Neutral Citation Number: [2023] EWHC 94 (TCC)

Case No: HT-2022-000103

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

Royal Courts of Justice
Rolls Building
London EC4A 1NL

Before :

Her Honour Judge Kelly sitting as a Judge of the High Court

- -

Between :

EXYTE HARGREAVES LIMITED

Claimant

- and –

NG BAILEY LIMITED

Defendant

Lord Marks KC (instructed by **HQ Law Limited**) for the **Claimant**
Mr Laurence Page (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **Defendant**

Hearing date: 21 June 2022
Date draft circulated to the Parties: 20 January 2023
Date handed down: 31 January 2023

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APPROVED JUDGMENT

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 10:30am on Tuesday 31 January 2023.

Her Honour Judge Kelly

1. This judgment follows the hearing of the Claimant's application for summary judgment dated 28 March 2022 to enforce decisions made in four adjudications in favour of the Claimant against the Defendant. The decisions were as follows:
   (1) Mr Don Smith dated 12 November 2021,
   (2) Mr Mark Borg dated 17 November 2021,
   (3) Mr Paul Whittle dated 29 November 2021, and
   (4) Mr Matthew Molloy dated 3 December 2021.

2. By the date of the hearing, the Claimant did not seek to enforce the decision of Mr Smith.

3. At the hearing, I had the benefit of written and oral submissions from both Lord Marks KC for the Claimant and Mr Laurence Page for the Defendant, both of Counsel.

Background

4. By subcontract made on 23 May 2019, the Claimant agreed to undertake works to the fume extraction and general galvanised supply and extraction ductwork as part of "Project Helios" at Porton Down, Salisbury ("the subcontract"). All of the adjudications concerned the Claimant's claims which arose out of variations to the subcontract.

5. The subcontract sum was £5,740,258 and the contractual date for completion was 21 October 2020. Liquidated damages were contractually agreed to be £70,000 per week up to a maximum of 50% of the agreement sum. Clause 3.1 of the subcontract provided:

   "The Subcontractor shall be entitled to receive interim payments in respect of the Agreement Sum. The interim sum due shall be the total of the following applicable at the relevant valuation date: the value as calculated by NG Bailey of the Agreement Works including Variations properly executed; less: the amount of retention calculated in accordance with the Retention Percentage, less the amount of all previous payments made to the Subcontractor, and less any sums due from the Subcontractor to NG Bailey under this Agreement".

6. Clause 3.7 of the subcontract provided:

"If NG Bailey intends to pay less than the sum stated in the payment notice, NG Bailey shall issue to the Subcontractor no later than 1 day before the final date for payment a pay less notice specifying the sum that NG Bailey considers due to the Subcontractor and the basis on which that sum is calculated. NG Bailey shall pay the sum stated in the pay less notice on or before the final date for payment."

7. The works under the subcontract are ongoing and there are now a large number of disputes between the parties concerning variations, time, loss and expense. There is an ongoing adjudication where the Claimant is seeking an extension of time for approximately one year.

8. The Claimant issued 10 notices of adjudication between 28 September 2021 and 28 October 2021, each relating to discreet variation orders. The Claimant seeks to enforce three of those adjudicators' awards. Two of the adjudication decisions which the Claimant does not seek to enforce are the decisions of Mr Bastone and Mr Smith. Both of those decisions were made before the three decisions which the Claimant now seeks to enforce. Mr Bastone decided that he did not have the jurisdiction to award a payment because of pay less notice 27 which created a negative balance to the Claimant. Mr Smith decided that he was not being asked to award payment and so did not consider the full payment cycle. The Defendant opposes the summary judgment application and asks the court to dismiss the application and the claim.

9. I have had the benefit of reading all of the witness statements contained within the bundle, together with the various documents to which I was taken during the course of the hearing and directed to in the skeleton arguments.

10. I do not propose to rehearse all of the arguments raised orally and in writing, nor all of the evidence filed by the parties. However, I record that I read and considered the evidence as a whole and all of the arguments made before coming to my decision.

The Issues

11. The parties broadly agree on the issues to be determined. The Claimant set out the issues as follows:

(1) Did each adjudicator make an order for payment?

(2) Did the decision of Mr Bastone bind later adjudicators in respect of the rate of interest?

(3) Did each adjudicator have jurisdiction to make the decision?

The Law

12. Happily, counsel largely agree on the legal principles, even if they disagree as to whether some of the principles apply on the facts of this case.

13. The statutory regime in respect of adjudication is contained within the Housing Grants, Construction and Regeneration Act 1996 ("the Act"). For construction contracts:

(1) Section 108 of the Act provides that a party has the right to refer a dispute to adjudication.

(2) Section 109 of the Act provides that a party has the right to payment by instalment, stage payments or periodic payments, unless the duration of the work is less than 45 days.

(3) Section 110 of the Act provides that the contract must set out an adequate mechanism for determining what payments become due and when, including providing a final date for payment.

(4) Section 111 of the Act imposes the obligation on the payer to pay a notified sum on or before the final date for payment. It also provides the payer with a right to issue a pay less notice and imposes a timescale for such notices and payment.

14. I was referred to Coulson on Construction Adjudication and to the following cases during submissions:

(1) *AECOM Design Build Limited v Staptina Engineering Services Limited* [2017] EWHC 723 (TCC),
(2) *WRW Construction Limited v Datblygau G Davies Developments Limited* [2020] EWHC 965 (TCC),
(3) *Siteman Painting and Decorating Services Limited v Simply Construct (UK) Ltd* [2018] SC GLA 64,
(4) *Bexheat Ltd v Essex Services Group Ltd* [2022] EWHC 936 (TCC),
(5) *Flexidig Limited v M & M Contractors (Europe) Limited* [2020] EWHC 847 (TCC),
(6) *SW Global Resourcing Ltd v Morris & Spottiswood Ltd* [2012] CSOH 200,
(7) *CCSU v Minister for Civil Service* [1985] AC 374,

(8) *AWG Construction Services Ltd v Rockingham Motor Speedway Ltd* [2004] EWHC 888 (TCC),
(9) *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC),
(10) *Balfour Beatty Construction Ltd v Serco Ltd* [2004] EWHC 3336 (TCC),
(11) *Essential Living (Greenwich) Ltd v Elements (Europe) Ltd* [2022] EWHC 1400 (TCC).

15. From those materials, I summarise the following legal principles:

(1) The court takes a robust approach to adjudication enforcement. The fact that an adjudicator has made an error of law or fact when deciding an issue referred is not a defence to enforcement of the award. The decisions are binding even if they are wrong unless and until overturned by a court at a final hearing. The only defence to enforceability is if the findings offend the principles of natural justice or if the adjudicator did not have jurisdiction.

(2) Any jurisdictional issues will be considered on an enforcement application by reference to the nature, scope and extent of the dispute identified in the notice of adjudication. It is too rigid to say that an adjudicator's jurisdiction is limited to only the facts and matters in the adjudication notice. It may also be necessary to look at the adjudicator's decision, the position taken by the parties during the adjudication including the submissions made, the evidence submitted to the adjudicator as well as claims and assertions that were made by the parties before adjudication.

(3) If a previous adjudicator has reached a decision on a dispute or difference, a subsequent adjudicator has no jurisdiction to determine matters which are the same or substantially the same as were decided in that previous adjudication. One must take a reasonably broad brush approach to determine the ambit and scope of the referred claims.

(4) If an adjudicator has answered the right question in the wrong way, the decision will be binding. If the wrong question has been answered, the decision will be made without jurisdiction.

(5) If an adjudicator is asked to consider the issue of interim payment (as opposed to interim valuation) the adjudicator is obliged to consider the defences raised which go to that issue.

(6) An employer may be entitled to set off an adjudicator's decision against monies payable to it by way of liquidated or ascertained damages, but only if that liability

has in fact accrued and the relevant contractual notice provisions have in fact been complied with.

(7) Even if the adjudicators' decisions are not binding orders for payment but binding valuations only, the court has the power to enforce payment in accordance with the valuations without the need for a further adjudication to convert those binding valuations into orders for payment.

(8) It would be unusual to allow a set off against enforcement of an adjudication decision. O'Farrell J considered set-off in the *Bexheat Limited* and the possible circumstances where that may be permissible. She said:

> 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."

I acknowledge that I have copied and pasted the dicta of O'Farrell J above from the skeleton argument of Lord Marks KC.

The Evidence

16. I had the benefit of reading the witness statement of Mr Rashid Butt dated 28 March 2022 for the Claimant, the witness statement of Jane Elizabeth Fender-Allison dated 3 May 2022 for the Defendant and the witness statement of Mr Oliver Tyson dated 10 May 2022 for the Claimant, in response to the statement of Ms Fender-Allison.

Mr Butt

17. Mr Butt set out brief details of the subcontract and brief details of the four adjudications for which summary judgment was originally sought. He exhibited the subcontract agreement, the relevant adjudicators' decisions and correspondence in respect of the adjudications, as well as the notices of intention to refer disputes to adjudication. As a result of the decisions, Mr Butt asserted that the Claimant was entitled to payment plus interest on the sums until payment because, in breach of the subcontract, the Defendant had failed to comply with the adjudicators' decisions and had not paid.

Ms Fender-Allison

18. Ms Fender-Allison asserted in her witness statement that the Claimant was not entitled to summary judgment because the adjudicators did not have jurisdiction to

award payment. This was as a result of the wording of the adjudication notices and as a result of the fact that the adjudication notices concerned individual variation orders (or purported variation orders) rather than the consideration of entire payment cycles. The Defendant had issued an amended pay less notice to the Claimant on 1 October 2021 concerning the relevant payment cycle, that is payment cycle 27. That pay less notice 27 asserted liquidated damages and contra charges in the sum of nearly £2.9 million. It was asserted therefore that the Defendant was entitled to set-off that sum against any decisions made in favour of the Claimant by the adjudicators. She also asserted that in any event, full effect was given to the adjudicators' decisions which the Claimant now seek to enforce but there remains a negative figure as a result of the liquidated damages applied in the pay less notice in respect of late completion.

19. The enforcement proceedings related only to four of the adjudications, even though the Claimant had issued a number of successive applications in respect of various variation orders. The notices of intention to refer a dispute to adjudication were identical in the first 10 adjudications, including the variations which the Claimant now seeks to enforce. For example, the wording in the notice in respect of the redress sought in the adjudication decided by Mr Borg was as follows:

"EHL will ask the adjudicator to decide/declare that: –

a. the proper value of VO88 is £11,950.47 (or such other amount as the adjudicator shall decide).
b. EHL is entitled to a further payment of £11,950.47 plus VAT as applicable (or such other amount as the adjudicator shall decide).
c. EHL is entitled to interest.
d. NGB shall pay all of the adjudicator's fees and expenses."

20. As such, it was asserted that the Claimant did not seek to provide the adjudicators with jurisdiction to carry out a full valuation of all the disputed items in the payment cycle in which the individual variation order had first appeared. In particular, it was asserted that the adjudicators did not purport to assess the true value of the liquidated damages and contra charges applied by way of set-off.

21. The decision of Mr Bastone in an earlier adjudication had expressly found that although the Claimant was entitled to an additional payment as a result of a variation order, he was unable to order payment because the additional sum due remained less than the aggregate negative sum owed pursuant to pay less notice 27. It was argued

that the various findings made by Mr Bastone were binding on later adjudicators pending determination at trial.

22. The relevant decisions now sought to be enforced by the Claimant did not order payment of the sums assessed. By its conduct, the Claimant had accepted that it did not seek payment in the original 10 notices. This was because the Claimant had changed the wording on future notices of adjudication by adding that the Defendant "shall pay" additional sums to the Claimant. Further, it was asserted that the Claimant accepted in the email from its solicitor on 17 November 2021 at 14:06 that the effect of pay less notice 27 and the liquidated damages and charges applied meant that the Defendant was not required to make payments under the subcontract in respect of sums otherwise due on a proper valuation of the variation orders. The wording of the relevant paragraph in the email relied upon was:

"…NGB has decided to issue a Pay Less Notice (attached) claiming that it is owed £3,279,079.26 of which £2,870,129 is claimed as LADs. This is simply a cynical ploy by NGB to avoid making any more payments under the Subcontract. It is relied on (successfully) by NGB to prevent other adjudicators from ordering payment of additional sums they have assessed as otherwise due on a proper valuation of Variations."

Mr Tyson

23. In reply to the witness statement of Ms Fender-Allison, Mr Tyson disputed the Defendant's interpretation of the wording of the email of 17 November 2021 as set out above. He asserted that the email merely acknowledged that the Defendant had tried to rely on the pay less notice to avoid making payments and had successfully convinced some adjudicators that they could not award payment. The Claimant did not accept that decision was correct. In addition, Mr Tyson noted that the Defendant had not argued before Mr Borg, Mr Molloy or Mr Whittle that payment could not be ordered based on pay less notice 27. As a result, he asserted it was too late for this to be argued now.

24. Mr Tyson also argued that pursuant to clause 3 of the subcontract, there was no requirement for the Claimant to repay the Defendant at an interim stage in respect of liquidated damages. The Defendant had yet to certify practical completion. The liquidated damages claimed were not accepted by the Claimant and had not been

assessed. He asserted that the liquidated claimed by the Defendant would not be payable until after practical completion and any final accounting process had taken place. The sums should not be payable to the Defendant by way of set-off against the adjudicators' decisions.

The Adjudicators' Decisions

Mr Mark Borg

25. In his summary of the dispute referred, at paragraph 1.4.1 of his decision, Mr Borg stated that "the nature of the dispute between the Parties concerns the proper value and payment of VO88". At paragraph 1.4.3 of his decision, Mr Borg set out verbatim the redress sought by the Claimant. At paragraph 1.4.5 of his decision, he set out the relief sought by the Defendant. The various grounds of opposition were set out. Those grounds included an argument that "EHL is not entitled to a payment". The sum claim was disputed and a lower true valuation of VO88 asserted. Mr Borg did not record that the Defendant at any stage argued that the Claimant was not entitled to enforcement of an order for payment of the true value of VO88 as a result of a pay less notice or any set-off.

26. Jurisdictional issues were raised by the Defendant. The arguments raised were that the dispute had not crystallised because the valuation contended for in the notice had not previously been stated nor applied for as part of the contractual payment mechanism. Mr Borg decided that a dispute had crystallised as to what the value of VO88 was and decided that he could decide what sum, if any, was due in respect of it. Mr Borg noted that the Defendant specifically reserved its right to challenge enforcement of the decision "in light of the jurisdictional issues".

27. In his decision, Mr Borg set out the issues which need to be decided. As well as the proper value of VO88 set out at issue 4, Mr Borg identified issue 5 as whether the Claimant was "entitled to further payment for VO88" and issue 6 as whether the Claimant was "entitled to interest on any sums due for VO88, and if so, at what rate".

28. When making a decision on each of the issues set out in his decision, Mr Borg set out the contentions made by both parties before setting out his findings. In respect of this dispute, when dealing with issue 3, Mr Borg noted at paragraph 4.4.10 the submission of the Claimant that the adjudicator's role in respect of VO88 was to "decide its true value and give effect to that determination by ordering payment".

29. Having listened to the parties contentions about value, Mr Borg assessed the value of VO88 at £8,611.71. Having considered the notice of adjudication, Mr Borg stated at paragraph 4.6.3 that "I consider that I am to decide whether EHL are entitled to payment for VO88 pursuant to Application Number 27, and if I find they are, decide whether EHL should be paid such further sum". He then found that the Claimant was "entitled to be paid the sum of £8611.71 plus VAT". He also awarded interest at a rate of 2% above the base rate of the Bank of England, finding that he was bound by the decision of Mr Bastone in respect of the rate of interest. He stated that the Claimant was entitled to £13.87 interest to date and that interest would accrue at £0.50 per day for every day after 17 November 2021.

Submissions

30. The Claimant submitted that it was clear from the decision of Mr Borg that the heart of his decision was as summarised at paragraph 4.6.3. He had specifically noted that the Claimant was asking for payment as well as an assessment of the valuation of VO88. As Mr Borg set that out as part of his decision, it cannot realistically be argued that his adjudication decision did not in fact concern payment of any sum assessed to be due on the decided valuation of VO88. Further, an entitlement to interest would only arise in respect of late payment. If there was a balancing exercise to be done on each side, interest would generally be calculated on the balance. The fact that Mr Borg assessed interest by itself indicates that he understood that payment was expected to be made.

31. Although challenges were made to the jurisdiction of Mr Borg, those jurisdictional challenges did not include any submission that Mr Borg did not have jurisdiction to order payment because of the negative balance created by pay less notice 27. He was not asked to consider a set off.

32. The Defendant submitted that its arguments concerned the proper scope of the adjudication. The Defendant was not required to make immediate payment in respect of any of the decisions because the Claimant did not seek that order – indeed those orders could not be granted due to the negative balance created by pay less notice 27. The Defendant asserted that because of the way individual valuation orders were referred for a true valuation by the Claimant, the individual assessment made by the adjudicators in their decisions must then sit within the framework of the payment cycle in which the variation order fell. Considering the payment cycle as a whole, there was a negative balance due to the Claimant because of the Defendant's pay less notice 27.

33. In circumstances where the liquidated damages had been applied immediately after receiving notice of the first adjudication decided by Mr Bastone, it was crucial for the Claimant to be clear whether or not it was seeking payment from the Defendant and if so, whether the account generally was within the scope of the dispute. The wording of the redress sought in the notices was not sufficient to seek payment of the valuations adjudicated. If the Claimant wished to challenge the liquidated damages and contra sum applied in pay less notice 27, it needed to raise that to be dealt with in the adjudication. The Claimant did not challenge liquidated damages or any other matters within payment cycle 27. As a result, the question for the adjudicator was narrow and simply the value of VO88.

34. The fact that interest was awarded by Mr Borg does not mean that he intended payment to be made. The delay in ascertaining the value generated an interest element in the Claimant's favour. However, the value of VO88 and any interest due in respect of that variation were part of payment cycle 27. As such, the value of VO88 and interest on it would have to be set off against the liquidated damages sum claimed which had been applied by the Defendant in pay less notice 27.

35. Insofar as the adjudicator purported to order additional payments outside of the consideration of cycle 27 as a whole, the terms of dispute were clarified by the Claimant's solicitors in their response to the jurisdictional issues raised before Mr Borg when they said "there is clearly a dispute as to EHL's entitlement and what is

this variation worth, this is what you are being asked to decide, and what was referred". No mention was there made about payment.

36. Alternatively, if the adjudicator was acting within his jurisdiction, his failure to take into account pay less notice 27 when calculating the additional payments owed was a manifest error. The Defendant, reasonably, did not appreciate that the Claimant believed that Mr Borg's decision entitled it to a payment despite the pay less notice. As the Claimant's intentions remained obscure for months, the Defendant submitted that it was not reasonably on notice that the Claimant intended to make use of the "patent error" in the decision of Mr Borg overlooking the effect of the pay less notice.

Mr Paul Whittle

37. Mr Whittle summarised the dispute before him in his decision noting at paragraph 3 that it concerned "the value of VO96 and EHL's entitlement to payment for VO96". The redress sought by EHL in his adjudication was in the same wording as that in the dispute before Mr Borg. Mr Whittle summarised the dispute: "Is the proper value of VO96 £32,571.03, or such other amount". He noted that there were a number of sub issues which he needed to consider to arrive at his finding on the main issue.

38. In his decision, Mr Whittle noted at paragraph 10 that there were no challenges to his jurisdiction. He did not record that the Defendant reserved any right to challenge jurisdiction at enforcement.

39. Mr Whittle recorded that the Claimant argued that Mr Bastone's decision in relation to his interpretation of clause 4.1 and 2.11 of the contract was binding on him, which submission Mr Whittle rejected. Mr Whittle set out briefly the contentions of each party in relation to each of the sub-issues he identified. Whilst the Defendant raised a number of issues for him to consider, the issue of set-off as a result of the imposition of the liquidated damages as claimed in pay less notice 27 was not one of them.

40. Having found the proper valuation of VO96, Mr Whittle then specifically considered whether the Claimant was "entitled to a further payment" from the Defendant. His finding was that "EHL is due for payment of the sum of £18,732.62 plus VAT at the

applicable rate, save for NGB issuing EHL a Payment Notice no later than 17 November 2021 and/or Pay Less Notice, no later than 28 November 2021".

41. Mr Whittle also considered interest. In its reply during the adjudication, the Claimant sought interest only at the subcontract rate of 2%. Interest was not ordered because Mr Whittle decided that the final date for payment was the date for service of his decision and therefore "until payment is not received on Monday, 29 October 2021, save for a Pay Less Notice served no later than 28 November 2021, there is no debt".

Submissions

42. Similar arguments to those raised in respect of Mr Borg's decision were made about Mr Whittle's decision by the Claimant and as such, I do not set them out in detail again. No challenge at all was made to Mr Whittle's jurisdiction, nor any reservation of a right to challenge enforcement of the decision in the light of jurisdictional issues. The arguments raised by the Defendant during the adjudication all failed.

43. Mr Whittle expressly considered whether or not the Claimant was entitled to a further payment from the Defendant. He decided that he did have jurisdiction to make an order for payment pursuant to the adjudication notice. He made an order for payment. He made a decision on the valuation and found that the final date for payment was 29 October 2021, subject to any pay less notice. The only reason Mr Whittle did not assess interest was because he had determined that there was no debt at the date of his decision. Lord Marks KC argued that Mr Whittle had gone off on a "frolic of his own" regarding the issue of pay less notice because nobody made any submission about it during the adjudication itself. However, the fact that he had done so is not an answer to enforcement of his decision in any event. The same reasons applied in relation to the claim for set-off. A decision about the value of a completed variation cannot be set-off against an unassessed and unproven entitlement to liquidated damages.

44. The Defendant also raised similar arguments to those raised in respect of Mr Borg's decision to challenge Mr Whittle's decision. Again, I do not set them out in the same detail. It was argued that payment was not sought, but only the proper value of VO96. It was argued that Mr Whittle applied the correct principle by noting that the payment

depended on the surrounding balances in the relevant payment cycle, and the pay less notice affected that balance. By doing that, Mr Whittle plainly did not anticipate payment unless there was a positive balance in the payment cycle. No interest will be payable because, although Mr Whittle erroneously linked VO96 to payment cycle 28 instead of payment cycle 27, the same issue remains that there was a negative balance because of the liquidated damages claimed in pay less notice 27.

Mr Matthew Molloy

45. Mr Molloy set out the dispute in paragraphs 3, 4 and 5 of his decision. The Claimant sought "an extension of time and payment in respect of VO-14 and VO-15". The Defendant denied that the Claimant had any entitlement for various reasons which included failure to meet a condition precedent and failure to demonstrate an entitlement to an extension of time. In addition, the Defendant asserted that the Claimant's failure to provide a parent company guarantee meant that the Claimant "is not entitled to payment in any event".

46. The details of the matters referred were set out at paragraph 11 of the decision and again the redress sought by the Claimant was in the same wording as for the other adjudications. The Claimant submitted it was "entitled to a further payment" and interest. The Defendant asked him to determine that the Claimant "has no entitlement to payment". Mr Molloy considered that one of the substantive issues to be decided was "Is EHL entitled to further payment in respect of VO-14 and VO-15 and, if so, how much?".

47. Jurisdictional challenge was made by the Defendant who contended that the Claimant was seeking to refer more than one dispute to adjudication. Mr Molloy decided that the matters referred represented part of the single dispute which the Claimant had elected to crystallise into a single adjudication. As such, he dealt with it. He did however note that the Defendant's continued participation in the adjudication was subject "to the reservation of its position regarding jurisdiction".

48. Having set out the various contentions made by both parties, Mr Molloy found that the Claimant was entitled to an extension of time in respect of the two variation orders

"of 154 days from 21 October 2020 until 24 March 2021". He then assessed the value of the two variation orders in the sum of £385,242.74. At paragraph 67 of his decision, Mr Molloy noted the objections made by the Defendant about the Claimant not being entitled to payment in the absence of a parent company guarantee. He also noted that the point had not been pursued in the rejoinder and the Claimant's "explanation that NGB has made a claim on the guarantee. I therefore see no good reason not to award payment". He therefore went on to find that the Claimant "is entitled to further payment of £385,242.74 in respect of VO-14 and VO-15". No argument was made by the Defendant for a set-off.

49. Mr Molloy also went on to consider interest. The Defendant sought to argue that the Claimant was not entitled to claim interest because the notice of adjudication did not specify a basis for interest and that 2% above base rate was a substantial remedy. It did not argue that Mr Molloy was bound by the decision of Mr Bastone. Mr Molloy decided that the statutory rate of 8.1% applied and found that the Claimant was "entitled to interest of £5,044.04 up to the date of my Decision and continuing at the daily rate of £85.49 until payment is made".

Submissions

50. As with the two previous adjudications, the Claimant raised similar arguments in respect of Mr Molloy's decision and as such, I do not set them out in detail. Although there was a jurisdictional challenge to Mr Molloy, it did not include any challenge to the jurisdiction of Mr Molloy to make an order for payment as a result of a claimed set-off. The Defendant reserved its position in relation to jurisdiction, but that reservation could not cover any issue not raised before the adjudicator by it. Mr Molloy specifically described the substantive issues as being whether the Claimant was entitled to a further payment and interest and if so how much. The Defendant cannot then have been in any doubt that the issue of payment was to be decided by Mr Molloy.

51. The Defendant also raised similar arguments in respect of Mr Molloy's decision as were raised with the previous two adjudications. Mr Page noted that this adjudication was a little different because it sought an extension of time as well as assessment of the value of two variation orders. It was again asserted that the Claimant had

conceded the issue of payment in the email of 17 November 2021. That email was sent to Mr Molloy in the course of correspondence concerning a request for additional time by the Defendant of 18 days to prepare a rejoinder in the adjudication before Mr Molloy.

52. The Defendant also argued that as the issue of interest had already been considered by Mr Bastone and assessed at 2% above base rate, Mr Molloy did not have jurisdiction to consider that issue because the decision of Mr Bastone was binding on him.

Findings

Did each adjudicator make an order for payment?

53. In my judgment, each adjudicator did make an order for payment. The redress sought in each of the notices was identical. The wording "EHL will ask the adjudicator to decide/declare" was sufficient to notify both the adjudicator and the Defendant that the Claimant was in fact seeking a decision, as well as a declaration, in respect of the various matters set out in the redress sought. That clearly included a claim to be "entitled to a further payment". The redress sought for payment was contained within a separate sub-paragraph to the redress sought as to the proper value of the various variation orders. In each of the cases, the Defendant asked the adjudicator to decide that the Claimant was not entitled to a payment.

54. Mr Borg made an order for payment in respect of VO88. The wording of his decision makes it clear that he considered that the referred dispute was not limited to the value of the variation but also payment of the sum assessed. In my judgment, it is also clear that the Defendant was aware that the Claimant was seeking payment, as well as a valuation, from the wording of the grounds of opposition. It is also relevant that the payment ordered by Mr Borg was said to be plus VAT. A liability to pay VAT would only arise upon payment, or the accrual of a liability to make immediate payment.

55. I also find that Mr Whittle made an order for payment in respect of VO96. From the decision, it is clear that he was ordering a payment, as emphasised by the fact that he identified the final date for payment of the sum assessed. If he was not ordering

payment, identifying a date would have been completely redundant. In addition, whilst Mr Whittle did not order interest, the only reason for that was that no interest was due "until payment is not received on Monday, 29 October 2021, save for a pay less notice". There could not be a clearer indication that he was ordering payment of the sum found. The consequences, if any, of the service of a valid pay less notice I will deal with later.

56. I also find that Mr Molloy made an order for payment. Having calculated the sums due in respect of the two variation orders he was asked to consider, he then specifically stated that the Claimant was "entitled to further payment" in respect of those variation orders. He also ordered interest to be paid from the date of his decision and continuing at a daily rate. I accept the argument of the Claimant that interest would not be payable unless the sum were due for payment.

57. I do not accept the Defendant's argument that it was conceded in the email of 17 November 2021 that, as a result of the negative balance following the amendment of pay less notice 27, no payment was in fact being claimed. The wording used by the Claimant's solicitor in the emails was in the context of dealing with the jurisdictional challenges raised by the Defendant. Although the wording relied upon was used, it was used in connection with an argument about whether or not the dispute had crystallised. No concession was made that the Claimant was not seeking any payment and only seeking a valuation. I reject the Defendant's submission that the wording relied upon in the email of 17 November 2021 can be construed as conceding that the Claimant accepted it would not be paid, as a result of the pay less notice 27, when read in the context of the email as a whole.

Did the decision of Mr Bastone in respect of the rate of interest bind later adjudicators?

58. Although the Defendant argued during the course of the various adjudications that the decision of Mr Bastone was not binding on subsequent adjudicators, it now seeks to assert that the decision of Mr Bastone is binding in relation to his assessment of interest.

59. Mr Borg found that the decision of Mr Bastone on interest did bind him. It was the Claimant who argued before Mr Borg that he was bound by aspects of the decision of Mr Bastone. It is not apparent from the decision of Mr Borg that either party had submitted that he was bound by the decision of Mr Bastone on interest. Indeed, it appears from his decision, when setting out the arguments of the Defendant, that the Defendant argued the interest point on the merits.

60. Mr Whittle noted that from the Claimant's reply, it only sought interest at the subcontract rate of 2% over base in contrast to the original submission made. In the end, he did not make a decision in respect of the rate of interest. He had determined that there was no debt because the final date for payment had not yet been reached.

61. Mr Molloy awarded interest at the statutory rate of 8.1% after considering the Late Payment of Commercial Debts (Interest) Act 1998. It does not appear from the decision of Mr Molloy that the Defendant argued that he was bound by the previous decision of Mr Bastone.

62. I do not accept the submissions made by the Defendant in respect of interest. I accept the submission of Lord Marks KC that if any of the adjudicators were wrong in deciding that the decision of Mr Bastone either did bind them or did not bind them, that is a question of law and not of jurisdiction. Even if the adjudicators got it wrong, the decision that each of them made is temporarily binding.

63. I remind myself that in order for the decision of Mr Bastone to be binding, it must be the same or substantially the same dispute proposed to be adjudicated in the other adjudications. The adjudications concerned different variations. The only matter in common was it was the same subcontract. It is also of relevance, in my judgment, that the Defendant, rather than arguing the Claimant was bound by the decision of Mr Bastone, was arguing at the time of the adjudications that it was not binding.

Did the adjudicators have jurisdiction to make the decision?

64. In my judgment, each adjudicator did have jurisdiction to make the decision he did. The fact that each were being asked to decide both value and payment was clear from

the notice of referral to adjudication and from the various submissions made by the parties on all of the matters, including jurisdiction.

65. I accept the submission made by Lord Marks KC that as the Defendant did not raise the issue of an intention to set-off the valuation determined by the adjudicator against liquidated damages applied in cycle 27, it is too late to raise that as an issue on jurisdiction now. I do not accept the submission of Mr Page that it was for the Claimant to raise any issue about set off or how the valuation would affect the balance of payments within cycle 27 generally. Those were matters which, in my judgment, could and should have been raised by the Defendant if the Defendant intended to rely upon them. For whatever reason, it chose not to. Mr Borg noted at paragraph 1.6.5 of his decision that "NG Bailey reserves its right to challenge enforcement of the Decision in light of the jurisdictional issues". A similar reservation was noted by Mr Molloy. No such reservation was noted by Mr Whittle because no jurisdictional arguments were raised by the Defendant. In my judgment the reservation of a right to challenge the jurisdiction related only to those issues actually raised by the Defendant during the course of each adjudication. It did not mean any point (including those which could and should have been raised during the course of the adjudications) would be able to be argued on any later enforcement application.

66. Also relevant to this point is the fact that the original pay less notice 27 did not assert an entitlement to liquidated damages within the timescale that would be required by section 111 of the Act. I accept the submission of Lord Marks KC that an amendment outside of the timescale prescribed by the Act cannot then be relied upon retrospectively to create a pre-existing debt. I further accept his submissions that there is no concluded right to liquidated damages until practical completion and an assessment has been made dealing with any dispute as to extensions of time between the parties whether by adjudication, agreement or otherwise.

67. I do not accept the argument that because the subcontract permits the deduction from payment of "any sums due from the Subcontractor to NG Bailey", that alone suffices to allow the set-off. The issue of set-off was not raised before any of the adjudicators. Although the date for completion was initially 22 February 2021, it was accepted by

the Defendant that the date changed, initially being brought forward to 21 October 2020, and then extended (after adjudication by Mr Molloy) to 24 March 2021. There are ongoing adjudications concerning extensions of time which, if successful for the Claimant, will result in the set-off claimed by the Defendant being extinguished.

68. In my judgment, although the rate of liquidated damages is clear within the contract, the total period of time for which any liquidated damages may be payable has not been resolved, either by adjudication, agreement or otherwise. In those circumstances, I do not accept that it is proper to permit a set-off of unassessed liquidated damages, particularly when the Defendant did not ask the adjudicator to permit or even consider such a set-off. I do not accept that, in the absence of such assessment or agreement between the parties, those sums are "due". In addition, valuation of any liquidated damages does not arise out of the assessment of the various valuation orders upon which the adjudicators were asked to decide.

69. I do not accept that the Defendant can bring itself within the limited exceptions to allow a set-off or a withholding of sums as summarised by O'Farrell J in the *Bexheat Limited* case. In my judgment, this is particularly so where an adjudicator has not been asked to consider that issue. Further, I do not accept that the dicta of Coulson J (as he then was) in the *Pilon* case assist the Defendant. It is clear from the judgment in that case that the specific arguments which the Defendant argued on appeal concerning jurisdiction were raised before the adjudicator at the time and fully argued. The adjudicator found that he did not have jurisdiction to consider batches 1-25 of the contract, as contended for by the Defendant in that case, but only batches 26-62. Considering batches 1-25 would have involved consideration of an overpayment made in respect of those earlier batches. That decision was overturned by the Court of Appeal. However, the facts in that case were very different to those in the present case and the case can be distinguished here where the Defendant did not raise the jurisdiction issue now argued.

70. In addition, I accept the submission of the Lord Marks KC that even if the adjudicator was wrong not to permit the set-off, that would in any event be an error of law rather than an issue of jurisdiction. Any set-off would be a defence to payment, and payment

in respect of the variation orders was the issue being considered by each adjudicator. As such, I do not accept that any of the matters decided by Mr Bastone or Mr Smith were binding on the subsequent adjudicators. In those circumstances, the adjudicators' decisions are binding in any event.

Conclusion

71. As a result of the various facts and matters set out above, the Claimant is entitled to summary judgment in respect of the adjudication decisions of Mr Borg, Mr Whittle and Mr Molloy in the total sum of £412,587.07 plus VAT where applicable, interest and costs, which I will deal with following consideration of any further submissions from the parties.

72. I am grateful to Counsel for their very able assistance in this matter.