or implied elsewhere in this Trade Contract, the Employer may take over such part or parts. The Construction Manager shall thereupon give the Trade Contractor notice identifying the part or parts taken over and giving the date when the Employer took over those part or parts ("the Relevant Part" and "the Relevant Date" respectively)."

21. Clause 2.34 stated:

> "For the purpose of clauses 2.36 and 4.21.2, practical completion of the Relevant Part shall be deemed to have occurred on the Relevant Date."

22. Clause 2.35 provided:

> "As from the Relevant Date the insurance obligations of the Employer other than the defects liability protection referred to in paragraph 1.2 of Schedule 3 shall terminate in respect of the Relevant Part (but not otherwise)."

23. Clause 2.36 of the Conditions (as amended) provided:

> ".1 If any defects, shrinkages or other faults in the Works or such works in a Section appear prior to the Final Release Date due to materials, goods or workmanship not in accordance with this Trade Contract … or any failure of the Trade Contractor to comply with his obligations in respect of the Trade Contractor's Design Portion:
>
> .1 such defects, shrinkages and other faults shall be specified by the Construction Manager in a schedule of defects which he shall deliver to the Trade Contractor as an instruction not later than 14 days after the Final Release Date; and
>
> .2 notwithstanding clause 2.36.1.1, the Construction Manager may whenever he considers it necessary issue instructions requiring any such defect, shrinkage or other fault to be made good, provided no instructions under this clause 2.36.1.2 shall be issued after delivery of a schedule of defects or more than 14 days after the Final Release Date.
>
> .2 Within the period specified in such schedule or instructions, the defects, shrinkages and other faults shall at no cost to the Employer be made good by the Trade Contractor …
>
> unless the Construction Manager shall otherwise instruct …"

24. The Final Release Date was defined in the Trade Contract Particulars as twenty-four months after practical completion of the Works.

25. Clause 2.37 provided that the Employer should take responsibility for protecting the Works or such works in a Section at all times after the date of practical completion.

26. Clause 4.21.2 and the Trade Contract Particulars provided for retention of three per cent to be deducted from the gross valuation of interim certificates in respect of work which had not reached practical completion. Half of the retention would be released in respect of the valuation of work which had reached practical completion.

The Works

27. On 8 August 2016 Dobler commenced its work on site.

28. The original contractual completion date for the Works was 21 August 2017 but, by a Deed of Variation with an effective date of 23 January 2018, the parties agreed an extended New Completion Date of 30 April 2018:

> "3.1.3 The Parties hereby agree that the 30 April 2018 shall be the new completion date for the Works (including the Revised Scope) ("New Completion Date"). The term New Completion Date shall have the meaning of "Completion Period" where stated in the Trade Contract."

29. Clause 5 of the Deed of Variation included the following provisions:

> "5.2 Liquidated damages at the rates stated in the Contract Particulars may only be levied by the Employer from the New Completion Date onwards where applicable pursuant to the Trade Contract.
>
> 5.3 Any delay to the Trade Contractor from the Effective Date onwards that delays completion of the Works (as revised by the Revised Scope) past the New Completion Date are to be dealt with in accordance with the provisions of the Trade Contract."

30. The Works were not completed by the New Completion Date of 30 April 2018.

31. During the week ending 15 June 2018, EWB took over Blocks B and C. EWB did not issue a practical completion certificate in respect of these parts of the Works.

32. On 20 December 2018 the Works were certified as having achieved practical completion.

The adjudications

33. Disputes arose between the parties as to the final account valuation, including variations, extensions of time and any liquidated damages payable.

34. On 7 May 2019 EWB issued a provisional assessment of the Final Trade Contract Sum, assessing the final amount as £8,202,631.41. Taking into account the total sum of £9,225,761.44 already paid to Dobler, EWB would be entitled to a payment from Dobler of £1,023,130. The breakdown attached to the letter showed a deduction of £574,184.20 in respect of liquidated damages, stated to be calculated as: "£25,000 a week, capped at 7%".

35. On 10 May 2019 Dobler issued a pay less notice, assessing the Final Trade Contract Sum as £10,646,062.40, which would entitle Dobler to a further payment from EWB of £1,420,300.94. The breakdown attached to the letter showed no deduction in respect of liquidated damages.

36. Article 7 of the Articles of Agreement and clause 9.2 of the Conditions provided that either party could refer any dispute or difference arising under the Contract to adjudication. There have been three adjudications between the parties.

37. The first adjudication between the parties did not result in a decision.

38. In the second adjudication, Dobler's position was that EWB took over Blocks B and C early, on 15 June 2018; as a result, Blocks B and C were deemed practically complete, and thereafter the liquidated damages provision became void and unenforceable for uncertainty or because it was operated as a penalty clause. EWB's position was that it had not taken over Blocks B and C and defects in the Works prevented achievement of practical completion until 20 December 2018. Further, the liquidated damages of £25,000 per week did not amount to a penalty for the continuing delay to Block A alone.

39. On 15 August 2019 the adjudicator, David White, published his decision, deciding that:

    i) the value of the final Trade Contract Sum was £9,972,627.86,

    ii) EWB was entitled to liquidated damages for delay beyond the New Completion Date up to the date on which it took over part of the works;

    iii) on 15 June 2018 EWB took partial occupation Blocks B and C, which amounted to deemed practical completion of those blocks and liquidated damages could not be levied after that date;

    iv) Dobler was entitled to an extension of time up to 25 June 2018 and, therefore, no liquidated damages were payable.

40. In the third adjudication, Dobler claimed additional sums in respect of its works, asserting that liquidated damages were an exhaustive remedy for delay and that EWB was not entitled to claim general damages for delay. EWB relied on the decision in the second adjudication as rendering the liquidated damages regime void for uncertainty or a penalty; as a result, EWB claimed it was entitled to deduct general damages for late delivery of Block A in the sum of £2,228,705.85.

41. On 21 October 2020 the adjudicator, Philip Harris, published his decision, deciding that:

    i) he was bound by the decision in adjudication 2 that contractual liquidated damages applied up to practical completion of Blocks B and C on 15 June 2018 but not thereafter;

    ii) the liquidated damages provision was not uncertain or unenforceable as a penalty; it was an exhaustive remedy for delay, excluding any entitlement on the part of EWB to general damages;

    iii) EWB must pay Dobler £598,135.71 plus VAT, the sum due in respect of payment application 30.

The proceedings

42. On 28 October 2020 EWB issued these Part 8 proceedings, seeking the Court's determination of the following questions:

    i) Are the liquidated damages provisions in clause 2.32.1 void and/or unenforceable?

ii) If so, is EWB entitled to claim general damages for delay and, if so, are any recoverable damages limited by reference to the void and/or unenforceable provisions of clause 2.32.1?

43. The remedy sought is declaratory relief in the following terms:

i) The liquidated damages provisions in clause 2.32.1 are void and/or unenforceable.

ii) The Claimant is therefore entitled to claim general damages for delay.

iii) The recoverable damages are not limited by reference to the void and/or unenforceable provisions of clause 2.32.1.

iv) The conclusion in the Second Adjudication Decision, to the effect that the Claimant was (in principle) entitled to liquidated damages in accordance with clause 2.32.1 up to the date on which the Claimant took over part of the Works, but not thereafter, is wrong and is not binding on the parties.

v) The conclusion in the Third Adjudication Decision, to the effect that the Claimant was not entitled to claim general damages for delay, is wrong and is not binding on the parties. Consequently, the Claimant is entitled to pursue a claim for general damages for delay and Mr Harris's valuation of Application 30 and his order that the Defendant pay £598,135.71 (plus VAT and interest) to the Claimant is not binding on the parties.

Parties submissions

44. Mr Rigney QC, leading counsel for EWB, submits that where an employer under a construction contract has (and exercises) a contractual right to take early possession, but the liquidated damages provisions do not contain a mechanism for reducing the level of liquidated damages to reflect such early possession, the liquidated damages provisions are void and/or unenforceable. Where liquidated damages provisions are void and/or unenforceable, the employer is entitled to recover general damages for delay in completion, and the void and/or unenforceable liquidated damages do not cap the damages recoverable.

45. Alternatively, Mr Rigney submits that, irrespective of the position in relation to construction contracts in general, clause 2.32.1 of the Trade Contract is void and/or unenforceable and EWB is therefore entitled to recover general damages for delay; such general damages are not capped at £25,000 per week or an aggregate maximum of 7% of the final Trade Contract Sum.

46. Mr Bowling, counsel for Dobler, submits that under clause 2.34, EWB's taking over a Relevant Part had two limited effects: (i) EWB had to release the first half of the retention held for the Relevant Part (clause 4.21.2 and Particulars item 4.21); and (ii) Dobler came under a new obligation in respect of the works within a Relevant Part to comply with the Construction Manager's instructions to fix defects as directed (clause 2.36). However, all other obligations on the part of Dobler continued pending the issue of a certificate of practical completion in respect of all works, including its obligation to carry out and complete the Works in clause 2.1. Clause 2.32 includes a mechanism

for the rate of liquidated damages to be reduced and therefore avoids rendering the provision a penalty in the event that parts of the works are taken over. EWB had discretion to deduct the full rate of liquidated damages or a lesser rate, which discretion must be exercised reasonably, having regard to its take-over of part of the works.

47. Mr Bowling submits that if, contrary to Dobler's primary case, the liquidated damages provision is unenforceable, nevertheless it acts as a cap on general damages.

48. Thus, both parties have performed a *volte-face* in that they are each arguing the case taken by the other side in the adjudications.

Whether the liquidated damages provision is void and/or unenforceable

49. The issue is whether, on a true construction, clause 2.32 is penal and/or unenforceable, having regard to the provisions for partial take-over of the Works and any mechanism for reducing the level of liquidated damages to reflect such take-over.

50. The leading case on liquidated damages is the decision of the Supreme Court in *Cavendish Square Holding BV v Makdessi* [2015] UKSC 67, in which the penalty test was re-stated by Lords Neuberger and Sumption (with whom Lord Carnwath agreed):

> "[31] In our opinion, the law relating to penalties has become the prisoner of artificial categorisation, itself the result of unsatisfactory distinctions: between a penalty and genuine pre-estimate of loss, and between a genuine pre-estimate of loss and a deterrent. These distinctions originate in an over-literal reading of Lord Dunedin's four tests and a tendency to treat them as almost immutable rules of general application which exhaust the field… The real question when a contractual provision is challenged as a penalty is whether it is penal, not whether it is a pre-estimate of loss. These are not natural opposites or mutually exclusive categories. A damages clause may be neither or both. The fact that the clause is not a pre-estimate of loss does not therefore, at any rate without more, mean that it is penal. To describe it as a deterrent (or, to use the Latin equivalent, in terrorem) does not add anything. A deterrent provision in a contract is simply one species of provision designed to influence the conduct of the party potentially affected. It is no different in this respect from a contractual inducement. Neither is it inherently penal or contrary to the policy of the law. The question whether it is enforceable should depend on whether the means by which the contracting party's conduct is to be influenced are "unconscionable" or (which will usually amount to the same thing) "extravagant" by reference to some norm.
>
> [32] The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some

> appropriate alternative to performance. In the case of a straightforward damages clause, that interest will rarely extend beyond compensation for the breach, and we therefore expect that Lord Dunedin's four tests would usually be perfectly adequate to determine its validity. But compensation is not necessarily the only legitimate interest that the innocent party may have in the performance of the defaulter's primary obligations.
>
> [33] The penalty rule is an interference with freedom of contract. It undermines the certainty which parties are entitled to expect of the law. Diplock LJ was neither the first nor the last to observe that "The court should not be astute to descry a 'penalty clause'": Robophone at p 1447. As Lord Woolf said, speaking for the Privy Council in Philips Hong Kong Ltd v Attorney General of Hong Kong (1993) 61 BLR 41, 59, "the court has to be careful not to set too stringent a standard and bear in mind that what the parties have agreed should normally be upheld", not least because "[a]ny other approach will lead to undesirable uncertainty especially in commercial contracts.
>
> …
>
> [35] … In a negotiated contract between properly advised parties of comparable bargaining power, the strong initial presumption must be that the parties themselves are the best judges of what is legitimate in a provision dealing with the consequences of breach."

51. Lord Mance, who delivered a concurring judgment, stated at [152]:

> "What is necessary in each case is to consider, first, whether any (and if so what) legitimate business interest is served and protected by the clause, and, second, whether, assuming such an interest to exist, the provision made for the interest is nevertheless in the circumstances extravagant, exorbitant or unconscionable. In judging what is extravagant, exorbitant or unconscionable, I consider (despite contrary expressions of view) that the extent to which the parties were negotiating at arm's length on the basis of legal advice and had every opportunity to appreciate what they were agreeing must at least be a relevant factor."

52. Lord Hodge stated the applicable test at [255]:

> "I therefore conclude that the correct test for a penalty is whether the sum or remedy stipulated as a consequence of a breach of contract is exorbitant or unconscionable when regard is had to the innocent party's interest in the performance of the contract. Where the test is to be applied to a clause fixing the level of damages to be paid on breach, an extravagant disproportion

> between the stipulated sum and the highest level of damages that could possibly arise from the breach would amount to a penalty and thus be unenforceable. In other circumstances the contractual provision that applies on breach is measured against the interest of the innocent party which is protected by the contract and the court asks whether the remedy is exorbitant or unconscionable."

53. The commercial benefits to both parties of an effective liquidated damages provision was recently considered in *Triple Point Technology, Inc v PTT Public Company Ltd* [2021] UKSC 29 per Lady Arden at [35]:

> "… Parties agree a liquidated damages clause so as to provide a remedy that is predictable and certain for a particular event (here, as often, that event is a delay in completion). The employer does not then have to quantify its loss, which may be difficult and time-consuming for it to do…"

Also, per Lord Leggatt at [74]:

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

54. The starting point for the court is to construe the relevant provisions. It is now well-established that, when interpreting a written contract, the court is concerned to ascertain the intention of the parties by reference to what a reasonable person, having all the background knowledge which would have been available to the parties, would have understood them to be using the language in the contract. It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the contract, (iii) the overall purpose of the clause and the contract, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense,

but (vi) disregarding subjective evidence of any party's intentions: *Arnold v Britton* [2015] UKSC 36 per Lord Neuberger Paras.15-23; *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50 per Lord Clarke Paras.21-30; *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38 per Lord Hoffmann Paras.14-15, 20-25.

55. Clause 2.32 of the Conditions provided for liquidated damages to be paid or allowed by Dobler if it failed to complete the Works by *"the relevant Date for Completion of … the Works"*.

56. The Works comprised the façade and glazing works for Blocks A, B and C of Building A04 within the development.

57. Clause 2.5 of the Conditions and Part 3 of the Trade Contract Particulars provided for the whole of the Works to be completed within one defined period of fifty-four weeks on site. In the Deed of Variation, the parties extended that period and agreed a single revised date for completion, namely, 30 April 2018.

58. The Contract did not contain any provision for sectional completion or specify separate completion dates for each block.

59. Therefore, subject to any extensions of time, Dobler's liability to pay or allow liquidated damages arose if it failed to complete the façade and glazing works for all three blocks of Building A04 by 30 April 2018.

60. Clause 2.32 as drafted contemplated the applicability of liquidated damages in respect of any failure to meet (a) contractual dates for completion of sections of the works and/or (b) a contractual date for the whole of the works. However, the liquidated damages specified in the Trade Contract Particulars were confined to one rate for: *"delay in completion of the Works beyond the Date for Completion"*, subject to the grace period of four weeks. The Contract did not provide for an alternative rate of liquidated damages that would be applicable to any late completion affecting only one of the blocks, or part of the Works.

61. The natural and ordinary meaning of the words used in the above provisions was that Dobler was obliged to complete all its work in Blocks A, B and C, to achieve practical completion of the Works. If Dobler failed to complete any of its work in Blocks A, B or C by the New Completion Date (or any extended date), EWB would be entitled to liquidated damages at the rate set out in Part 3 of the Trade Contract Particulars.

62. Clause 2.33 entitled EWB to take over part of the Works prior to practical completion. However, neither that clause, nor any other provision in the Contract contained any mechanism for adjustment to be made to the rate of liquidated damages payable thereafter.

63. Mr Bowling submits that, although clause 2.33 permitted EWB to take over part of Dobler's works prior to practical completion, such take-over was of limited effect under the Contract; in particular, deemed practical completion of that part did not relieve Dobler of a continuing obligation to complete the works in that part pursuant to clause 2.1. Clause 2.34 provided that practical completion of any part taken over ("the Relevant Part") would be deemed to have occurred *"for the purpose of clauses 2.36 and 4.21.2"*. Mr Bowling correctly points out that clause 2.34 was of limited effect;

Dobler was obliged to rectify defects notified under clause 2.36 in respect of the Relevant Part and Dobler became entitled to the release of the first half of retention held in respect of the Relevant Part under clause 4.21.2. However, in my judgment, it does not follow that taking over part of its work had no further impact on Dobler's wider obligations under the Contract.

64. The deeming provision contained in clause 2.34 was not expressed to preclude the Relevant Part from being treated as practically complete for other purposes. Unhelpfully, the term "take over" was not defined in the Contract but in practice the effect of such take-over was that the Relevant Part was agreed to be complete. Although Dobler did not have any entitlement to exclusive possession of the site, clause 2.6 obliged EWB to permit Dobler to occupy such part of the site as was reasonably required for the execution of the Works. By taking over of part of the Works under clause 2.33, EWB effectively excluded Dobler from that part of the site. Once EWB took over part of the Works and excluded Dobler from that part, its right to instruct further work was limited to defects rectification under clause 2.36. As a result, Dobler had no further obligation or right to carry out its work in such part. That was reflected in clause 6.3.3 (dealing with liability for damage to the property): *"If clause 2.33 has been operated, then, after the Relevant Date, the Relevant Part shall not be regarded as "'the Works" or "work executed" for the purpose of clause 6.3.1."* Although that provision was concerned with property damage, it is indicative of a change in contractual status of the Relevant Part that went beyond the deeming provision in clause 2.34.

65. Both parties benefitted from early take-over of part of the Works. Dobler's obligation to carry out that part of the Works ceased and was replaced by its obligation to rectify defects under clause 2.36. Dobler became entitled to release of half of the retention in respect of the value of the Relevant Part under clause 4.21.2. EWB also benefitted from early completion of part of the Works. Separate obligations were owed by EWB to the relevant local authority to complete Blocks B and C by specified dates, failing which liquidated damages would become payable by EWB. Taking over Blocks B and C prior to completion of the Works enabled EWB to progress the follow-on trades in those blocks and hand them over to the local authority, thus avoiding or reducing any liability for liquidated damages. Taking over Block A prior to practical completion enabled EWB to lease or sell the apartments, generating early revenues or reducing financing costs.

66. In summary, as a matter of construction, the Contract entitled EWB to take over part of the Works prior to practical completion. Both parties benefitted from operation of clause 2.33. However, Dobler was not entitled to any relief from liquidated damages to reflect such take-over. The full rate of liquidated damages continued to be applicable to the reduced scope of the outstanding works.

67. Mr Rigney submits that where an employer under a construction contract has (and exercises) a contractual right to take early possession, but the liquidated damages provisions do not contain a mechanism for reducing the level of liquidated damages to reflect such early possession, the liquidated damages provisions are void and/or unenforceable. Reliance for that proposition is placed on the following extracts from the leading construction law textbooks:

Keating on Construction Contracts (11th Edition) (2021) at paragraph 10-023:

> "Difficulties can arise where a single sum is stipulated for liquidated damages but the works are to be completed in sections at different times or where the employer takes possession of part of the works before completion of the whole. Unless there are effective provisions for dividing the single sum between the sections or reducing it in proportion to the part taken into possession, a claim for liquidated damages will fail."

Hudson's Building and Engineering Contracts (14th Edition) (2020) at paragraph 6-024:

> "… in the absence of a properly completed contractual mechanism for sectional completion and accompanying liquidated damages, it has been held the liquidated damages clauses are liable to be rendered inoperable or invalidated through the Employer taking possession of a section of the works. Unless there are effective provisions for dividing the single sum between the sections or reducing it in proportion to the part taken into possession, a claim for liquidated damages will fail."

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

69. When construing the relevant provisions of the Contract to determine whether the liquidated damages regime is operable, it is helpful to consider the cases cited by Mr Rigney in support of his argument.

70. In *Bramall & Ogden v Sheffield City Council* (1983) 29 BLR 73 His Honour Judge Hawser QC held that a liquidated damages provision was unenforceable and a penalty because the mechanism for calculating such damages where partial possession was taken did not work. The contract in that case provided for the contractor to construct 123 dwellings and associated works. Clause 22 provided for payment of "a sum calculated at the rate stated in the Appendix as Liquidated and Ascertained Damages" in respect of any failure to complete the works by the contractual date for completion. The rate for liquidated damages in the Appendix was expressed as "at the rate of £20 per week for each uncompleted dwelling". There was no contractual provision for sectional completion but as individual houses were completed they were taken over by the employer by consent. Clause 16(e) of the contract provided:

> "In lieu of any sum to be paid or allowed by the Contractor under clause 22 of these Conditions in respect of any period during which the works may remain incomplete occurring after the date on which the Employer shall have taken possession of the relevant part there shall be paid or allowed such sum as bears the same ratio to the sum which would be paid or allowed apart from

> the provisions of this Condition as does the Contract Sum less the total value of the relevant part to the Contract Sum."

The intention was that where parts of the works were taken into possession by consent, the sum to be paid or allowed as liquidated damages should be proportionately reduced on the basis of the value of the occupied part relative to the full contract sum. The court found that the provision was inoperable by reason of the inconsistency between clause 16(e) and the Appendix; the calculation required in clause 16(e) could not be carried out by reference to a rate per uncompleted dwelling, rather than a specific rate for the whole of the works, particularly in circumstances where the works were not confined to the construction of the dwellings.

71. His Honour Judge Hawser QC stated at p.85-89:

> "Mr Stimpson's argument may I hope be summarised as follows. The "Works" cover not only the houses but the other items above referred to. Condition 22 refers to a failure "to complete the Works" by the extended date. As from that date the employer becomes entitled to liquidated damages until the Works are completed. Clause 16 deals with the consensual taking of possession of part of the Works. Condition 16(e) provides for the sum payable after taking possession in respect of the period during which the Works remain incomplete. The way in which the liquidated damages are dealt with is set out in the Appendix. This does not allow of the calculation to be made which is required by Condition 16(e), and one cannot operate the Appendix and Condition 16(e) in the circumstances of this case. The inconsistency can only be reconciled if provision is made in the contract for sectional completion of those parts which are taken over and to which specific liquidated damages provisions are applied …
>
> There is no doubt that the applicants' argument is a very technical one, but I think that it is correct …
>
> I think one must read and give effect to both conditions. I do not think one can avoid the conclusion that Condition 16(e) would apply to the present situation, and it does not seem to be consistent with the liquidated damages as set out in the Appendix.
>
> It would of course be open to the parties to have made appropriate provision in the contract itself so as to deal with the situation …
>
> It seems to me, therefore, that in the absence of any provision for sectional completion in this contract, the respondents were not entitled to claim or deduct liquidated damages as provided in the Appendix."

72. The decision in *Bramall & Ogden* was referred to by Her Honour Judge Kirkham in *Avoncroft Construction Limited v Sharba Homes (CN) Limited* [2008] EWHC 933 (TCC) at [3] to [7]. However, that case concerned the enforcement of an adjudicator's decision. The central issue was whether any entitlement to liquidated damages could be set-off against the sum awarded by the adjudicator. Having decided that no set-off was available, it was unnecessary for the judge to analyse the contract provisions to determine the issue of entitlement to liquidated damages.

73. Another example of inoperability arose in the case of *Taylor Woodrow Holdings Limited v Barnes & Elliott Limited* [2004] EWHC 3319 (TCC). In that case, although the contract provided for sectional completion and a pro-rata adjustment of liquidated damages to take account of partial possession, the adjustment could not be calculated because the scope of works falling within each section was not adequately defined or capable of ascertainment from the contract documents. On that basis, His Honour Judge Wilcox held that the liquidated damages provision was void for uncertainty at [22]:

> "It follows inexorably that if for the purposes of clause 24 the contents of any section were not ascertained in the contract, or any mechanism agreed between the parties whereby they could be ascertained, there is no basis for triggering the operation of clause 24 since it would be uncertain what had remained undone and when. The arbitrator so found. In my judgment his construction of the contract was correct. Clause 24 was void for uncertainty; it was incapable of operation. Clause 17.1.4 was inoperable. By virtue of that, where partial possession was given, the proportionate relief from any LADs on the section was incapable of calculation. Any LADs, referred as they were to living units, however comprised, would not bear a proper relationship to the extent of the section not take into possession."

74. Thus, in the cases above, the courts did not reject, as automatically fatal, the concept of one rate of liquidated damages for late completion of the works where there is sectional completion or partial possession; rather, the express provisions in each case simply did not work because of errors in drafting.

75. As a matter of construction, the provisions in this case are reasonably clear and certain. There is one completion date for the whole of the Works. Liquidated damages are payable at the rate set out in the Trade Contract Particulars for failure to complete the whole of the Works by the completion date. There is no reduction in the rate of liquidated damages where partial completion is achieved or the employer takes over part of the Works prior to practical completion. Such provisions are capable of being operated. The Contract in this case does not give rise to the difficulties found in *Brammell v Ogden* or *Barnes & Elliott* that rendered the provisions void and unenforceable.

76. The issue that then arises is whether the liquidated damages provision, as construed above, is penal and unenforceable as submitted by Mr Rigney on behalf of EWB. The basis of that submission is the use of the same rate of liquidated damages as compensation for late completion of any combination of Blocks A, B and/or C, despite the fact that different levels of loss would be incurred; in particular, where EWB chose to exercise its right under clause 2.33 to take over part of the works.

77. That issue is certainly a factor that the court must consider. In *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co* [1915] AC 79, one of Lord Dunedin's tests was that there was a presumption (but no more) that a provision would be penal: "when a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage". In some cases the use of a single rate of liquidated damages payable regardless whether 10% or 90% of a development is handed over, or completed, after the contractual date for completion, might indicate that the liquidated damages provision amounted to a penalty; but in other cases, it might not. Mr Rigney accepted that, as a matter of principle, a rate of liquidated damages that was objectively modest would not amount to a penalty simply because it applied to a number of different breaches. Each provision must be considered in the context of the contract as a whole.

78. In my judgment, applying the test set out in *Cavendish Square*, the liquidated damages provision in this case is not unconscionable or extravagant so as to amount to a penalty for the following reasons.

79. Firstly, the liquidated damages provision was negotiated by the parties, who both had the benefit of advice from external lawyers, as explained by Daniel Rauh, the Managing Director of Dobler, in his witness statement. The court should be cautious about any interference in the freedom of the parties to agree commercial terms and allocation of risk in their business dealings. As noted by Lord Leggatt in *Triple Point* (above), such a provision limits the contractor's exposure to an unknown and open-ended liability, while at the same time giving the employer certainty about the amount that it will be entitled to recover as compensation. Each party is therefore better able to manage the risk of delay in the completion of the project.

80. Secondly, EWB had a legitimate interest in enforcing the primary obligation of Dobler to complete the Works as a whole by the New Completion Date. Late completion of any part of the Works was likely to have an adverse impact on the work of following trade contractors carrying out fit out and other finishing works, causing not just delay but also disruption to the project as a whole. Late completion of Blocks B and/or C would expose EWB to liability for liquidated damages to the local authority. Late completion of Block A would expose EWB to the risk of losing purchasers for the apartments.

81. Thirdly, quantification of the damages that would be suffered by EWB would be difficult, particularly if part, but not all, of the Works were completed on time. Different combinations of partially incomplete blocks could result in a wide range of the categories of loss referred to above. By fixing in advance the liquidated damages payable for late completion of the whole Works, the parties avoided the difficulty of calculating and proving such loss.

82. Fourthly, the level of damages was set at £25,000 per week (or pro rata for part of a week), with a grace period of four weeks and a maximum of 7% of the Trade Contract Sum, a cap of £602,336.63 at the date of the Contract. There is no evidence before the court, and it has not been suggested by either party, that such level of damages was unreasonable or disproportionate to the likely losses in the event of late completion of the work in any one or more of the blocks forming part of Building A04.

83. In those circumstances, the liquidated damages provision is not extravagant, exorbitant or unconscionable. It is a secondary obligation which imposes a detriment on Dobler which is proportionate to the legitimate interest of EWB in the enforcement of the primary obligation of completion of the Works in accordance with the terms of the Contract. In conclusion, the liquidated damages provision is valid and enforceable.

Alternative argument as to clause 2.32

84. Although not necessary given the above conclusion, for completeness I have considered Dobler's alternative argument that clause 2.32 contains a mechanism for reducing liquidated damages that would save the provision if otherwise inoperable.

85. Clause 2.32 provides that EWB may give notice that it requires Dobler to pay:

> "liquidated damages at the rate stated in the Trade Contract Particulars, or lesser rate stated in the notice."

86. Mr Bowling submits that where a party reserves to itself discretion to set a rate or price, a term is implied that such discretion must not be exercised unreasonably. Where there has been partial take-over of work, it would be unreasonable to deduct full liquidated damages. An unreasonable exercise of discretion would fall outside the scope of clause 2.32 and be invalid. If EWB takes over part of the Works but wishes to preserve its entitlement to liquidated damages, it must serve notice setting a new, lesser rate, within the reasonable range of values having regard to the nature scope and extent of any Relevant Part taken over that would reduce EWB's delay-based losses.

87. The leading case on the implication of terms of rationality or reasonableness as a constraint on the exercise of contractual discretion is *Braganza v BP Shipping* [2015] UKSC 17, in which Lady Hale (with whom Lord Kerr agreed) stated:

> "[18] Contractual terms in which one party to the contract is given the power to exercise a discretion, or to form an opinion as to relevant facts, are extremely common. It is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. Nevertheless, the party who is charged with making decisions which affect the rights of both parties to the contract has a clear conflict of interest. That conflict is heightened where there is a significant imbalance of power between the contracting parties as there often will be in an employment contract. The courts have therefore sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given.
>
> [21] … In *Paragon Finance plc v Nash* [2001] EWCA Civ 1466, [2002] 1 WLR 685, the court had to consider whether there was any implied term limiting the power of a mortgagee to set interest rates under a variable rate mortgage. Dyson LJ had no difficulty in holding (at paras 32 to 36) that it was necessary, in order to

> give effect to the reasonable expectations of the parties, to imply a term that the power would not be exercised dishonestly, for an improper purpose, capriciously or arbitrarily. He went on to discuss whether there should also be a term that the power would not be exercised unreasonably. He concluded that there had been a "somewhat reluctant" extension of the implied term to include "unreasonableness that is analogous to *Wednesbury* unreasonableness" (paras 37 to 42)."
>
> [22] These authorities, together with *Ludgate Insurance Co Ltd v Citibank NA* [1998] Lloyd's Rep IR 221, 239-240, and *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] EWCA Civ 1047, [2001] 2 All ER (Comm) 299, at paras 64, 67, 73, are helpfully summarised by Rix LJ in *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] EWCA Civ 116, [2008] Bus LR 1304. In his conclusion, at para 66, he substitutes the more modern term "irrationality" for unreasonableness:
>
> > "It is plain from these authorities that a decision-maker's discretion will be limited, as a matter of necessary implication, by concepts of honesty, good faith, and genuineness, and the need for the absence of arbitrariness, capriciousness, perversity and irrationality. The concern is that the discretion should not be abused. Reasonableness and unreasonableness are also concepts deployed in this context, but only in a sense analogous to *Wednesbury* unreasonableness, not in the sense in which that expression is used when speaking of the duty to take reasonable care, or when otherwise deploying entirely objective criteria: as for instance when there might be an implication of a term requiring the fixing of a reasonable price, or a reasonable time. In the latter class of case, the concept of reasonableness is intended to be entirely mutual and thus guided by objective criteria. ... Laws LJ in the course of argument put the matter accurately, if I may respectfully agree, when he said that pursuant to the *Wednesbury* rationality test, the decision remains that of the decision-maker, whereas on entirely objective criteria of reasonableness the decision-maker becomes the court itself.""

88. A distinction can be drawn between the exercise of discretion by one party under a contract, where such a term may be implied, and the exercise of an absolute contractual right by a party, where such a term is unnecessary. In *Mid-Essex Hospital Services NHS Trust v Compass Group UK and Ireland Ltd* [2013] EWCA Civ 200 Jackson LJ considered the earlier authorities then available in respect of a contractual provision entitling the trust to award service failure points at [83]:

> "An important feature of the above line of authorities is that in each case the discretion did not involve a simple decision whether or not to exercise an absolute contractual right. The discretion involved making an assessment or choosing from a range of options, taking into account the interests of both parties. In any contract under which one party is committed to exercise such a discretion, there is an implied term. The precise formulation of that term has been variously expressed in the authorities. In essence, however, it is that the relevant party will not exercise its discretion in an arbitrary, capricious or irrational manner. Such a term is extremely difficult to exclude, although I would not say it is utterly impossible to do so."

89. Having considered the contractual framework for the calculation of service failure points and the Trust's discretion to impose them, Jackson LJ determined that an implied term did not arise in that case:

> "[91] The discretion which is entrusted to the Trust in relation to service failure points and deductions in the present case is very different from the discretion which existed in the authorities discussed above. The Trust is a public authority delivering a vital service to vulnerable members of the public. It rightly demands high standards from all those with whom it contracts. There may, of course, be circumstances in which the Trust decides to award less than the full amount of service failure points or to deduct less than it is entitled to deduct from a monthly payment. Nevertheless the Trust could not be criticised if it awards the full number of service failure points or if it makes the full amount of any deduction which it is entitled to make. The discretion conferred by clause 5.8 simply permits the Trust to decide whether or not to exercise an absolute contractual right.
>
> [92] There is no justification for implying into clause 5.8 a term that the Trust will not act in an arbitrary, irrational or capricious manner. If the Trust awards more than the correct number of service failure points or deducts more than the correct amount from any monthly payment, then there is a breach of the express provisions of clause 5.8. There is no need for any implied term to regulate the operation of clause 5.8."

90. In *Equitas Insurance Limited v Municipal Mutual Insurance Limited* [2019] EWCA Civ 718 Males LJ emphasised the necessity for the relevant provision to be construed as part of the contract before determining whether the provision was one to which any implied term would apply:

> "[113] … Although the *Mid Essex* case uses the expression "absolute contractual right" that is the result of a process of construction which takes account of the characteristics of the parties, the terms of the contract as a whole and the contractual context, not a starting point intrinsic to the term itself. It is only possible to say whether a term conferring a contractual choice on

> one party represents an absolute contractual right after that process of construction has been undertaken."

91. In *TAQA Bratani Ltd v RockRose* [2020] 2 Lloyd's Rep 64 His Honour Judge Pelling QC (sitting as a High Court Judge) cautioned against unnecessary interference with the contractual freedom of the parties in commercial contracts:

> "[53] Absolute rights conferred by professionally drawn or standard form contracts including but not limited to absolute rights to terminate relationships and roles within relationships are an everyday feature of the contracts that govern commercial relationships and extending Braganza to such provisions would be an unwarranted interference in the freedom of parties to contract on the terms they choose, at any rate where there is no fiduciary relationship created by the agreement …"

92. In his further written submissions, Mr Bowling accepts, in my view correctly, that there may be no room for an implied term requiring a discretion to be operated rationally if the process of construction indicates that the clause confers absolute contractual rights intended to be exercised in a party's own judgment.

93. In my judgment, there is no room for an implied term in this case. Firstly, as a matter of construction, clause 2.32 expressly gives EWB a contractual right to deduct liquidated damages at the rate set out in the Trade Contract Particulars. That amounts to an absolute contractual right. The court would be reluctant to go behind the allocation of risk negotiated by the parties, with the benefit of legal advice, when agreeing the commercial terms of the Contract. There is no need to imply any term that such contractual right must be exercised in a rational or reasonable manner in order to make that provision work.

94. Secondly, even if the court considered that it was necessary to imply a term that EWB would not act in an arbitrary, capricious or irrational manner when levying liquidated damages, consistent with the explanation set out by Lady Hale in *Braganza*, that would be limited to the circumstances in which EWB could operate the provision, namely, whether there was any logical connection between late completion of any part of the Works and the ostensible reasons given by EWB for the decision to deduct liquidated damages. It would not extend to an implied term of reasonableness as to any objective assessment of the appropriate amount of liquidated damages to be levied.

95. Thirdly, even if a term of reasonableness were to be implied, the Contract contains no mechanism for determining any reasonable level of reduced damages, or the factors that should be taken into account when fixing such "lesser amount". As Mr Rigney succinctly observed, in such circumstances, the clause would no longer be a liquidated damages provision.

96. For the above reasons, Dobler's alternative argument based on an implied term would not save the liquidated damages provision, if otherwise unenforceable for uncertainty or as a penalty.

If clause 2.32 is penal and/or unenforceable, whether any general damages are nevertheless "capped" at the level of liquidated damages otherwise payable

97. It is not strictly necessary for the court to decide this issue, having found that the liquidated damages provision was valid and enforceable. However, as it has been argued in full, the court has considered it briefly.

98. It is common ground that where a liquidated damages provision has been held to be unenforceable as uncertain or a penalty, the employer is entitled to prove actual loss and claim unliquidated damages: *Rapid Building Group Ltd v Ealing Family Housing Association Ltd* (1984) 29 BLR 5 per Stephenson LJ at p.16.

99. EWB's case is that, in such circumstances, the unenforceable liquidated damages provision does not operate as a cap on the recoverable general damages. The innocent party can sue for general damages and the unenforceable liquidated damages clause is simply ignored.

100. Dobler's case is that the unenforceable liquidated damages provision acts as a cap on general damages.

101. Both parties helpfully drew the court's attention to the positions adopted by the textbooks as follows:

Keating (11th edition) at paragraph 10-029:

> "There is authority in charterparty cases suggesting that a claimant can recover more than the agreed sum if it is held to be a penalty. On the other hand there are judicial indications to the contrary. It is suggested that the charterparty cases are special to the clauses in question, and that in construction contracts the question is open. It is submitted that it would be inequitable to permit an employer to avoid the effect of a provision which was penal in order to recover more. Further, where the nature of the clause is usually to limit the contractor's liability (as suggested above), there is every reason why the contractor should not be denied that limitation simply because the employer's estimate of its loss was not genuine."

Hudson (14th edition) at paragraph 6-050:

> "Unless there is some independent reason why the Contractor should not have the benefit of an agreed limiting sum, restricting the Employer's general damages to the liquidated amount without further enquiry will secure any such benefit for the Contractor, if it exists, while removing the need to investigate the precise makeup of the liquidated sums. Nevertheless, while treating liquidated damages as a "cap" on general damages appears to have been recognised since the early cases, the point may be open and a more precise statement of its rationale in construction cases is still awaited."

Chitty on Contracts (33rd edition with supplement)(2020) at paragraph 26-243:

> "A clause which is not a genuine pre-estimate, e.g. because it stipulates for more than the likely loss, and which is therefore a penalty, may be ignored if it is for less than the actual damage suffered. Where a charterparty contained the following clause: "[p]enalty for non-performance of this agreement proved damages, not exceeding estimated amount of freight", it was held that the clause provided a penalty and not a limitation of liability, so that the party complaining of non-performance was entitled to recover damages for his actual loss although it exceeded the estimated amount of freight. It is unsettled whether this principle applies to penalty clauses in other types of contract, so as to entitle the claimant to ignore the sum stipulated as a penalty (where it was clearly not intended to limit liability) and to sue for damages for a greater amount to compensate him for his actual loss."

McGregor on Damages (21st edition) (2021) at paragraph 16-029:

> "Just as the penalty cannot augment his damages so too the claimant will not be restricted to the penalty in the rare cases where it is less than the actual damage… It was early held in Winter v Trimmer, and again in Harrison v Wright, that the claimant could ignore this penal stipulation and recover for his greater loss. The same result was reached in the last century in Wall v Rederiaktiebolaget Luggude where Bailhache J retraced the law in a very useful judgment which remains the clearest authority for the present rule. However the wording of the clause had become more complex and the earlier cases provide more useful illustrations of circumstances in which a penalty is likely to turn out less than the actual damage. The decision itself was approved soon after as to its interpretation of the particular clause as a penalty by the House of Lords in Watts v Mitsui, and, as Scrutton LJ pointed out in Widnes Foundry v Cellulose Acetate Silk Co, Lord Sumner clearly took the view that "the clause did not prevent the shipowners or charterers from recovering the actual amount of damage, though it might be more than the estimated amount of freight". In view of this line of authority, the occasional dicta which state that the penalty marks the ceiling of recovery are unacceptable. They are probably based upon the historical fact that the sum in a penal bond fixed the maximum amount recoverable."

102. Therefore, all the textbooks recognise the line of authority in charterparty cases that permits an innocent party to ignore the penalty clause and recover its actual loss, whether more or less than the sum stipulated in the penalty clause. The editors of Keating, Hudson and Chitty consider that the position is unsettled in other types of contract. In Keating and Hudson it is noted that there is merit in treating the liquidated damages cap as an agreed limitation on damages for the benefit of the contractor. The editors of McGregor consider that the charterparty line of authority is clear and *dicta* suggesting the penalty acts as a cap are wrong.

103. In *Wall v Rederiaktiebolaget Luggude* [1915] 3 KB 66, Bailhache J summarised the position in relation to penalties in charterparties at p.73:

> "You cannot under it recover more than the proved damages, and if proved damages exceed the penal sum you are restricted to the lower amount. As a penalty clause may be disregarded it is always disregarded and has become a dead letter, or from another point of view, a "brutum fulmen", as Blackburn J called it in Godard v Gray LR 6 QB at p 148."

104. In *Watts, Watts & Co v Mitsui* [1917] AC 227, another charterparty case, the House of Lords approved Bailhache J's analysis in *Wall*. Lord Finlay LC stated in respect of the penalty clause at p.235:

> "If this clause had appeared for the first time I think it might have been construed as imposing a limitation on the damages to be recovered, but the penalty clause is an old one with a settled meaning, and the intention, if it existed, to make so fundamental a change in its effect as is suggested ought to have been much more clearly shown in order to bind the other party to the contract.
>
> In my opinion the judgments of Bailhache J. in the present and in the earlier case before him on this point were right."

105. Lord Dunedin agreed (at p.245) and Lord Sumner stated at p.246:

> "I have no doubt that clause 13 is a penalty clause and immaterial in the present case. … The whole matter has been fully and, if I may say so, admirably discussed by Bailhache J. in the recent case of Wall v. Rederiaktiebolaget Luggude. Your Lordships decided the point in Ströms Bruks Aktie Bolag v. Hutchison upon a somewhat similar clause, and I think that the present case cannot really be distinguished. My only difficulty is to understand why such a provision should be inserted at all."

106. The point was expressly left open in *Cellulose Acetate Silk Co Ltd v Widnes Foundry* (1925) Ltd [1933] AC 20, per Lord Atkin at p.26:

> "I desire to leave open the question whether, where a penalty is plainly less in amount than the prospective damages, there is any legal objection to suing on it, or in a suitable case ignoring it and suing for damages."

107. In *Robophone Facilities Limited v Blank* [1966] 1 WLR 1428, Diplock LJ raised the question as undecided but declined to answer it at p.1446E-H:

> "Where the court refuses to enforce a "penalty clause" of this nature, the injured party is relegated to his right to claim that lesser measure of damages to which he would have been entitled

> at common law for the breach actually committed if there had been no penalty clause in the contract.
>
> I make no attempt, where so many others have failed, to rationalise this common law rule. It seems to be sui generis. The court has no general jurisdiction to re-form terms of a contract because it thinks them unduly onerous on one of the parties - otherwise we should not be so hard put to find tortuous constructions for exemption clauses, which are penalty clauses in reverse: we could simply refuse to enforce them. Again, it is by no means clear that "penalty clauses" are simply void, like covenants in unreasonable restraint of trade. There are dicta either way, and in *Cellulose Acetate Silk v. Widnes Foundry* Lord Atkins expressedly left open the question whether a penalty clause in a contract, which fixed a single sum as payable upon breach of a number of different terms of the contract, some of which breaches may occasion only trifling damage but others damage greater than the stipulated sum, would be treated as imposing a limit on the damages recoverable in an action for a breach in respect of which it operated to reduce the damages which would otherwise be recoverable at common law."

108. In *Cavendish Square* (above) Lords Neuberger and Sumption (with whom Lord Carnwarth agreed) stated that the consequence of a damages provision being held to be a penalty was that the clause would be wholly unenforceable. They specifically rejected the suggestion by the Court of Appeal in *Jobson v Johnson* [1989] 1 WLR 1026 that a penalty provision could be partially enforced on a scaled down basis, i.e. only to the extent of any actual loss suffered by the breach:

> "[9] the penalty clause is wholly unenforceable … Deprived of the benefit of the provision, the innocent party is left to his remedy in damages under the general law.
>
> …
>
> [87] If, as the authorities show, the penal consequences of a contractual provision fall to be determined as at the time of the agreement, and a provision found to be a penalty is unenforceable, it is impossible to see how it can be enforceable on terms."

109. Lord Hodge agreed with that stated position on partial enforceability at [283]:

> "In English law a penalty clause cannot be enforced. For the reasons given by Lord Neuberger and Lord Sumption in their judgment (at paras 84-87) I think that the decision of the Court of Appeal in Jobson v Johnston was incorrect in so far as it modified a penalty clause and should be overruled."

110. This issue was considered in the context of an option to acquire shares, rather than a liquidated damages provision and the Supreme Court did not expressly consider

whether a penalty clause could operate as a cap on general damages. However, as Mr Rigney submits, if a penalty were held to operate as a cap, it would not be wholly unenforceable. Therefore, *Cavendish Square* provides persuasive support for the view that if a liquidated damages provision is void for uncertainty or as a penalty, it is wholly unenforceable and the employer's entitlement to general damages will not be subject to a cap.

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

112. In this case a further issue that arises is whether clause 2.32.1 together with the Trade Contract Particulars simply amounted to an agreed liquidated damages provision or whether it should be construed also as a limitation of liability provision.

113. The relevant words used were:

> "Liquidated damages will apply … at the rate of £25,000 per week (or pro rata for part of a week) up to an aggregate maximum of 7% of the final Trade Contract Sum…"

114. Mr Bowling submits that the clear intention of the parties was that Dobler would not pay more than £25,000 per week if it fell into culpable delay. The fact that the mechanism for imposing that liability might fail ought not to detract from their bargain in this regard. Further, the agreement that delay damages would be capped at 7% of the Trade Contract Sum was an independent covenant on the part of EWB that operates as a limitation of liability provision in any event.

115. Mr Rigney submits that liquidated damages clauses are, by definition, not exclusion clauses or limitation of liability clauses, relying on: *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 per Lord Upjohn at 421D; *K Line PTE Ltd v Priminds Shipping (HK) Co Ltd* [2020] EWHC 2373 (Comm) per Andrew Baker J at [55(ii)] and [59(iii)]. He acknowledges that a clause might be drafted in such a way that the parties should be taken to have intended it to operate as both as a liquidated damages clause and also as a limitation of liability clause, but such an intention would have to be clear from the words used. He submits that there is nothing in the wording of clause 2.32.1 that leads to the conclusion that this is what the parties intended.

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

completion to a specific percentage of the final contract sum. The clear intention of the parties was that Dobler's liability for delay damages would be so limited.

117. Therefore, if, contrary to my finding above, the liquidated damages provision in clause 2.32.1 were void and/or unenforceable, EWB would be entitled to claim general damages but subject to the overall cap on liability of 7%.

Conclusion

118. For the reasons set out above, the answers to the issues are as follows:

i) The liquidated damages provision in clause 2.32.1 is valid and enforceable.

ii) If, contrary to the finding on issue i), the liquidated damages provision were void or unenforceable, EWB would be entitled to claim general damages for delay, subject to an overall cap of 7% of the final Trade Contract Sum, as a limitation of liability provision.

119. Following hand down of this judgment, the hearing will be adjourned to a date to be fixed for the purpose of any consequential matters, including any applications for permission to appeal, and any time limits are extended until such hearing or further order.