Neutral Citation Number: [2022] EWHC 936 (TCC)

Case No: HT-2021-000450

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
TECHNOLOGY AND CONSTRUCTION COURT (QBD)

Royal Courts of Justice
Rolls Building
London, EC4A 1NL

Date: 19/04/2022

Before:

MRS JUSTICE O'FARRELL DBE

- -

Between:

BEXHEAT LIMITED	**Claimant**
- and -	
ESSEX SERVICES GROUP LIMITED	**Defendant**

- -
- -

Nicholas Kaplan (instructed on a direct access basis, through Harris Consulting International as intermediary) for the **Claimant**
Lucie Briggs (instructed by **Druces LLP**) for the **Defendant**

Hearing date: 13th January 2022

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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 The National Archives. The date and time for hand-down is deemed to be Tuesday 19th April 2022 at 2:00pm"**

Mrs Justice O'Farrell:

1. This is an application by the claimant ("BHL") for summary judgment to enforce the adjudication decision of Mr Silver dated 12 November 2021 ("the Second Adjudication Decision"), directing the defendant ("ESG") to pay to BHL £706,029.62 plus interest and the adjudicator's fees.

2. ESG resists enforcement on the grounds that:

   i) the true value of the application payment the subject of the Second Adjudication Decision had already been determined in an earlier adjudication by another adjudicator, Mr Cope ("the First Adjudication");

   ii) ESG has a contractual entitlement to set off or make deductions against the adjudicator's award in respect of any amounts which may at any time be due or have become due from BHL to ESG;

   iii) BHL deprived ESG of its contractual right to elect to have the true value of the application payment in dispute determined at the same time by the same adjudicator as the notified sum dispute;

   iv) the adjudicator had no jurisdiction to award compensation pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 ("the 1998 Act") and that part of the award should not be enforced.

3. Alternatively, ESG seek a stay of enforcement on the grounds that:

   i) there is a real risk that any subsequent determination requiring return of any part of the judgment sum would go unsatisfied by reason of BHS's financial position; and/or

   ii) BHL has organised its financial affairs with the purpose of dissipating or disposing of the judgment sum.

The Contract

4. The dispute arises out of a project for the construction of a residential and extra care facility, comprising a double level basement and ground floor plus five storey building. ESG was engaged as sub-contractor for the MEP works.

5. By a contract dated 8 October 2019, BHL was engaged by ESG as sub-sub-contractor to carry out the plumbing works ("the Contract").

6. The contract sum was £1,035,000, subject to adjustment in accordance with the Contract.

7. The Contract contains provisions for interim payments to be made on specified dates as set out in clause 19 and the Second Schedule:

   > "19.4 In accordance with the dates specified in the Second Schedule (or as the Parties otherwise agree), the Sub-subcontractor shall as a condition precedent to being

paid submit an application for payment for work carried out specifying the sun the Sub-subcontractor considers to be due and the basis on which it has been calculated 7 days before the end of the calendar month ("**Interim application**"). The payment due date in relation to each payment to be made under this Sub-subcontract will be the last calendar day of the month of a valid interim application (the "**Due Date**").

19.5 Within 15 days of the last calendar date of the month of a valid Interim Application, the Sub-Contractor may give to the Sub-subcontractor a notice specifying the sum that the Sub-Contractor considers to be due as at the payment due date and the basis on which it has been calculated ("**Payment Notice**").

19.6 Subject to clauses 19.7 and 19.8, the Sub-Contractor shall pay to the Sub-subcontractor on or before the final date for payment the amount specified in the Payment Notice in accordance with clause 19.5 or, if no such notice is given, the amount specified in the Interim Application.

19.7 Not later than one working day before the Final Date for Payment, the Sub-Contractor may give to the Sub-subcontractor a notice of its intention to pay less than the amount which becomes due under clause 19.6 specifying the sum that the Sub-Contractor considers to be due on the date the notice is given and the basis upon which it has been calculated ("**Pay-Less Notice**"). In such a case the amount due will be the amount specified in the Sub-Contractor's notice under clause 19.7.

19.8 The final date for payment of any amount which becomes due under an Interim Application is 45 days after the Due Date ("**Final Date for Payment**"). The Sub-Contractor shall pay to the Sub-subcontractor the sum stated in the Pay Less Notice on or before the Final Date for Payment.

19.9 For the avoidance of doubt all payments made in respect of and in response to Interim Applications shall be on account only and not conclusive as to the final value of any part thereof."

8. Clause 30 of the Contract provides for adjudication as follows:

"30.1 Any dispute or difference between the Parties arising from, under or in connection with this Sub-Subcontract may be referred to adjudication at any time by either Party and the adjudication shall be conducted in

> accordance with the Scheme for Construction Contracts (England and Wales) Regulations 1998 (or as amended), save that the appointed Adjudicator shall also have the power to decide how the Party's legal costs of the adjudication shall be paid.
>
> 30.2 The Sub-Contractor shall be entitled to set off or make deductions against an Adjudicator's award in respect of any amounts which may at any time be due or have become due from the Sub-Subcontractor to the Sub-Contractor under the Sub-Subcontract or otherwise.
>
> 30.3 If the Sub-Contractor shall so elect the Adjudicator shall be entitled to adjudicate on more than one dispute at the same time and the parties agree that the Adjudicator shall so have jurisdiction and shall be entitled to set off one decision against another."

9. The works achieved practical completion on 30 September 2021.

10. Disputes arose between the parties as to BHL's entitlement to payment, in particular, in respect of variations and prolongation costs.

11. There have been two adjudications in respect of those disputes.

The First Adjudication

12. On 19 July 2021 BHL submitted Payment Application 22 (dated 16 July 2021) in the gross sum of £1,832,071.87 for the valuation period to 31 July 2021, seeking a net payment of £678,885.78.

13. On 13 August 2021 ESG issued a Pay Less Notice, setting out its cumulative valuation of the works for that period of £1,170,729.19, giving rise to a net sum due to BHL of £4,808.44.

14. On 18 August 2021 BHL commenced the First Adjudication, seeking the following relief as set out in its Notice of Adjudication:

> "1. That the true value of BHL's Application for Payment Number 22 dated 16 July 2021 is £2,010,121.83, plus any applicable VAT or such other value as the Adjudicator shall decide.
>
> 2. That the Respondent, ESG, shall pay to BHL on 13 September 2021 (the final date for payment of AFP22) the sum of £797,423.01 plus any applicable VAT or such other sum as the Adjudicator shell determine.
>
> [3]. Should ESG fail to make payment of the sum due to BHL on 13 September 2021 that BHL is entitled to payment of interest in accordance with clause 19.18 of the Sub-Subcontract.

> [4]. That BHL is entitled to be reimbursed compensation of £100.00 as compensation in accordance with the Late Payment of Commercial Debts (Interest) Act 1998, as amended, or such other sum as the Adjudicator shall determine.
>
> [5]. That the Respondent immediately pays or reimburses the fees and expenses of the Adjudicator. "

15. Mr Jonathan Cope was appointed as the adjudicator in the First Adjudication.

16. In its response document, ESG sought the following orders by way of relief in the First Adjudication:

> "10.1.1 That the true value of BHL's application for payment 22 is £8,740.553, or such other sum as the adjudicator may decide;
>
> 10.1.2 That BHL is not entitled to any further payment at this time under application for payment 22 dated 19 July 2021;
>
> 10.1.3 That BHL pay the adjudicators fees and expenses; and
>
> 10.1.4 The adjudicator gives reasons for his decisions."

17. On 12 October 2021 the adjudicator issued his decision. The dispute was described in his decision as follows:

> "4. The dispute concerns the true value of BHL's interim application for payment 22 dated 19th July 2021 ("AP22"), and BHL's entitlement to payment.
>
> 5. BHL valued the Sub-Subcontract Works, including the measured works, preliminaries, variations and claims, in the gross sum of £1,832,071.87 in AP22 and sought payment of the sum of £678,885.78. In ESG's Payless Notice issued on 13th August 2021 ESG valued the Sub-Subcontract Works in the sum of £1,170,729.19, and stated that the sum due for payment was £4,808.44. There is no dispute as to the validity of ESG's Payless Notice.
>
> 6. BHL now claims that the true value of the Sub-Subcontract Works set out in AP22 is £2,010,121.742 and that, taking into account the sums previously paid by ESG, it is entitled to payment of £797,423,01 in this adjudication. ESG now submits that the true value is £1,031,700.00, and that the resulting sum due is £3,932.11.
>
> 7. The difference between the parties' valuations mainly results from differing valuations of the variations and BHL's claims in the form of direct additional costs …

> 8. ESG notes that it currently has a contra-charge account against BHL in the current sum of £75,252.04, but it accepts that as this was not deducted in its Payless Notice issued against AP22 it falls outside the scope of this adjudication."

18. Mr Cope's decision in the First Adjudication was that:

    i) the true value of Interim Application 22 was £1,319,830.61;

    ii) BHL was entitled to payment of £141,646.35 plus VAT;

    iii) BHL was entitled to interest pursuant to the Contract but not under the Late Payment of Commercial Debts (Interest) Act 1998;

    iv) BHL should pay 35% of the adjudicator's fees and ESG should pay 65% of the adjudicator's fees.

19. Those sums were paid in full by ESG.

The Second Adjudication

20. On 17 August 2021 (one day before commencement of the First Adjudication) BHL issued Payment Application 23 in the gross sum of £2,010,121.74 for the valuation period to 31 August 2021, seeking a net payment of £847,675.97.

21. It is common ground that any Pay Less Notice was due by 14 October 2021, as set out in the Second Schedule to the Contract. ESG did not issue its purported Pay Less Notice until 15 October 2021 and therefore it was invalid. ESG failed to make any payment in respect of Interim Application 23.

22. On 18 October 2021 BHL commenced the Second Adjudication, seeking the sum of £706,029.70, as the notified sum applied for under Interim Application 23, taking into account the payment made by ESG in respect of Interim Application 22, together with VAT and interest.

23. Mr Silver was appointed as the adjudicator in the Second Adjudication.

24. In the Second Adjudication ESG argued that a document served on 13 October 2021 amounted to a valid Pay Less Notice, BHL was improperly seeking to circumvent the decision in the First Adjudication and BHL was not entitled to any further payment. ESG sought the following relief:

    i) that the notice given on 13 October was in form and substance an effective Pay Less Notice;

    ii) that BHL was not entitled to any further payment;

    iii) that BHL pay the adjudicator's fees and expenses; and

    iv) the adjudicator gives reasons for his decision.

25. On 12 November 2021 the adjudicator issued his decision that:

i) ESG failed to issue a valid Pay Less Notice in response to Interim Application 23;

ii) ESG should pay BHL the sum of £706,029.62 plus VAT;

iii) BHL was entitled to contractual interest and statutory compensation of £100 under the 1998 Act; and

iv) ESG was liable for the adjudicator's fees and expenses.

26. ESG did not make any payment in respect of the Second Adjudication award.

Abortive third adjudication

27. On 19 October 2021 ESG issued a notice of adjudication seeking a determination of the true value of Interim Application 23. Mr Linnett was appointed as the adjudicator for this Third Adjudication. Following a meeting at which he heard representations from both parties, Mr Linnett resigned without producing an award.

Proceedings

28. On 23 November 2021 BHL issued these proceedings, claiming the sum of £706,029.62 plus interest, statutory compensation and the adjudication fees.

29. On 1 December 2021 the court issued an order giving directions for abridgement of time for acknowledgement of service and an expedited timetable for the summary judgment hearing.

30. The issues before the court are:

i) whether the 'true value' of Interim Application 23 was determined in the First Adjudication, with the result that Mr Silver had no jurisdiction to determine the payment due under Interim Application 23 in the Second Adjudication Decision and/or ESG satisfied its payment obligations in respect of the same;

ii) whether ESG has an entitlement under clause 30.2 of the Contract to set off or make deductions against the Second Adjudication award in respect of any amounts which may at any time be due or have become due from BHL to Essex;

iii) whether ESG was entitled under clause 30.3 of the Contract to elect to have the 'true value' of the application payment in dispute determined at the same time by the same adjudicator as the 'notified sum' dispute;

iv) whether Mr Silver had jurisdiction to award to BHL £100 compensation pursuant to the 1998 Act; if not, whether that part of the award should be severed;

v) whether enforcement of any judgment should be stayed, having regard to any risk that any subsequent judgment requiring return of the sum paid would go unsatisfied, or to avoid any manifest injustice.

31. The court has the benefit of witness statements from:

i) Andrew Bailey, the managing director of BHL – first statement dated 23 November 2021 and second statement dated 30 December 2021;

ii) Anthony Cassidy, the commercial director of ESG – statement dated 16 December 2021;

iii) Daniel Djanogly, forensic accountant – report on the financial affairs of BHL dated 15 December 2021;

iv) Andrew Hider, managing director of ESG – statement dated 6 January 2022.

32. Ms Briggs, counsel for ESG, seeks permission to adduce the statement of Mr Hider, although it was served after 16 December 2021, the date ordered by the court for service of any evidence by ESG. Reliance is placed on the witness statement of Richard Bailey, partner of Druces LLP, solicitors acting for ESG, dated 7 January 2022, explaining that Mr Hider's evidence is in response to Andrew Bailey's second witness statement concerning the detrimental impact on ESG's business if it is required to pay the Second Adjudication award.

33. Mr Kaplan, counsel for BHL, submits that it is a matter for the court whether to grant relief but opposes the introduction of the statement on the grounds that no adequate explanation has been provided for the failure to comply with the court's order, the statement is too late and would cause prejudice to BHL because there is no opportunity to respond.

34. The court grants permission to ESG to adduce in evidence the witness statement of Mr Hider. Although it has been produced late, it is short and confined to specific points on ESG's accounts raised for the first time in Mr Andrew Bailey's second witness statement. Given that Mr Hider's statement was sent to BHL on 6 January 2022, BHL has had sufficient time to consider the new points and provide instructions so that the court is satisfied that it does not cause any prejudice.

Applicable legal principles

35. The applicable legal principles relating to adjudication enforcement in the circumstances that arise in this case are well-established and not in dispute.

36. Where a valid application for payment has been made by a contractor in accordance with the terms of a construction contract falling within the scope of the Housing Grants, Construction and Regeneration Act 1996 (as amended by the Local Democracy, Economic Development and Construction Act 2009) ("the 1996 Act"), an employer who fails to issue a valid Payment Notice or Pay Less Notice must pay the 'notified sum' in accordance with section 111 of the

1996 Act by the final date for payment. If the employer fails to pay the 'notified sum', the contractor is entitled to seek payment of such sum by obtaining an adjudication award in its favour.

37. Clause 30 of the Contract provides that the Scheme for Construction Contracts (England and Wales) Regulations 1998 (or as amended) applies ("the Scheme"). Paragraph 21 of the Scheme provides that in the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the parties.

38. The courts take a robust approach to adjudication enforcement, enforcing the decisions of adjudicators by summary judgment regardless of errors of procedure, fact or law, unless the adjudicator has acted in excess of jurisdiction or in serious breach of the rules of natural justice: *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] BLR 93 per Dyson J at [14]; *Carillion v Devonport Royal Dockyard* [2005] EWHC 778 (TCC) per Jackson J at [80]; *Carillion v Devonport Royal Dockyard* [2005] EWCA 1358 per Chadwick LJ at [85]-[87]; *J&B Hopkins Ltd v Trant Engineering Ltd* [2020] EWHC 1305 per Fraser J at [12]-[16]; *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25 per Lord Briggs at [17]-[26].

39. Where a party is required to pay the 'notified sum' by reason of its failure to issue a valid Payment Notice or Pay Less Notice, such party is entitled to embark upon a 'true value' adjudication in respect of that sum but only after it has complied with its immediate payment obligation under section 111 of the 1996 Act: *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448 per Jackson LJ at [107]-[111]; *M Davenport Builders Ltd v Greer* [2019] EWHC 318 (TCC) per Stuart-Smith J (as he then was) at [21]-[25], [35] & [37].

40. A material issue in these proceedings is the impact of the First Adjudication Decision; whether it affects the validity of the Second Adjudication Decision and whether ESG is entitled to rely on the 'true valuation' in the First Adjudication against any obligation to satisfy Interim Application 23 and/or the Second Adjudication Decision.

41. Paragraph 23(2) of the Scheme provides that the decision of an adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, arbitration or settlement.

42. The consequence of the binding effect of an adjudication decision on a dispute or difference is that an adjudicator has no jurisdiction to determine matters which are the same or substantially the same in a subsequent adjudication. The relevant principles were set out in *HG Construction Ltd v Ashwell Homes (East Anglia) Ltd* [2007] EWHC 144 (TCC) per Ramsey J at [38] and summarised by Coulson J (as he then was) in *Benfields Construction Ltd v Trudson (Hatton) Ltd* [2008] EWHC 2333 at [34]:

> "(a) The parties are bound by the decision of an adjudicator on a dispute or difference until it is finally determined by court or

adjudication proceedings or by an agreement made subsequently by the parties.

(b) The parties cannot seek a further decision by an adjudicator on a dispute or difference if that dispute or difference has already been the subject of a decision by an adjudicator.

(c) The extent to which a decision or a dispute is binding will depend on an analysis of the terms, scope and extent of the dispute or difference referred to adjudication and the terms, scope and extent of the decision made by the adjudicator. In order to do this the approach has to be to ask whether the dispute or difference is the same or substantially the same as the relevant dispute or difference and whether the adjudicator has decided a dispute or difference which is the same or fundamentally the same as the relevant dispute or difference.

(d) The approach must involve not only the same but also substantially the same dispute or difference. This is because disputes or differences encompass a wide range of factual and legal issues. If there had to be complete identity of factual and legal issues then the ability to re-adjudicate what was in substance the same dispute or difference would deprive Clause 39A.7.1 of its intended purpose.

(e) Whether one dispute is substantially the same as another dispute is a question of fact and degree."

43. In *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical)* 2019] EWCA Civ 27 the issue of jurisdictional challenges and waiver in adjudication was considered by the Court of Appeal (not affected by the subsequent appeal to the Supreme Court). Having referred to all of the relevant authorities, Coulson LJ stated:

"[91] In my view, the purpose of the 1996 Act would be substantially defeated if a responding party could, as a matter of course, reserve its position on jurisdiction in general terms at the start of an adjudication, thereby avoiding any ruling by the adjudicator or the taking of any remedial steps by the referring party; participate fully in the nuts and bolts of the adjudication, either without raising any detailed jurisdiction points, or raising only specific points which were subsequently rejected by the adjudicator (and the court); and then, having lost the adjudication, was allowed to comb through the documents in the hope that a new jurisdiction point might turn up at the summary judgment stage, in order to defeat the enforcement of the adjudicator's decision at the eleventh hour. …

[92] In my view, informed by that starting-point, the applicable principles on waiver and general reservations in the adjudication context are as follows:

> i) If the responding party wishes to challenge the jurisdiction of the adjudicator then it must do so "appropriately and clearly". If it does not reserve its position effectively and participates in the adjudication, it will be taken to have waived any jurisdictional objection and will be unable to avoid enforcement on jurisdictional grounds (*Allied P&L*).
>
> ii) It will always be better for a party to reserve its position based on a specific objection or objections: otherwise the adjudicator cannot investigate the point and, if appropriate, decide not to proceed, and the referring party cannot decide for itself whether the objection has merit (*GPS Marine*).
>
> iii) If the specific jurisdictional objections are rejected by the adjudicator (and the court, if the objections are renewed on enforcement), then the objector will be subsequently precluded from raising other jurisdictional grounds which might otherwise have been available to it (*GPS Marine*).
>
> iv) A general reservation of position on jurisdiction is undesirable but may be effective… Much will turn on the wording of the reservation in each case. However, a general reservation may not be effective if:
>
> > i) At the time it was provided, the objector knew or should have known of specific grounds for a jurisdictional objection but failed to articulate them (*Aedifice, CN Associates*);
> >
> > ii) The court concludes that the general reservation was worded in that way simply to try and ensure that all options (including ones not yet even thought of) could be kept open (*Equitix*)."

Impact of the First Adjudication Award

44. Mr Kaplan, counsel for BHL, submits that BHL's claim in the Second Adjudication was a simple claim for payment based on ESG's failure to respond to Interim Application 23 in time; such failure is now admitted by ESG. The legal consequences of ESG's failure are well-established and BHL is entitled to assert its statutory right to payment. The dispute in the First Adjudication concerned the true value of Interim Application 22 and did not determine the true value of Interim Application 23. At the time that Interim Application 23 was issued, the First Adjudication had not been commenced and therefore the subsequent decision in that adjudication could not affect the validity of the application. Mr Cope was clear that he was carrying out a valuation for the purposes of Interim Application 22, as required by the Notice of Adjudication. In any event, ESG did not raise any jurisdiction challenge in the Second Adjudication based on the 'true valuation' in the First Adjudication and therefore is taken to have waived any such challenge.

45. Ms Briggs, counsel for ESG, submits that the First Adjudication Decision is in fact and in substance a binding decision on the true value of BHL's entitlement under Interim Application 23. She accepts that the case law is clear as to the requirement for a party to have paid under the notice provisions prior to commencing a true value adjudication. However, she submits that this case can be distinguished on its facts because there is a pre-existing and binding adjudication decision determining the true value of Interim Application 23. BHL referred to adjudication the 'true value' dispute (in the First Adjudication) prior to BHL's commencement of the 'notified payment' dispute (in the Second Adjudication). The First Adjudication Decision was rendered prior to the date on which Interim Application 23 fell due for payment, prior to the date on which a Pay Less Notice was required, prior to the date of the Second Adjudication Decision and prior to BHL's application to enforce. The parties are bound by the First Adjudication Decision and no further sums are due.

46. The starting point is for the court to consider the scope of the First Adjudication; in particular, whether the dispute or difference the subject of the First Adjudication is the same or substantially the same as the dispute or difference in the Second Adjudication.

47. The dispute or difference referred in the First Adjudication concerned the true valuation of the BHL's entitlement in respect of Interim Application 22. The Notice of Adjudication expressly sought declarations and payment based on *"the true value of BHL's Application for Payment Number 22 dated 16 July 2021"*. On its face, Interim Application 22 was for payment in respect of work for the valuation period up to 31 July 2021. The net sum claimed by BHL was calculated by reference to the line items and figures in Interim Application 22. ESG's identification of the dispute was set out in its response in which it defined the relief it sought based on the true valuation of Interim Application 22.

48. In contrast, the dispute or difference referred in the Second Adjudication was whether ESG had served a valid Pay Less Notice in response to Interim Application 23; if not, whether BHL was entitled to payment of the sum claimed as 'the notified sum'. The Notice of Adjudication expressly sought declarations and payment based on Application for Payment Number 23 dated 17 August 2021. On its face, although the line items and figures in Interim Application 23 were substantially the same as those in Interim Application 22, Interim Application 23 was for payment in respect of work for a different valuation period, that is, up to 31 August 2021. In its response, and subsequent submissions, ESG focused on the issue as to whether it had served a valid Payment Notice or Pay Less Notice in response to Interim Application 23 and the main relief sought was a declaration as to the validity of its Pay Less Notice.

49. Thus, on analysis, the dispute or difference the subject of the First Adjudication was not the same or substantially the same as the dispute or difference in the Second Adjudication.

50. Next, the court must consider the matters decided by the adjudicators; whether Mr Cope's decision in the First Adjudication decided a dispute or difference which is the same or fundamentally the same as the dispute or difference decided by Mr Silver in the Second Adjudication.

51. The dispute or difference determined by Mr Cope in the First Adjudication concerned the true value of Interim Application 22. In his decision, he expressly stated that the nature of the dispute was *"the true value of BHL's interim application for payment 22 dated 19th July 2021 ("AP22"), and BHL's entitlement to payment"*. Necessarily, the scope of the dispute required Mr Cope to work through the detailed argument, evidence and figures in respect of the measured works, preliminaries, variations and claims for additional costs but all with the intention of establishing the true value of Interim Application 22. Indeed, the relief granted by the First Adjudication Award contained a declaration as to the true valuation of Interim Application 22.

52. In contrast, the dispute or difference determined by Mr Silver in the Second Adjudication concerned the validity of the document relied by ESG as the Pay Less Notice in response to Interim Application 23; the key issue centred on the status of a valuation document served by ESG on 13 October 2021, one day after publication of the First Adjudication Decision. Ms Briggs places reliance on the fact that the figures included in Interim Application 23 for the measured works, preliminaries and variations were identical to the figures in Interim Application 22, save that the claims for additional costs were included in the figure for variations and credit was given for ESG's payment of the First Adjudication Award. However, Mr Silver did not carry out an examination of the claims, evidence and argument in respect of the true valuation of Interim Application 23. The relief granted by the Second Adjudication Award did not refer to the true valuation of Interim Application 23; it simply decided that BHL was entitled to payment in full by reason of ESG's failure to serve a valid Pay Less Notice.

53. Thus, on analysis, the dispute or difference that was decided by Mr Cope in the First Adjudication was not the same or substantially the same as the dispute or difference decided by Mr Silver in the Second Adjudication.

54. It follows that this is not a case in which the adjudicator trespassed on an earlier decision. The decision in the Second Adjudication was solely concerned with determining BHL's entitlement to the 'notified sum' by reason of ESG's failure to serve a valid Pay Less Notice.

55. In her submissions, Ms Briggs confirmed that ESG is not entitled to, and does not, rely on a jurisdictional challenge to the Second Adjudication Award. Her argument is that ESG is entitled to rely on the and enforce the 'true value' First Adjudication Award against an application for payment, even where it has failed to serve a valid Payment Notice or Pay Less Notice. She submits that although the Court of Appeal in *S&T v Grove* held that a paying party is prohibited from commencing a true value adjudication *after* it has failed to serve a valid Pay Less Notice, either party is entitled to have the true value of an application / claim adjudicated upon and decided *prior* to the sum falling due and *prior* to the paying party being potentially debarred from such a course of action due to failure to comply with Pay Less Notice requirements. There is nothing within *S&T v Grove* or the subsequent authorities that prohibit such a course of action.

56. Although this argument has a superficial attraction, it does not assist ESG for the following reasons.

57. Firstly, although the First Adjudication Award that determined the true value of the works was issued on 12 October 2021, prior to the date by which the Pay Less Notice was due or the commencement of the Second Adjudication, it was limited to the 'true value' of the works in respect of Interim Application 22, for the valuation period up to 31 July 2021. Therefore, its enforcement would not necessarily prove to be a good defence to Interim Application 23. Although it is said by Ms Briggs that the true value of the works in respect of Interim Application 23 would not change, the relevant period for the valuation was different, up to 31 August 2021, and the issue as to whether such true valuation remained the same has not been adjudicated upon.

58. Secondly, regardless whether the 'true valuation' would be the same for both Interim Application 22 and Interim Application 23, and therefore binding on the parties so that no further payment was due, this was not raised as a defence in the Second Adjudication. ESG's response in the Second Adjudication was based on its contention that the document dated 13 October 2021 amounted to a valid Pay Less Notice. Even if there was any error of fact or law in the decision, it is binding on the parties and enforceable as set out above. On analysis, ESG's argument is tantamount to an attack on jurisdiction because it seeks to rely on the binding effect of the First Adjudication Decision as displacing Mr Silver's power to direct payment of the sum awarded in the Second Adjudication Decision. But ESG is not entitled to rely on a challenge to jurisdiction in circumstances where it failed to reserve its position on this matter. ESG did raise a jurisdiction challenge in the Second Adjudication but such challenge was limited to alleged non-payment of fees in the First Adjudication; it did not extend to an argument that Mr Silver did not have jurisdiction to award any sum in the Second Adjudication by reason of the First Adjudication Decision. Applying the principles set out by Coulson LJ in *Bresco* (above), following rejection by Mr Silver of the specific jurisdictional objection, ESG is precluded from raising other jurisdictional grounds which might otherwise have been available to it.

59. Thirdly, the argument ignores the express stipulation in section 111 of the 1996 Act:

> "(1) … 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.
>
> (4) A notice under subsection (3) must specify –
>
> (a) the sum that the payer considers to be due on the date the notice is served, and
>
> (b) the basis on which that sum is calculated.

> It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.
>
> …
>
> (6) Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a)."

60. If ESG wished to rely on the 'true valuation' adjudicated upon in the First Adjudication against any further payment sought in Interim Application 23, it could and should have raised this in a Pay Less Notice. Having failed to do so, the sum claimed in Interim Application 23 became the 'notified sum' due for the purpose of section 111 of the 1996 Act. BHL was entitled to adjudicate on its entitlement to payment of the 'notified sum' and, having obtained a favourable adjudication decision, enforce it by summary judgment.

Set-off

61. Ms Briggs submits that clause 30.2 of the Contract entitles ESG to set off or make deductions against an adjudicator's award in respect of any amounts which may at any time be due or have become due from BHL to ESG under the Contract or otherwise. It is said that there is a sum currently due from BHL to ESG of £163,345.10 by way of contra charges, which sum ESG is entitled to set off or make deduction against the sum awarded in the Second Adjudication.

62. Clause 30.2 of the Contract contains a provision that purports to entitle ESG to set-off or make deductions against the Second Adjudication Award:

> "The Sub-Contractor shall be entitled to set off or make deductions against an Adjudicator's award in respect of any amounts which may at any time be due or have become due from the Sub-Subcontractor to the Sub-Contractor under the Sub-Subcontract or otherwise."

63. The difficulty that arises with such provision is that it is contrary to section 8 of the 1996 Act and the Scheme.

64. Section 8 of the 1996 Act states:

> "(1) A party to a construction contract has the right to refer a dispute arising under the contract for adjudication under a procedure complying with this section.
>
> …
>
> (3) The contract shall provide in writing that the decision of the adjudicator is binding until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement.

> (5) If the contract does not comply with the requirements of subsections (1) to (4), the adjudication provisions of the Scheme for Construction Contracts apply."

65. In this case, clause 30.1 provides that the Scheme applies and the Scheme includes the following provisions:

> "21 In the absence of any directions by the adjudicator relating to the time for performance of his decision, the parties shall be required to comply with any decision of the adjudicator immediately on delivery of the decision to the parties.
>
> …
>
> 23(2) The decision of the adjudicator shall be binding on the parties, and they shall comply with it until the dispute is finally determined by legal proceedings, by arbitration (if the contract provides for arbitration or the parties otherwise agree to arbitration) or by agreement between the parties."

66. In *Ferson Contractors Limited v Levolux AT Limited* [2003] EWCA Civ 11, the Court of Appeal considered whether, pending final resolution by arbitration or litigation, an adjudicator's decision should be enforced in derogation of contractual rights with which it may conflict. The court held that an argument of set-off could not be relied on as a defence to enforcement of an adjudication decision - per Mantell LJ at [30]:

> "The intended purpose of s.108 is plain… The contract must be construed so as to give effect to the intention of Parliament rather than to defeat it. If that cannot be achieved by way of construction, then the offending clause must be struck down. "

67. In *Thameside Construction Co Ltd v Stevens* [2013] EWHC 2071, Akenhead J carried out a careful analysis of the relevant authorities and summarised the principles at [24]:

> "Drawing all these threads together, I reach the following broad conclusions on the issues arising where a party seeks to set-off against or withhold from sums which an adjudicator has said are to be paid or are payable:
>
> (a) The first exercise should be to interpret or construe what the adjudicator has decided. In that context, one can look at the dispute as it was referred to him or her. That can involve looking at the Notice of Adjudication, the Referral Notice, the Response and other "pleading" type documents. One can have regard to the underlying construction contract. Primarily, one needs to look at the decision itself.

> (b) In looking at what the adjudicator decided, one can distinguish between the decisive and directive parts of the decision on the one hand and the reasoning on the other, although the decisive and directive parts need to be construed to include other findings which form an essential component of or basis for the decision (see *Hyder*).
>
> (c) The general position is that adjudicators' decisions which direct that one or other party is to pay money are to be honoured and that no set-off or withholding against payment of that amount should be permitted.
>
> (d) There are limited exceptions. If there is a specified contractual right to set-off which does not offend against the statutory requirement for immediate enforcement of an adjudicator's decision, that is an exception albeit that it will be a relatively rare one. Where an adjudicator is simply declaring that an overall amount is due or is due for certification, rather than directing that a balance should actually be paid, it may well be that a legitimate set-off or withholding may be justified when that amount falls due for payment or certification in the future. (See *Squibb*).
>
> (e) Where otherwise it can be determined from the adjudicator's decision that the adjudicator is permitting a further set-off to be made against the sum otherwise decided as payable, that may well be sufficient to allow the set-off to be made (see *Balfour Beatty*)."

68. The identified exceptions do not apply in this case. Mr Silver directed ESG to pay a specific sum of money to BHL. The set-off on which ESG seeks to rely is based on contra charges and does not arise out of the First or Second Adjudication decisions. Likewise, the valuation of subsequent interim applications and the final account process do not arise out of the First or Second Adjudication decisions. There is nothing in the Second Adjudication Decision that indicates any further set-off is permitted.

69. ESG relies on the wording of clause 30.2 which expressly entitles it to set-off against an adjudication award. However, an unqualified contractual right to set-off offends against the statutory requirement for immediate enforcement of an adjudicator's decision as set out above. Therefore, the court must construe it as subject to the provisions of the Scheme, expressly incorporated by clause 30.1, which precludes set-off save where the limited exceptions identified in *Thameside* apply, circumstances which do not arise in this case. Alternatively, if it is unable to construe it so as to be consistent with the intent of the 1996 Act and the Scheme, the court must strike down the clause as unenforceable.

Joinder of disputes

70. ESG's case is that Mr Silver wrongly refused to allow joinder of the 'true value' of Interim Application 23 with the 'notified sum' issue in the Second

Adjudication. Ms Briggs submits that pursuant to clause 30.3 of the Contract, ESG was entitled to elect that the same adjudicator shall adjudicate (at the same time) both the 'notified sum' and the 'true value' dispute in respect of Interim Application 23, which would have enabled the parties to set off one decision against another. In breach of the Contract BHL refused to allow ESG to exercise this entitlement. Had ESG been able to do so, both disputes would have been determined at the same time and resulted in a balance of nil due to BHL because Mr Silver would have been obliged to determine the true value of Interim Application 23 in line with the determination made by Mr Cope in the First Adjudication.

71. Clause 30.3 states:

> "If the Sub-Contractor shall so elect the Adjudicator shall be entitled to adjudicate on more than one dispute at the same time and the parties agree that the Adjudicator shall so have jurisdiction and shall be entitled to set off one decision against another."

72. This unilateral right on the part of ESG to refer more than one dispute to the adjudicator is inconsistent with paragraphs 8 and 20 of the Scheme, which require the consent of all parties to a multiple dispute adjudication:

> "8(1). The adjudicator may, with the consent of all the parties to those disputes, adjudicate at the same time on more than one dispute under the same contract.
>
> …
>
> 20. The adjudicator shall decide the matters in dispute. He may take into account any other matters which the parties to the dispute agree should be within the scope of the adjudication or which are matters under the contract which he considers are necessarily connected with the dispute."

73. The requirement for the consent of all parties to a multiple dispute adjudication recognises the burden imposed on parties and adjudicators by the tight time limits in the adjudication process. A difficult task could become impossible if one party could unilaterally require the adjudicator to determine a raft of disputes within one adjudication. There is implicit recognition of this difficulty in clause 30.3 in that it does not compel the adjudicator to determine more than one dispute, even where such election has been made by ESG.

74. Further, in this case, section 111 of the 1996 Act would preclude ESG from relying on clause 30.3 to refer the 'true value' dispute in respect of Interim Application 23 prior to satisfying its obligation to pay the 'notified sum' as explained in *S&T v Grove* (above) by Jackson LJ at [107]:

> "… Both the HGCRA and the Amended Act create a hierarchy of obligations, as discussed earlier. The immediate statutory

> obligation is to pay the notified sum as set out in section 111. As required by section 108 of the Amended Act, the contract also contains an adjudication regime for the resolution of all disputes, including any disputes about the true value of work done under clause 4.7. As a matter of statutory construction and under the terms of this contract, the adjudication provisions are subordinate to the payment provisions in section 111. Section 111 (unlike the adjudication provisions of the Act) is of direct effect. It requires payment of a specific sum within a short period of time. The Act has created both the prompt payment regime and the adjudication regime. The Act cannot sensibly be construed as permitting the adjudication regime to trump the prompt payment regime. Therefore, both the Act and the contract must be construed as prohibiting the employer from embarking upon an adjudication to obtain a re-valuation of the work before he has complied with his immediate payment obligation."

75. Although this part of the judgment was technically obiter, the principles enunciated were considered further in *Davenport v Greer* (above) by Stuart-Smith J (as he then was) and followed:

> "[21] … it seems to me consistent with the policy underlying the adjudication regime that a defendant who *has* discharged his immediate obligation should generally be entitled to rely upon a subsequent true value adjudication and that a defendant who *has not* done so should not be entitled to do so. In answer to the question whether a person who has not discharged his immediate obligation *should* be entitled to rely upon a later true value decision by way of set-off or counterclaim in order to resist the enforcement of his immediate obligation I would give a policy-based answer that, in my view, he should not be entitled to do so since that would enable a defendant who has failed to implement the Payment or Payless Notice provisions to string the claimant along while he goes about getting the true value adjudication decision rather than discharging his immediate obligation and then returning if and when he has obtained his true value decision. In my judgment, the passages I have cited from *Harding* (at first instance and in the Court of Appeal) are at least consistent with and provide support for the policy-based approach I have outlined. Adopting a phrase from [141] of the judgment of Coulson J in *Grove* at first instance "the second adjudication cannot act as some sort of Trojan horse to avoid paying the sum stated as due".
>
> …
>
> [25] To my mind these statements are clear and unequivocal: the employer becomes free to commence his true value adjudication when (and only when) he has paid the sum ordered to be paid by the earlier adjudication.

> …
>
> [34] I recognise that the relevant section of the judgment of the Court of Appeal in *Grove* is technically obiter. However, it was provided after full argument and was expressly intended to provide authoritative guidance on an issue that Coulson J had decided in the contractor's favour. I would feel obliged to follow it even if I did not agree with it. As it happens I agree with the reasoning and the outcome.
>
> [35] In my judgment, it should now be taken as established that an employer who is subject to an immediate obligation to discharge the order of an adjudicator based upon the failure of the employer to serve either a Payment Notice or a Pay Less Notice must discharge that immediate obligation before he will be entitled to rely upon a subsequent decision in a true value adjudication. Both policy and authority support this conclusion and that it should apply equally to interim and final applications for payment.
>
> …
>
> [37] The decisions of Coulson J and the Court of Appeal in *Grove* are clear and unequivocal in stating that the employer must make payment in accordance with the contract or in accordance with section 111 of the Amended Act before it can *commence* a 'true value' adjudication…"

76. Thus, it is now clear that:

i) where a valid application for payment has been made, an employer who fails to issue a valid Payment Notice or Pay Less Notice must pay the 'notified sum' in accordance with section 111 of the 1996 Act;

ii) section 111 of the 1996 Act creates an immediate obligation to pay the 'notified sum';

iii) an employer is entitled to exercise its right to adjudicate pursuant to section 108 of the 1996 Act to establish the 'true valuation' of the work, potentially requiring repayment of the 'notified sum' by the contractor;

iv) the entitlement to commence a 'true value' adjudication under section 108 is subjugated to the immediate payment obligation in section 111;

v) unless and until an employer has complied with its immediate payment obligation under section 111, it is not entitled to commence, or rely on, a 'true value' adjudication under section 108.

77. Applying the above principles, ESG's exercise of any contractual right under clause 30.3 of the Contract to require the adjudicator to determine the 'true value' dispute together with the 'notified sum' dispute in the same adjudication

must be subject to compliance with its immediate payment obligation of the 'notified sum'. As ESG failed to comply with its immediate payment obligation in respect of the 'notified sum', it was not entitled to adjudicate on the 'true value' dispute, whether pursuant to clause 30.3 or otherwise.

78. Further, as submitted by Mr Kaplan, even if both the 'notified sum' and the 'true value' disputes were before the adjudicator, BHL would be entitled to rely on section 111 of the 1996 Act, which requires ESG to pay the 'notified sum' by the final date for payment, unless it has specified a lesser sum in a timeous Payment Notice or a timeous Pay Less Notice, prior to any determination of the 'true value' dispute. Therefore, once Mr Silver decided that the purported Pay Less Notice relied on by ESG was invalid, given that it was common ground that ESG had not paid the 'notified sum', Mr Silver could not at that stage go on to determine the 'true value' dispute. Indeed, that was the correct conclusion reached by Mr Linnett in the abortive third adjudication.

Severance

79. ESG seeks an order that the part of the Second Adjudication Decision in which BHL is awarded £100 compensation pursuant to the Late Payment of Commercial Debts (Interest) Act 1998 is severed on the ground that the adjudicator had no jurisdiction to award this sum. ESG's case is that BHL's entitlement to claim compensation under the Act had already been decided (in the negative) in the First Adjudication. As such Mr Silver had no jurisdiction to re-decide the matter differently in the Decision.

80. Given the limited value of this issue, it can be dealt with shortly. Where part of an adjudication award is held to be unenforceable, the court has power to sever that part and enforce the remainder: *Cantillon Ltd v. Urvasco Ltd* [2008] EWHC 282 (TCC) per Akenhead J at [63]; *Willow Corp SARL v MTD Contractors Ltd* [2019] EWHC 1591 (TCC) per Pepperall J at [68]-[74]. In this case, the compensation awarded is a fixed sum in respect of a discrete issue and of very modest value in comparison to the remainder of the award. Therefore, it would be an appropriate case for the court to consider severance.

81. However, it is common ground that ESG failed to raise this challenge to Mr Silver's jurisdiction in the Second Adjudication, despite raising other such challenges. Therefore, as set out above, any right to challenge jurisdiction in respect of the compensation issue was waived: *Bresco* (above).

Summary judgment

82. For the reasons set out above, ESG has no defence to the application for enforcement of the Second Adjudication Award and BHL is entitled to summary judgment.

Application for stay of enforcement

83. ESG's alternative argument is that enforcement should be stayed on the grounds that there is a real risk that any subsequent judgment requiring return of the sum would go unsatisfied by reason of BHL's financial position and/or it organising

its financial affairs with the purpose of dissipating or disposing of the adjudication sum. Further or alternatively, a stay should be granted at the discretion of the court given the unique circumstances of this case and that ESG will suffer manifest injustice if a stay is not granted.

84. CPR 83.7 empowers the court to grant a stay of execution of a judgment for payment of money if it is satisfied that (a) there are special circumstances which render it inexpedient to enforce the judgment or (b) the applicant is unable from any reason to pay the money.

85. The relevant principles are set out in *Wimbledon Construction Company 2000 Ltd v Vago* [2005] EWHC 1086 per Coulson J (as he then was) at [26]:

> "(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 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 present 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*)."

86. In *Gosvenor London Ltd v Aygun Aluminium UK Ltd* [2018] EWCA Civ 2695 Coulson LJ confirmed at [37] that the above should be supplemented as follows:

> "(g) If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay."

87. Coulson LJ stressed at [9] that this summary was not intended to be an inflexible list, referring to his judgment in *Equitix ESI CHP (Wrexham) Ltd v Bestor UK Ltd* [2018] EWHC 177 (TCC) at [62]:

> "It was, of course, not my intention that this summary should be set in stone. It was simply a summary of the main points established by the cases up to that time. It does not, for example, deal with the position where allegations of fraud are made, particularly in circumstances where those might affect the financial standing of the referring party (who is almost always the party opposing the stay)."

88. Further, the court has power to order a stay in order to avoid manifest injustice: *Galliford Try Building Limited v Estura Limited* [2015] EWHC 412 (TCC); *Flexidig Ltd v M&M Contractors (Europe) Ltd* [2019] NIQB 117.

89. ESG's case is that if the sum awarded in the Second Adjudication is enforced, BHL will not be in a position to repay if and when required. Reliance is placed on paragraphs 65-68 of Mr Cassidy's witness statement, including the following:

> "I believe that, even if ESG is able to obtain an adjudicators decision or court decision, valuing BHLs account, that BHL will not repay the money. Instead they will either have dissipated the money by moving money out of the company or otherwise disposing of the money. BHL is a small company with only one director who is also the sole shareholder and has no employees so is basically one of those small construction companies that is used as a directors personal business. BHL has already made it clear that it will only repay monies "in due course" in the letter from Mr Michael Harris on Friday 10 October 2021, a copy of which is produced at Exhibit AC7. They have refused to provide management accounts, stating that BHL does not have management accounts, and the account information publicly available for BHL is 18 months out of date. BHL should by now be preparing its accounts to file its Corporation Tax returns and therefore there is no reason for it to not provide draft accounts to

> the court. Nothing that I have seen in the responses from Mr Harris gives me comfort that ESG will ever see the money again."

90. ESG also relies on the report of Mr Djanogly, forensic accountant, dated 15 December 2021.

91. On the basis of that evidence, Ms Briggs makes the following points:

    i) BHL has refused to disclose any financial information to demonstrate the current state of affairs. No accounts have been filed for the last financial year, BHL has refused to provide any draft accounts and no management accounts have been disclosed. The inference is that the financial position of BHL has worsened.

    ii) Net current assets as of 2020 accounts were just over £100,000, slightly down on the previous year. Profitability has decreased between 2019 and 2020 from 4.62% of turnover to 2.99%. BHL's latest credit rating recommends a maximum credit of £49,000 and that it is of "Higher than Average Risk".

    iii) Over the past 3 years BHL appears to have been mainly financed by debt and BHL admits to currently using a factoring company to finance its operations. There has been correspondence from Shire, the factoring company, informing ESG that all monies due should be paid to them.

    iv) Mr Cassidy's evidence is that BHL has only one other live contract which is "in considerable delay". Whilst Mr Bailey's evidence is that BHL has carried out work for other contractors and states his plans to increase turnover, he has not given any details of current projects.

    v) BHL has a sole director and there is no protection against Mr Bailey distributing the funds to himself and closing the company. It is noted that in the accounts for year ended 31 May 2020 it appears that almost the entire operating profit of the company (£179,507 against operating profit of £182,113) has been dissipated, presumably to Mr Bailey as sole director, either as remuneration (£12,500), "distributions to owners" (£78,807) or Dividends (£88,200).

92. Mr Bailey of BHL responds in his second statement of 30 December 2021, including at paragraphs 43-45:

> "BHL has been running successfully for nearly eight years and has in that time carried out six substantial projects for ESG itself. 4 of these have been over one million in value, a number of them have required more than 20/30 men on site at any one time and two of these BHL have been engaged to help ESG out of trouble as their previous subcontractors have either proved inadequate, walked off the project or gone into liquidation. BHL has never failed to complete a project for ESG.

> Outside of its business with ESG, BHL also carries out work for a number of other tier one M&E contractors in the London region. The value of the contracts it has been engaged on vary from £750,000 - £2,000,000. BHL has, at various times, engaged up to 80 subcontractors at any one time plus supervision, management and office staff. Over the years I have turned the company into one with a £3 million plus turnover. My plans are to expand the business with ambitions to double that turnover in the next 3-5 years. Contrary to Mr Cassidy's insinuations, I have absolutely no intention at all to dissipate the hard-won resources or ruin the hard-won reputation of the business whether to spend those sums on my personal lifestyle or for any other reason. I find Mr Cassidy's suggestion that I would do so offensive.
>
> I should also put on record that, in order to build the business over its 8-year history I have done nothing more than take a modest income from the business so as to support a decent living standard for myself and my family. In order to further build the business and provide security for myself and my family in later life, I have no intention to do any more than that for the foreseeable future."

93. Mr Kaplan's response to the matters relied on by ESG is as follows:

    i) BHL has not refused to provide management or other accounts to ESG. BHL is not required to, and does not, keep management accounts. Its next set of accounts are not due until February 2022 (after the date of the hearing), as Mr Djanogly's report confirms, and they have not yet been prepared.

    ii) The accounts indicate that BHL's financial position has not changed significantly since the date of the Contract in 2019. Profit for 2019 was c.£104,000 as against profit for 2020 of c.£101,000. Profit as a percentage of turnover decreased between 2019 and 2020 because overall turnover increased, a sign of strength, rather than weakness.

    iii) BHL has not sought to hide its use of factoring, which is usual in the industry. Where factoring is used, BHL provides ESG with the account details of the factoring company on the relevant invoices; where factoring is not used, BHL provides its own account details on invoices. That is consistent with the letter from Shire dated 22 November 2021, which requires ESG to make payment to Shire *"[w]here the invoices are assigned to Shire."*

    iv) BHL is not obliged to provide further details of its business.

    v) ESG's speculative assertion that Mr Bailey will dissipate any monies that it is required to pay is refuted by Mr Bailey's evidence.

94. Having considered carefully the evidence on these matters, the court is satisfied that the accounts show that BHL is a going concern and there is no indication

that it is insolvent. There is no evidence that any of the distributions are improper or indicate an intention on the part of Mr Bailey to dissipate the assets of BHL. On the contrary, Mr Bailey's evidence, which the court accepts, is that he has worked hard to build up the business and seeks to improve its success. Significantly, the accounts demonstrate that BHL's financial position is substantially the same as it was at the time that the Contract was entered into. Any adverse movement in its financial position would be accounted for by ESG's failure to pay the sum awarded in the Second Adjudication.

95. The evidence of ESG's financial position, as set out in Mr Cassidy's second witness statement and Mr Hider's statement, is not material to the issue of any stay. It is accepted that satisfaction of the judgment would have an adverse impact on its standing but ESG has not applied for a stay on the basis that it would be unable to pay.

96. ESG's submission that the court should order a stay of execution pending determination of the 'true value' of Interim Application 23, by adjudication or litigation, is contrary to general rule that adjudicators' decisions are intended to be enforced summarily and the successful party should not as a rule be kept out of its money.

97. For those reasons, the court refuses ESG's application for a stay of execution.

Conclusion

98. The Second Adjudication Decision is valid and enforceable and the circumstances in this case are not so exceptional so as to justify a stay of execution.

99. It follows that BHL is entitled to summary judgment in the sum of £724,827.88, plus interest and costs, which I will deal with following consideration of any further submissions from the parties.