Neutral Citation Number: [2018] EWHC 123 (TCC)

Case Nos: HT-2017-000336
HT-2017-000381

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

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

Date: 27 February 2018

Before:

THE HON MR JUSTICE COULSON

- -

Between:

Grove Developments Limited	**Claimant**
- and -	
S&T(UK) Limited	**Defendant**

- -
- -

Mr Alexander Nissen QC (instructed by **Macfarlanes LLP**) for the **Claimant**
Mr Anthony Speaight QC and **Mr Matthew Thorne**
(instructed by **Trowers and Hamlins LLP**) for the **Defendant**

Hearing dates: 19 and 25 January 2018

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Judgment Approved

The Hon. Mr Justice Coulson :

1. INTRODUCTION

1. By a construction contract dated 26 March 2015, the claimant ("Grove") engaged the defendant ("S&T") to design and build a new Premier Inn Hotel at Heathrow Terminal 4. The hotel was to include 613 bedrooms and a pedestrian link bridge. The contract sum was £26,393,730.04. The contract incorporated the JCT Design and Build Contract 2011. The contractual completion date was 10 October 2016. Practical completion was not achieved until 24 March 2017.

2. Since then, there have been three adjudications between the parties: the first decided that the Schedule of Amendments was part of the contract; the second adjudication decided that S&T were not entitled to a full extension of time, but were entitled to an extension of time down to 9 January 2017; and the third adjudication decided that Grove's Pay Less Notice of 18 April 2017 was invalid. This last decision meant that, on the face of it, S&T were entitled to be paid in excess of £14 million pursuant to their interim application no. 22. Grove had already anticipated a potentially adverse result in the third adjudication by the issue of their CPR Part 8 proceedings.

3. Between them, those Part 8 proceedings, together with S&T's counterclaim and S&T's separate enforcement action in respect of the decision in the third adjudication, raise four issues for the court's determination:

   (a) **Issue A**: whether or not Grove's Pay Less Notice complied with the requirements of the contract;

   (b) **Issue B**: whether, even if the Pay Less Notice did comply with the contract, the result in the third adjudication in S&T's favour should still be enforced;

   (c) **Issue C**: whether in principle, at this stage, Grove is entitled to commence a separate adjudication seeking a decision as to the 'true' value of interim application 22;

   (d) **Issue D**: whether Grove's notices in respect of liquidated damages were properly issued. This is a separate and discrete issue from the previous three.

4. I deal with those issues in this way. In **Section 2** I set out the relevant contract terms. In **Section 3** I identify the relevant events. In **Sections 4**, **5**, **6** and **7** I deal in detail with each of Issues A-D in turn. I am aware that **Section 6**, which deals with Issue C (whether an employer has the right to adjudicate the 'true' value of an interim application, in circumstances where their payment notice and/or pay less notice is deficient or non-existent) will be of particular interest to the construction industry, so I make no apologies for its length. There is a short summary of my conclusions in **Section 8**.

2. THE CONTRACT TERMS

5. The terms of the contract relevant to Issues A-D are set out in paragraph 6 below. The amendments to the standard form, which are taken from the Schedule of Amendments, are shown as underlined.

6. The terms were as follows:

> "Article 10
>
> *This Contract shall incorporate all the provisions of the Joint Contracts Tribunal Design & Build Contract 2011 (DB 2011), as amended by the Schedule of Amendments attached to the Conditions.*
>
> Clause 2.28
>
> *2.28 If the Contractor fails to complete the Works or a Section by the relevant Completion Date, the Employer shall issue a notice to that effect (a 'Non-Completion Notice'). If a new Completion Date is fixed after the issue of such a notice, such fixing shall cancel that notice and the Employer shall where necessary issue a further notice.*
>
> Clause 2.29

2.29.1 Provided

2.29.1.1 The Employer has issued a Non-Completion Notice for the Works or a Section; and

2.29.1.2 the Employer has notified the Contractor before the due date for the final payment under clause 4.12.5 that he may require payment of, or may withhold or deduct, liquidated damages,

the Employer may, not later than the day before *the final date for payment of the amount payable under clause 4.12, give notice to the Contractor in the terms set out in clause 2.29.2.*

2.29.2 A notice from the Employer under clause 2.29.1 shall state that for the period between the Completion Date and the date of practical completion of the Works or that Section:

2.29.2.1 he requires the Contractor to pay liquidated damages at the rate stated in the Contract Particulars, or lesser rate stated in the notice, in which event the Employer may recover the same as a debt; and/or

2.29.2.2 that he will withhold or deduct liquidated damages at the rate stated in the Contract Particulars, or at such lesser stated rate, from sums due to the Contractor.[1]

2.29.2.3 If the Employer fixes a later Completion Date for the Works or a Section, the Employer shall pay or repay to the Contractor any amounts recovered, allowed or paid under clause 2.29 for the period up to that later Completion Date.

2.29.2.4 If the Employer in relation to the Works or a Section has notified the Contractor in accordance with clause 2.29.1.2 that he may require payment of, or may withhold or deduct, liquidated damages, then, unless the Employer states otherwise in writing, clause 2.29.1.2 shall remain satisfied in relation to the Works or Section, notwithstanding the cancellation of the relevant Non-Completion

[1] *In addition to the notice under clause 2.29.2, the Employer, if he intends to withhold or deduct all or any of the liquidated damages payable, must give the appropriate Pay Less Notice under clause 4.9.4 or 4.12.8.*

Notice and issue of any further Non-Completion Notice.

Clause 4.7.1

4.7.1 Interim Payments shall be made by the Employer to the Contractor in accordance with section 4 and whichever of Alternative A (Stage Payments) or Alternative B (Periodic Payments) is stated in the Contract Particulars to apply.

Clause 4.7.2

4.7.2 The sum due as an Interim Payment shall be an amount equal to the Gross Valuation under clause 4.13 where Alternative A applies, or clause 4.14 where Alternative B applies, in either case less the aggregate of:

4.7.2.1 any amount which may be deducted and retained by the Employer as provided in clauses 4.16 and 4.18 ('the Retention');

4.7.2.2 the cumulative total of the amounts of any advance payment that have then become due for reimbursement to the Employer in accordance with the terms stated in the Contract Particulars for clause 4.6; and

4.7.2.3 the amounts paid in previous Interim Payments.

Clause 4.8.3

4.8.3 Where Alternative B applies, for the period up to practical completion of the Works, Interim Applications shall be made as at the monthly dates specified in the Contract Particulars for Alternative B up to the date of practical completion or the specified date within one month thereafter. Subsequent Interim Applications shall be made at intervals of 2 months (unless otherwise agreed), the last such application being made upon the expiry of the Rectification Period or, if later, the issue of the Notice of Completion of Making Good (or, where there are Sections, the last such period or notice). The due date in each case shall be the later of the specified date and the date of receipt by the Employer of the Interim Application.

Clauses 4.9.1, 4.9.2, 4.9.3, 4.9.4

4.9.1 The final date for payment of an Interim Payment shall be 21 days *from its due date.*

4.9.2 Not later than 5 days after the due date the Employer shall give a notice (a 'Payment Notice') to the Contractor in accordance with clause 4.10.1 and, subject to any Pay Less Notice given by the Employer under clause 4.9.4, the amount of the Interim Payment to be made by the Employer on or before the final date for payment shall be the sum stated as due in the Payment Notice.

4.9.3 If the Payment Notice is not given in accordance with clause 4.9.2, the amount of the Interim Payment to be made by the Employer shall, subject to any Pay Less Notice under clause 4.9.4, be the sum stated as due in the Interim Application.

4.9.4 If the Employer intends to pay less than the sum stated as due from him in the Payment Notice or Interim Application, as the case may be, he shall not later than 3 *days before the final date for payment give the Contractor notice of that intention in accordance with clause 4.10.2 (a 'Pay Less Notice'). Where a Pay Less Notice is given, the payment to be made on or before the final date for payment shall not be less than the amount stated as due in the* Pay Less Notice.

Clause 4.10.2

4.10.2 A Pay Less Notice:

4.10.2.1 (where it is to be given by the Employer) shall specify both the sum that he considers to be due to the Contractor at the date the notice is given and the basis on which that sum has been calculated;

4.10.2.2 (where it is to be given by the Contractor) shall specify both the sum that he considers to be due to the Employer at the date the notice is given and the basis on which that sum has been calculated.

Clause 4.14

4.14 The Gross Valuation shall be the total of the amounts referred to in clauses 4.14.1 and 4.14.2 less the total of the amounts referred to in clause 4.14.3, calculated as at the date for making an Interim Application under clause 4.8.3.

Clause 9.2.1

9.2 If a dispute or difference arises under this Contract which either Party wishes to refer to adjudication, the Scheme shall apply, subject to the following:

9.2.1 for the purposes of the Scheme the Adjudicator shall be the person (if any) and the nominating body shall be that stated in the Contract Particulars;"

3. THE RELEVANT EVENTS

7. In July 2017, S&T commenced the first adjudication. The dispute arose out of their contention that, as a matter of construction, the contract excluded the Schedule of Amendments. The adjudicator, Mr Piers Stansfield QC, was at pains to point out at paragraph 3 of his decision that he had not been asked to (and so did not) address matters such as rectification, misrepresentation or estoppel. In his decision dated 4 August 2017, he decided against S&T and concluded that, as a matter of construction, the Schedule of Amendments formed part of the contract[2].

8. In August 2017, S&T commenced the second adjudication. This time, the dispute concerned their entitlement to an extension of time from 10 October 2016 (the contractual completion date) to 18 May 2017. The adjudicator, Mr Philip Eyre, rejected two of the three reasons put forward by S&T in support of their claim for an extension of time. However, he accepted the validity of the third reason (the diversion of high voltage cables around the southern perimeter of the site) and granted an extension of time, on that basis only, to 9 January 2017.

9. By the time of Mr Eyre's decision on 19 September 2017, Grove had already deducted liquidated damages for the period between 10 October 2016 and 24 March 2017 (the date of practical completion). This amounted to £2,522,142.86. In consequence of the decision in the second adjudication, Grove accepted that they were no longer entitled to deduct the full amount, but maintained that they were still entitled to deduct a figure of £1,131,142.86, being the liquidated damages for the period of culpable delay from 9 January to 24 March 2017. An adjustment sum of £276,695.14 was subsequently paid by Grove to S&T to ensure that, on Grove's case, all that they were obliged to pay under the contract had been paid to S&T.

10. In the Part 8 proceedings, Grove sought a declaration that it should not be required to repay any further sum pursuant to Clause 2.29.3. The original point taken by S&T, to which this declaration went, now no longer arises. Although S&T sought in their counterclaim at (1)(b) a different declaration about liquidated damages, it is worded very generally and does not appear to go to any current issue that I have been able to discern. I therefore decline to make any specific declaration about liquidated damages, beyond that which flows from my decision on Issue D.

[2] From the documents I saw, this seems an unremarkable result but, despite both counsel's attempts to draw me into the debate, I consider that the merits of S&T's challenge to this decision are immaterial for present purposes, and I express no concluded view on the issue.

11. The subject matter of the third adjudication between the parties, namely the dispute about Grove's Pay Less Notice, and the consequential issue (namely, if the Pay Less Notice was invalid, whether Grove could challenge the 'true' value of interim application 22 without waiting for the final account process to be concluded), has its origins in the events of March and April 2017.

12. On 31 March 2017, after practical completion had been achieved but before it was certified, S&T sent Grove interim application no. 22. The application came with a detailed spreadsheet running to 30 odd pages. The summary showed that, from a gross figure of £25 million odd in interim certificate 21, S&T were now claiming that the overall contractual value was £39,707,085.90. As the S&T summary made clear, the "movement in month" – i.e. the increase above the last valuation by Grove – was £14,009,906.58.

13. In this way, a sum which represented 35% of the gross total value ascribed to the contract by S&T was the subject of the last interim application prior to the final account exercise. When measured against the contract sum of £26 million odd, and what had been valued and paid prior to 31 March 2017, it is easy to see why interim application 22, timed to arrive after practical completion had been achieved but long before any final account discussions and determination, might be categorised as a "smash and grab" claim, the phrase currently used in the construction industry to describe these large payment applications made at the end of the works but before the final account.[3] However, as S&T have correctly pointed out, theirs was not a contractor's claim (like some in the reported cases) where there was a sudden last-minute increase in the total amount of the claim; instead the big (and growing) difference between the parties' valuations had been apparent for months.

14. On 13 April 2017, Grove responded by email to interim application 22 with their detailed assessment of S&T's valuation. What was attached to the email was a version of the same spreadsheet sent by S&T, but now with Grove's assessment/valuation added. This detailed assessment gave rise to a separate Payment Notice and Interim Certificate 22, both dated 13 April 2017 and both attached to the same email. These all made plain that, on Grove's case, instead of the £14 million claimed by S&T, the net amount due from Grove to S&T was £1,407,748. And, just as the size of S&T's claim was not a surprise to Grove, the nature of Grove's response, and their much lower valuation, must have long been known to S&T.

15. It is accepted that this Payment Notice was not served in time. Equally, there is no suggestion (nor could there be) that the level of information provided by Grove in the purported Payment Notice was in any way inadequate or deficient. It mirrored precisely the level of information provided by S&T: the only difference was in the figures for each element of work.

16. On 18 April 2017, Grove emailed S&T various notices in respect of their claim for liquidated damages. I deal with those in greater detail in **Section 7** below, because they are only relevant to Issue D. On the same day, however, Grove emailed S&T their Pay Less Notice, which lies at the heart of the debate before me. That Notice was in the following terms:

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[3] This expression has been reflected in a number of the authorities. Although it is a pejorative term, I do not believe that the court can shy away from this generic description when it is freely used by the industry.

> "Pursuant to clauses 4.9.4 and 4.10.2 of the Building Contract, this Pay Less Notice gives written notification of the Employer's intention to pay less than the sum stated as being otherwise due from the Employer.
>
> The Employer considers that the sum that is due on the date this notice is given is £0.00.
>
> The basis on which the sum is calculated is as follows:
>
> 1. the sum which, absent point 2 below, would have been due from the Employer at 31 March 2017 is £1,407,748.00 plus VAT (the "**Sum**"). The basis on which the Sum is calculated is set out in the Payment Certificate 22 dated 13April 2017; and —
>
> 2. subject to paragraph 2, the Employer is entitled to withhold from the sum which would otherwise be due on that date liquidated damages of £2,506,857.00 (the "**Liquidated Damages**"). The Liquidated Damages have been calculated on the following basis:
>
> 2.1 Liquidated damages 11th October 2016 — 24th March 2017 @ £107,000.00 per week or proportion for any part thereof (total: £2,506,857.00)."

17. It is not suggested that the Pay Less Notice was out of time. The complaint now is that, because the Pay Less Notice referred back to the detailed calculation of the £1,407,748 in the purported Payment Notice of 13 April 2017, it was invalid. It is S&T's case that, in order for the Pay Less Notice to have been valid, the annotated spreadsheet had to be re-attached to the Pay Less Notice itself; a reference to it was not sufficient to comply with the contract.

18. Grove relied on the Pay Less Notice when not paying S&T any part of interim application no. 22. S&T did not seek payment for many months, which gives some support to the suggestion that, at least at that time, they did not consider that any issue arose as to the validity of the Pay Less Notice. Having raised the point for the first time in correspondence at the end of September, it was not until 1 November 2017 that S&T served a third notice of adjudication, in which they raised the issue of the validity of the Pay Less Notice. Ironically, this was done by way of an incorporation by reference, in that the notice of adjudication said that the dispute being referred to adjudication was that which had been set out in S&T's letter of 26 September 2017. That letter alleged that the Pay Less Notice was invalid because "the purported Payment Notice and calculation is *not attached* to the purported Pay Less Notice, and so the explanation of the basis on which that sum is calculated is *not attached*" (emphasis added).

19. The dispute was again referred to Mr Eyre on 8 November 2017. Eight days later, on 16 November 2017, Grove commenced the Part 8 proceedings. On 6 December 2017, Mr Eyre decided the third adjudication in favour of S&T. He said that the Pay Less

Notice was invalid because the basis of the calculation of Grove's figure was set out in a separate document. He said that the word "specify" in Clause 4.10.2.1 meant that the basis of calculation had to be provided within the Pay Less Notice itself. That decision leads on to a consideration of Issues A and B.

4. ISSUE A: THE PAY LESS NOTICE

4.1 The Issue

20. Issue A is defined by the parties as:

> "Whether Grove's purported Pay Less Notice complied with the requirement in Clause 4.10.2.1 to specify the basis of calculation."

S&T contend that the third adjudication decision reached the right conclusion for the right reasons. Grove contend that the notice did specify the basis of calculation, by reference to the document of 13 April 2017. If Grove are right, then question 1 in the Part 8 proceedings is resolved in their favour. They would be entitled to a declaration that the document issued on 18 April 2017 was a valid Pay Less Notice[4] because it specified both the sum that the employer considered to be due and the basis on which that sum had been calculated. If S&T are right, they are entitled to judgment in the enforcement proceedings in the sum of £14,009,906.58.

4.2 The Authorities

21. Notices of this kind have to be construed in a similar way to the underlying contract. The construction of such notices must be approached objectively, because the issue is how a reasonable recipient would have understood the notice. In addition, when construing the notice, the court must take into account the relevant 'objective contextual scene'. Authority for these propositions can be found in the speeches of the House of Lords in ***Mannai Investment Co Limited v Eagle Star Life Insurance Co Limited*** [1997] 1 AC 749.

22. This approach has been expressly adopted by the TCC when considering whether or not a particular pay less notice is valid: see, for example, paragraph 43 of the judgment of Carr DBE J in ***Jawaby Property Investment Limited v The Interiors Group Limited*** [2016] EWHC 557 (TCC)[5]. It is then instructive to see the effect of that approach in the TCC cases concerned with the validity of withholding notices (as they were called under the original Housing Grants (Construction and Regeneration) Act 1996) and pay less notices (as they now are under the amended Act). I shall refer hereafter to the statute as "the 1996 Act".

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[4] This may be subject to the further argument noted below, which has not yet been raised by S&T in court proceedings, that the Pay Less Notice was out of time because the Schedule of Amendments was not incorporated into the contract.

[5] In contrast, the adjudicator in the third adjudication said that the approach in ***Mannai*** was inapplicable to the construction of the notice. It follows that I disagree with that conclusion.

23. In ***Thomas Vale Construction Plc v Brookside Syston Limited*** [2006] EWHC 3637, HHJ Kirkham rejected the criticisms of the withholding notice in that case, regarding them as "artificial and contrived". She said that it was inappropriate to apply a "fine textual analysis" to a notice which was intended simply to communicate to the other party why a payment was not to be made. In that case, it was clear from the notice that payment was being withheld because the contractor had not remedied defects or completed outstanding works.

24. In ***Windglass Windows Limited v Skyline Construction Limited and Another*** [2009] EWHC 2022 (TCC) I reiterated at paragraph 14 that "the courts will take a practical view of the contents of a withholding notice and will not allow complaints as to form which might be described as artificial and contrived". Again in that case, the argument that the withholding notice was deficient failed.

25. A similar argument failed before Akenhead J in ***Henia Investments Limited v Beck Interiors Limited*** [2015] EWHC 2433 (TCC). At paragraph 32, the learned judge indicated that one way of testing the validity or otherwise of the pay less notice was to see whether it "provided an adequate agenda for an adjudication as to the true value of the Works and the validity of the alleged entitlement to liquidated damages for delay." He rejected the contractor's criticism of the Pay Less Notice. So too did the deputy high court judge in ***Surrey and Sussex Healthcare NHS Trust v Logan Construction (Southeast) Limited*** [2017] EWHC 17 (TCC).

26. In my judgment, all of these authorities point the same way. A pay less notice will be construed by reference to its background, in order to see how a reasonable recipient would have understood it. The court will be unimpressed by nice points of textual analysis, or arguments which seek to condemn the notice on an artificial or contrived basis. One way of testing to see whether the contents of the notice are adequate is to see if the notice provides an adequate agenda for a dispute about valuation and/or any cross-claims available to the employer.

27. There was a hint in one or two of the authorities, reflected in Mr Nissen's submissions on behalf of Grove, that an employer's pay less notice might be construed "more generously" than the contractor's interim application/payment notice because, whilst the former might be regarded as merely defensive, the latter can give rise to draconian consequences if they are not responded to in time (as this case demonstrates). However, I do not consider that the courts should generally adopt a different approach to the construction of the two different kinds of notices: that would be potentially contrary to ***Mannai***. That said, the particularly adverse consequences for an employer that follow from, say, a contractor's unanswered application/payment notice are relevant to the test of the reasonable recipient: would that recipient have realised that the document in question was an application or payment notice, with contractual force, and with all the consequences that that may entail?

28. In addition, I do not believe that the cases show a difference in approach. For example, in ***Caledonian Modular Limited v Mar City Developments Limited*** [2015] BLR 694, where the dispute concerned whether a purported payment notice was any such thing, I said:

> "But it seems to me that, if contractors want the benefit of these provisions, they are obliged, in return, to set out their interim

> payment claims with proper clarity. If the employer is to be put at risk that a failure to serve a Pay Less Notice at the appropriate time during the payment period will render him liable in full for the amount claimed, he must be given reasonable notice that the payment period has been triggered in the first place."

Similar comments can be found in other disputes about payment notices including ***Severfield (UK) Limited v Duro Felguera UK Limited*** [2015] EWHC 3352 (TCC), and ***Kersfield v Bray and Slaughter Limited*** [2017] EWHC 15 (TCC). In the latter case, O'Farrell J said at paragraph 31 of her judgment that "an interim application must be obviously identifiable as such and it must set out, as a minimum, the sum claimed as due and the basis on which such sum is calculated."

29. In my view, that general guidance applies equally to a payment notice and a pay less notice. Each has to make plain that it is, respectively, a payment notice or a pay less notice. Each has to clearly set out the sum which is said to be due and/or to be deducted, and the basis on which that sum is calculated. Beyond that, the question of whether or not it is a valid notice in accordance with the contract is a matter of fact and degree.

30. Finally, it is instructive to look at the two most recent cases in England and Scotland to see this approach in action. In ***Systems Pipework Limited v Rotary Building Services Limited*** [2017] EWHC 3235 (TCC), I set out some of the cases identified above. I deliberately did not distinguish between the two different kinds of notice. I went on to conclude that the payment notice in question was deficient. That was for the obvious reason that it only set out one side of the equation, namely the gross calculation, and so did not specify the sum due and payable. It could not, therefore, be described as a payment notice.

31. In the Scottish case of ***Muir Construction Limited v Kapital Residential Limited*** [2017] CSOH 132, Lord Bannatyne concluded that the Pay Less Notice was inadequate. One of the difficulties in fully understanding the court's reasoning stems from the fact that the terms of the pay less notice itself are not set out in the judgment. But it is plain to see why the judge came to his conclusion. At paragraph 89, he said:

> "From none of the information provided could the reasonable recipient work out the basis on which the zero sum figure was calculated. There is no calculation put forward which would allow the reasonable recipient to understand how that figure is arrived at. There is no specification which would allow the reasonable recipient to make any sense of the figure arrived at. The defender sets forth no figures and thus no basis substantiating the zero sum figure in the [Pay Less Notice] or in any of the other documentation upon which it relies."

On the face of it, therefore, the pay less notice was defective because it did not set out a single figure or sum (other than the conclusion of 'zero'). It is therefore hardly surprising that the learned judge concluded that, as a calculation explaining why nothing was due, the pay less notice was entirely deficient.

4.3 Analysis

32. In accordance with the principles identified in the authorities above, I find that the Pay Less Notice sent by Grove on 18 April 2017 did properly set out the basis of calculation so that, contrary to the adjudicator's decision, it was a valid Pay Less Notice. There are a number of reasons for that conclusion.

33. First, there can be no doubt that the detailed calculation sent five days earlier with the purported Payment Notice of 13 April would have permitted the reasonable recipient to understand precisely how Grove's valuation, and the figure of £1.4 million odd, was calculated. In contrast to the notice in ***Muir***, there were detailed figures for every separate element of the works. In accordance with the test in ***Henia***, there was a detailed agenda for any subsequent adjudication as to valuation: how could it be otherwise, when the same spreadsheet had been used by each party to identify their differences?

34. Secondly, there can be no possible objection in principle to a notice referring to a detailed calculation set out in another, clearly-identified document. That is how these things are commonly done[6]. S&T's letter of 31 March 2017 made plain that the calculation supporting their own application was set out in an attached spreadsheet, in precisely the same way as Grove's purported payment notice of 13 April relied on their own version of the same spreadsheet. Setting out the detailed calculation in a separate document is an uncontroversial feature of a number of the reported cases: both ***Severfield*** and ***Kersfield*** make clear that the relevant notices set out the detail of the figures in "accompanying spreadsheets".

35. Accordingly, S&T's argument must come down to the narrow submission that, whilst Grove's detailed spreadsheet of 13 April 2017 contained sufficient information for a reasonable recipient to understand Grove's case as to valuation, and whilst Grove could have re-sent that document as an attachment to the Pay Less Notice, the fact that it was not re-sent was fatal to the validity of the Pay Less Notice of 18 April 2017. S&T must submit that, even though it was plain on the face of the Pay Less Notice where the detailed calculation could be found, the Pay Less Notice was invalid because the spreadsheet was not re-sent and was instead only referred to.

36. Despite the attractive way in which it was put by Mr Speaight, I reject that argument as 'artificial and contrived' (as per ***Thomas Vale***). It would have the effect of preventing a party in the position of Grove from incorporating another document by reference, and oblige them instead to re-send that same document all over again. That is not a common sense or businesslike approach to a notice of this kind. There is nothing in the contract which required the re-sending of a document already sent, provided always that, as it was here, it was clear to what document the Pay Less Notice referred.

37. In the third adjudication, Mr Eyre decided this issue principally by reference to two things: the potential dangers of incorporation by reference, and the dictionary definition of the word "specify". Mr Speaight's submissions also made much of these arguments, so I deal with each in turn.

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[6] As I have noted, in their third notice of adjudication, S&T 'specified' the dispute by reference to their letter of 26 September, which they did not re-attach to the notice.

38. As to the argument about the potential dangers of incorporation by reference, I was very struck by paragraphs 26 and 27 of the adjudicator's decision of 6 December 2017. Those paragraphs incorporate a long passage from S&T's (ultimately successful) submissions in the third adjudication:

> "26. Notwithstanding that S&T has not been able to identify express direct legal authority in support of their interpretation of "*shall specify*" I have considered carefully the arguments that have been advanced by S&T at paragraph 15 of the Reply and agree with S&T about the effect of the plain wording of the Contract. S&T sets out the policy reasons for the approach to be preferred at Reply paragraph 15.2 and I consider that S&T has identified compe1ling policy reasons for the Pay Less Notice to require all calculations to be provided with the Pay Less Notice. Paragraph 15.2 states:
>
> ***"(b)……if the Responding Party's approach were adopted, the validity of a Pay Less Notice might then turn on, for example: whether the document referred to had been previously supplied to the recipient; whether such document was still in the receiving party's possession (and, if it was not, who should take the risk of that? Would the Notice still be valid because the Employer cannot be held responsible for loss of previous documents by a Contractor, even though it is the Employer's responsibility to specify matters?); whether a document in the public domain to which reference was made would suffice; in the case of a company, whether reference to a calculation in the possession of a different or past employee was sufficient; or whether a reference to a calculation stated orally in a site meeting was sufficient. On the Responding Party's logic, the majority (if not all) of these scenarios may be permissible despite the high potential for satellite disputes arising therefrom. [Indeed, Employers would on such reasoning be likely in future to seek to incorporate all documents exchanged between the parties as a 'catch-all' to safeguard their position, such as by noting (for example) that the basis for the calculation "is as set out in the documentation previously provided by the Employer and/or as discussed in site". There can be no distinction in principle between such a case and the present. This would undermine the purpose of the legislation and would lead to confusion and further dispute.] Likewise, if it is permissible to incorporate another document by reference, it would presumably also be permissible to incorporate 2 documents; if 2,***

> ***why not 3, or 4? If 3 or 4, why not a whole file? The more documents so incorporated, the less clear may be the message emerging from them. Supplying too much information can be as obscuring as supplying too little. It is precisely to avoid such fact-specific uncertainty that the wording of the Act and Contract is very clear: the relevant Notice must specify the basis of the calculation."***
>
> 27. On the use of the word "specify" I agree that the use of this particular word in drafting precludes an interpretation referring the reader to another earlier issued document. Had the parties intended that such reference would be permitted, they would certainly not have used the word "specify" and would have used different terminology such as "identify". The word "specify" imposes a requirement on the party seeking to pay less to ensure that the explanatory calculation is somehow provided together with the PLN. This approach is consistent with the language of the Judge at paragraphs 49 and 53 of ***Surrey and Sussex***."

39. In my view, it is not a proper approach to construction to condemn one interpretation by worrying about, not the known facts of the case or the test of the reasonable recipient, but instead increasingly fanciful factual scenarios which are far removed from what happened. I reiterate that none of the gloomy hypothetical questions posed by S&T, which the adjudicator repeats and adopts, have anything to do with the facts of this case or the proper interpretation of this Pay Less Notice.

40. Of course, I recognise that if a party incorporates a document already sent by reference, and does not re-send it, then that party takes the risk that something may go wrong with the technology or the mode of delivery of the first document. Equally, the words of reference, or the precise document being referred to, might be unclear. Each of those situations may give rise to a subsequent finding that the relevant notice was invalid. But it is idle to speculate on all the many ways in which the process of referring to another document might go wrong: all that matters is whether any of those difficulties occurred here.

41. In the present case, there were no practical difficulties at all, either about the electronic sending and receipt of the Notices of 13 and 18 April 2017; or the identity of the documents attached to either of the Notices; or the clarity of the precise reference in the Pay Less Notice to the detailed spreadsheet which had been attached to the purported Payment Notice five days earlier. On the facts of this case, the reasonable recipient would have known precisely what sum was being deducted and the basis of its calculation.

42. I think that this analysis also answers Mr Speaight's related point, about the policy that underpinned the 1996 Act. I agree that the 1996 Act was designed to promote clarity and certainty and it must of course follow that, if a notice is unclear or uncertain, then it would be contrary to that policy, and invalid. But if, as here, the pay less notice is entirely clear, and there can have been no uncertainty as to the document

to which Grove was referring, the policy point goes nowhere. In addition, because Grove's detailed response on the figures had been in S&T's possession for 5 days already by the time of the Pay Less Notice, the necessary clarity and certainty were plainly achieved; they had had considerably longer to take on board the opposing valuation than the contract stipulated.

43. Moving to the second strand of S&T's argument, I consider that the emphasis on the dictionary definition of "specify" gave rise to much too restricted an approach to the construction of this Pay Less Notice. But in any event, the Oxford English Dictionary defines the verb "specify" as "speak or treat of a matter etc in detail; gives details or particulars." In my view, that is what the Pay Less Notice does: it gives the particulars of Grove's detailed case as to valuation by reference to the earlier spreadsheet. The mere fact that the specifying is done by referring to another document does not detract from that.

44. The OED also defines the verb 'specify' as stating something "categorically or particularly". In my view the words in the Pay Less Notice ("the basis on which the sum is calculated is set out in the Payment Certificate 22 dated 13 April 2017") specified the sum calculated and identified (by reference) the reasons for its calculation both "categorically and particularly".

45. There is nothing in the dictionary definition of the word "specify" to support the argument that it somehow prohibited incorporation by reference, or that the 'specifying' could not be achieved unless the detailed 'specification' was provided simultaneously. In the contract, the verb "specify" goes to the detail required in the Notice, not the method by which that detail was conveyed to the other party.

46. Indeed, as Mr Nissen points out on behalf of Grove, because the dictionary definition refers expressly to an 'architect's or an engineer's specification', it suggests that incorporation by reference to other documents (which then have to be sought out) is within the definition of the word "specify". An architect's specification is usually festooned with references to British Standards, Codes of Practice and the Building Regulations. They will specify that, for example, the damp proof course has to be in accordance with a particular Building Regulation. It is not an invalid specification because the Building Regulation itself, although identified by reference, is not also sent with the same document.

47. Both parties sought to bolster their respective cases by reference to the allegedly draconian consequences if, in various hypothetical circumstances, the other side's argument was right. I have already said that I think that the adjudicator was led into error by this process. Certainly, I gleaned little assistance from the artificial exercises adumbrated by both sides: I found myself noting in the margins of my notebook that it was always "a matter of fact and degree". I cannot do better than repeat that mantra here.

48. Standing back for a moment, there was at the time no suggestion that S&T did not know precisely what was being referred to in the Pay Less Notice. That may explain the lengthy delay before the point was first taken. Even then, S&T have been careful not to say that they were in any way unsure or uncertain as to the nature and effect of

the reference. That is at least one way of testing whether a reasonable recipient would have had any such doubts[7].

49. For all these reasons, I answer Issue A in Grove's favour. The Pay Less Notice of 18 April 2017 complied with Clause 4.10.2.1 of the Contract. Grove are entitled to a declaration to that effect.

5. ISSUE B: ENFORCEMENT OF THE THIRD DECISION IN ANY EVENT

5.1 The Issue

50. The parties have agreed Issue B in the following terms:

> "Whether the third adjudication award ought to be enforced even if the Pay Less Notice did specify the basis of calculation. S&T so contends because Grove failed to comply with the time limits in the unamended JCT conditions and because of the imminent Part 7 litigation by which S&T intend to assert that Grove's attempt to amend the JCT conditions was ineffective."

51. In essence, this issue arises because the Schedule of Amendments altered the period when the Pay Less Notice was to be served. The unamended form of JCT contract identified a period of five days before the final date for payment; that was changed to three days by the Schedule of Amendments. On the facts, therefore, but for this part of the Schedule of Amendments, the Pay Less Notice would have been out of time.

5.2 The Sequence

52. The first adjudicator decided that the Schedule of Amendments was incorporated into the contract (see paragraph 7 above). That decision was and remains binding on the parties unless and until one or other party seeks to review it in court proceedings. I am not asked to review it and there are as yet no proceedings in which any such challenge is made, although I note that S&T have indicated that they want to commence such proceedings, and the parties are currently participating in the TCC Pre-Action Protocol process.

53. The decision of the first adjudicator was binding on Mr Eyre, the adjudicator who dealt with the second and third adjudications.

5.3 Analysis

54. In my judgment, having concluded in **Section 4** above that Mr Eyre was wrong to reach the conclusion that he did in the third adjudication, his decision of 6 December 2017 cannot be enforced. There are three different ways of arriving at that same result.

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[7] There is another point on the wider merits which, although only of tangential relevance, needs to be made. S&T were anxious to emphasise that the £14 million they were awarded by Mr Eyre was not a one-off claim, but was instead the steady build-up of differences between their own valuations and those of Grove during the currency of the contract. Thus, even on their own case, S&T had long been aware of the detailed reasons for the different valuations. In those circumstances, it cannot sensibly be said that it was the policy of the 1996 Act to require Grove to pay what S&T knew Grove disputed, simply because they did not re-send a document with the Pay Less Notice that itself was largely re-stating earlier valuation differences.

55. First, the parties agreed to be bound by the adjudicator's decision unless and until the underlying dispute is finally determined by the court. In **Section 4** above, I have finally determined the dispute about the validity of the Pay Less Notice of 18 April 2017. In that way, Mr Eyre's decision of 6 December 2017 is no longer binding on the parties. There is nothing left to enforce.

56. Secondly, at all relevant times since 4 August 2017, both parties have been bound by the decision of the first adjudicator as to the incorporation of the Schedule of Amendments into the contract. So both parties must accept, at least as things presently stand, that the Schedule of Amendments was incorporated into the contract, which means in turn that the Pay Less Notice of 18 April 2017 was served in time. Thus, although S&T may wish to complain about that decision in the future, it is not currently open to them to ask this court to decide anything on any basis other than that the first adjudicator's decision.

57. Thirdly if, in separate proceedings, the court concluded that the Schedule of Amendments was not incorporated into the contract, then S&T would be free to raise the dispute about the timing of the Pay Less Notice. That issue would not have been decided in any previous adjudication, so at that stage S&T could refer it to adjudication: see ***Harding v Paice*** [2015] EWCA Civ. 1231 and ***Brown v Complete Building Solutions Limited*** [2016] EWCA Civ. 1[8]. What they cannot do is refer it now, when the first adjudicator's decision renders any argument on the topic redundant.

58. Mr Speaight sought to argue that, because the relief claimed in the notice of adjudication in the third adjudication was a declaration that the Pay Less Notice was invalid, and that that was Mr Eyre's decision, his decision should remain in force until S&T have had the opportunity, in court proceedings, of overturning the first adjudicator's decision and/or seeking declarations on the issues in connection with the Schedule of Amendments which the first adjudicator expressly did not address, such as estoppel, collateral contract and the like. However, in my view, that approach is fundamentally wrong.

59. It is trite law that the notice of adjudication is the starting point for any consideration of the scope of the adjudication: see ***University of Brighton v Dovehouse Interiors Limited*** [2014] EWHC 940 (TCC). Although the notice has to be looked at in its factual context, the definition of the dispute in the notice of adjudication is of critical importance. Here, S&T's notice made plain that the dispute concerned the *content* of the notice. They never at any point raised any question as to its *timing* (because they could not do so).

60. In addition, Mr Speaight's submission, if taken to its logical conclusion, would mean that a party could hang on to an adjudicator's decision in its favour (in this case worth £14 million), even if the court had finally determined the only issue in that adjudication against them, merely because, at some point in the future, there might be court proceedings on a different topic which might lead to a different result (possibly for different reasons), and which might then allow a new argument to be run about the potential invalidity of the Pay Less Notice. Not only is that the sort of Micawberism that the 1996 Act (with its emphasis on clarity and certainty) was designed to prohibit,

[8] Both cases are discussed in detail in **Section 6** below.

but it is wholly contrary to the well-known summary of adjudication enforcement principles by Chadwick LJ in ***Carillion Construction Limited v Devonport Royal Dockyard Limited*** [2005] EWCA Civ. 1358.

61. In support of his position, Mr Speaight sought to rely on paragraph 32 of the judgment of Lord Mance in ***Aspect Contracts (Asbestos) Limited v Higgins Construction Plc*** [2015] UKSC 38. There, Lord Mance said:

> "One further point requires stating. In finally determining the dispute between Aspect and Higgins, for the purpose of deciding whether Higgins should repay all or any part of the £658,017 received, the court must be able to look at the whole dispute. Higgins will not be confined to the points which the adjudicator in his or her reasons decided in its favour. It will be able to rely on all aspects of its claim for £822,482 plus interest. That follows from the fact that the adjudicator's actual reasoning has no legal or evidential weight. All that matters is that a payment was ordered and made, the justification for which can and must now be determined finally by the court. Similarly, if Aspect's answer to Higgins's claim to the £490,627 plus interest ordered to be paid had been not a pure denial of any entitlement, but a true defence based on set-off which the adjudicator had rejected, Aspect could now ask the court to re-consider and determine the justification for that defence on its merits."

62. Mr Speaight argued that this meant that, if an adjudicator makes a decision in favour of the contractor, the court will not order repayment until "the whole dispute" had been determined by the court. He therefore said that this allowed S&T to be paid the £14 million, and to hang on to it until all the disputes, past, present and future, had been finally determined. But with respect, that was not what Lord Mance was saying. When he talked about the court considering "the whole dispute", he meant that the court would consider, afresh, the whole of the dispute which had originally been referred to adjudication. The parties would not be limited to the arguments or evidence that they advanced in the adjudication. So, in that case, where the dispute concerned the value of Higgins' claim, the parties were not bound by the arguments or evidence as to value that were advanced in the adjudication. In the present case, "the whole dispute" in the third adjudication was restricted to the content of the Pay Less Notice, so that is all that I have considered in reaching my decision on Issue A. In using that expression, Lord Mance was not referring to matters outside the adjudication in question, and certainly not referring to possible disputes which may or may not arise in the future.

63. For all these reason, therefore, I decide Issue B in Grove's favour. It is the only permissible consequence of my finding in relation to Issue A.

5.4 Interest

64. There was originally an argument about whether there should be interest payable to S&T in any event, on the basis of the decision in the third adjudication. However, the parties have agreed that if, as I have found, Grove were right on Issues A and B, no

interest would be payable. That seems to me to be right, and the logical consequences of paragraphs 23 and 24 of the judgment of Lord Mance in ***Aspect***.

6. ISSUE C: THE RIGHT TO ADJUDICATE THE 'TRUE' VALUE

6.1 The Issue

65. The parties have agreed that Issue C is defined as follows:

> "Whether Grove is, at this stage, entitled to commence a claim (whether by adjudication or litigation) for a financial adjustment in its favour on the basis of a fresh valuation (S&T's formulation) / a finding as to the 'true' value of the sum due (Grove's Formulation)."

66. There was some question as to whether this issue arose at all if (as I have done) I found in favour of Grove on Issues A and B. But I think it does arise because of the formulation of the claims for declarations in the Part 8 proceedings. For these purposes, I must simply assume that, contrary to my primary view, the Pay Less Notice was deficient. Further, the answer on Issue C would be directly relevant if, regardless of my conclusions on the Part 8 claims, it was to be decided that the Schedule of Amendments was not incorporated into the contract (because then the Pay Less Notice would have been out of time in any event). For these reasons, and for what it is worth, I do not believe that my consideration of Issue C is *obiter*. In any event, I consider that, in deference to the detailed arguments of leading counsel (for which I am grateful), I ought to set out my views on Issue C in some detail.

6.2 Analysis: First Principles

67. It is, I think, instructive to begin a consideration of this issue by applying first principles, and then to see the extent (if at all) to which the authorities point towards or away from the conclusion thereby arrived at. At all times I keep in mind the simplicity of the underlying issue: can an employer, whose payment notice or pay less notice is deficient or non-existent, pay the contractor the sum stated as due in the contractor's interim application and then seek, in a second adjudication, to dispute that the sum paid was the 'true' value of the works for which the contractor has claimed? In my view, on the application of first principles, there are six separate reasons why the answer to that question is Yes.

68. An instructive starting-point (not least because of the strength of the constitution in the Court of Appeal) is ***Henry Boot Construction Limited v Alstom Combined Cycles Limited*** [2005] 1 WLR 3850. At paragraph 23 of his judgment, Dyson LJ (as he then was) said:

> "It does not, however, follow from the fact that a certificate is a condition precedent that the absence of a certificate is a bar to the right to payment. This is because the decision of the engineer in relation to certification is not conclusive of the rights of the parties, unless they have clearly so provided. If the engineer's decision is not binding, it can be reviewed by an arbitrator (if there is an arbitration clause which permits such a

> review) or by the court. If the arbitrator or the court decides that the engineer ought to have issued the certificate which he refused to issue, or to have included a larger sum and a certificate which he did issue, they can, and ordinarily will, hold that the contractor is entitled to payment as if such certificate had been issued and award or give judgment for the appropriate sum."

69. Later in his judgment, when discussing ***Beaufort Developments (NI) Limited v Gilbert-Nash (NI) Limited*** [1999] 1 AC 266, Dyson LJ noted that the fact that the power to open up, review and revise certificates was expressly conferred on an arbitrator was not to be construed as removing the court's unlimited power to do the same. He confirmed that the court had always had the inherent power to determine the rights and obligations of the parties.

70. ***Henry Boot*** is therefore authority for the proposition that the court can decide the 'true' value of any certificate, notice or application and that, as part of that process, it has an inherent power to open up, review and revise any existing certificates, notices or applications.[9] Mr Speaight properly conceded that, if the court had the power to do something, then so too did an adjudicator. I agree: in any case where the parties have conferred upon an adjudicator the power to decide all disputes between them, the adjudicator has the same wide powers as the court. In this case, therefore, I consider that, in line with ***Henry Boot***, the court (and/or an adjudicator) has the power to decide the 'true' valuation of interim application 22.

71. The second reason why, as a matter of first principles, I have concluded that the employer can start a second adjudication dealing with the 'true' valuation is linked to the first, but it arises from the statutory power of the adjudicator.

72. Consider first s.108(1) of the 1996 Act. That provides:

> "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."

73. There is therefore no limitation on the nature, scope and extent of the dispute which either side can refer to an adjudicator. There is no qualification to the types of dispute encompassed by s.108: see ***Banner Holdings Limited v Colchester Borough Council*** [2010] EWHC 139.

74. The same is also true of paragraph 20 of the Scheme. That provides:

> "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 which the matters under the contract which he considers are necessary connected with the dispute. In particular, he may –

[9] The older cases talk about certificates, because that was the method by which the financial relationship between the employer and the contractor was regulated. Now, largely due to the 1996 Act, the standard forms of contract focus instead on notices and applications. But there is no essential difference: they are simply the means by which interim payments (and the final payment) are made.

> (a) Open up, revise and review any decision taken or any certificate written by any person referred to in the contract unless the contract states that the decision or certificate is final and conclusive;
>
> (b) Decide that any of the parties to the dispute is liable to make a payment under the contract (whether in sterling or some other currency) and, subject to section 11(9) of the Act, when that payment is due and the final date for payment;
>
> (c) Having regard to any term of the contract relating to the payment of interest decide the circumstances in which, and the rates at which, and the periods for which simple or compound rates of interest shall be paid."

It seems to me that the first sentence of paragraph 20 of the Scheme could not be broader.

75. It is convenient to note here that there has been some discussion in the cases (analysed in **Section 6.4** below) about sub-paragraph 20(a) and whether or not this gives an adjudicator the power to decide the 'true' valuation, after the employer has paid the sum stated as due (because of an absent or deficient payment notice or pay less notice). To the extent that it is suggested that the adjudicator does not have that power, I disagree, for the reasons already outlined. Moreover, paragraphs 88-91 of the judgment of Chadwick LJ in ***Carillion v Devonport Royal Dockyard Limited*** explained that the three instances (a) - (c) which follow the words "in particular" in paragraph 20 are not to be taken as in any way limiting the unqualified and broad words in the first sentence, which allows the adjudicator to decide "the matters in dispute". The three sub-paragraphs are merely examples of the adjudicator's powers: they are not limits upon it.

76. Accordingly, that is a second reason for concluding that, not only can a court decide any subsequent dispute as to the 'true' valuation of the interim application, but there is also no limit on the power or jurisdiction of an adjudicator which would prevent him or her from doing the same.

77. Thirdly, on the premise noted in paragraph 67 above, the dispute which the employer would wish to raise in the second adjudication is a different dispute to that which was determined in the first. In the first adjudication, the issue would be whether or not the employer's payment notice and/or pay less notice was deficient or out of time. If the adjudicator in the first adjudication found that the employer's notice(s) was deficient or out of time, then the contractor would have an unanswerable right to be paid the sum stated in its own application or payment notice[10]. In the present case, as a result of Mr Eyre's decision in the third adjudication, S&T were entitled to be paid the sum stated in interim application 22.

[10] Subject to an (entirely separate) argument by the employer for a stay of execution, relief which is usually difficult to obtain.

78. Mr Eyre did not concern himself with any detailed matters of valuation. That was because the only dispute referred to him was whether or not the content of the Pay Less Notice of 18 April 2017 was deficient. He concluded that it was. So he did not need – and did not have the jurisdiction – to address any questions of valuation. Thus the dispute relating to the 'true' valuation of interim application 22 was not considered or decided in the third adjudication. If Grove challenge S&T's evaluation, as they do, then that dispute must be capable of being referred to adjudication. Any other result would be an unwarranted restriction on Grove's ability to adjudicate any dispute "at any time", in accordance with s.108(2)(a) of the 1996 Act.

79. Fourthly, it is instructive to look at the words of the contract. Mr Speaight made detailed submissions, by reference to ***Beaufort***, and the earlier case of ***Gilbert Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd*** [1974] AC 689 to the effect that, since the common law did not recognise a contractor's right to interim payments, but most of the standard forms of building contract did, the terms of the contract were of the utmost importance. I respectfully agree with that analysis.

80. Here, the words in the contract expressly differentiate between "the sum due" (Clause 4.7.2) on the one hand, and "the sum stated as due" in the payment notice or the pay less notice (Clause 4.9), on the other. The contract deliberately uses different terms. Why?

81. In my view, the answer is obvious. "The sum due" is identified in Clause 4.7 because that is the result of the contractual mechanism designed to calculate the contractor's precise entitlement (the 'true' valuation). It is the process by which the correct amount, calculated to the penny, is arrived at. That is a very different thing to "the sum stated as due", which is the phrase used twice in Clause 4.9. Clause 4.9 recognises that the contractor's application/payment notice will identify the sum which the contractor has "stated to be due" and it provides that, in the absence of a payment notice and/or a Pay Less Notice from the employer, it is "the sum stated as due" which will be payable. Similarly, if there was a valid pay less notice, then it would be "the sum stated as due" in that notice that would be payable.

82. In neither case would it be "the sum due" (ie the 'true' valuation) that was payable (save in the most unlikely of coincidences, where the contractor or employer got it 100% right in their particular application or notice). In this scenario, the mechanism in Clause 4.7, designed to arrive at the precise "sum due", has been displaced by the notice regime, where all that matters is the sum "stated to be due" in the relevant notice. There is a fundamental difference between these two concepts. "The sum stated as due" will almost certainly be different to the sum carefully calculated under Clause 4.7, but (for example) because of the employer's failure to serve a proper or timeous pay less notice, it is "the sum stated as due" that has to be paid. That does not mean that "the sum stated as due" has somehow magically been transformed into a Clause 4.7 valuation, and "the sum due".

83. Accordingly, this is a fourth reason why, as a matter of first principles (namely, the construction of the contract), I conclude that an employer, having paid "the sum stated as due", is entitled to commence an adjudication as to the 'true' valuation of the contractor's interim application. In my view, any other result would ignore the careful drafting of the contract provisions.

84. The fifth reason why, as a matter of general principle, I consider that the employer can refer the dispute about the true valuation to adjudication, once he has paid the sum stated to be due, arises from considerations of equality and fairness. It is not controversial that, if an employer serves a payment notice or a pay less notice which is in a lower sum than that for which the contractor has applied, the contractor can refer the dispute about the 'true' value to adjudication. Sections 111(8) and (9) of the 1996 Act expressly envisage that situation: although they are concerned with when any additional sum is to be paid, they assume that the contractor has the right to make such a claim in the first place. It has never been argued that a contractor cannot do this, and Mr Speaight did not suggest otherwise.

85. If a contractor can launch an immediate attack on the "sum stated to be due" in the pay less notice, because they say that it is too low, there would need to be clear words in the 1996 Act and/or the Scheme and/or the particular contract in question which would prohibit the employer from being able to do the same. There are no such words anywhere. In my view, there is nothing in the 1996 Act or the Scheme or the JCT form which envisages such a one-way street. Accordingly, it would be wrong in principle to prohibit the employer from doing that which the contractor can do: there can be no justification for such radically different treatment.

86. Finally, as we shall see in **Section 6.4** below, the only real justification which has been advanced in the cases for prohibiting an employer from commencing a second adjudication, to deal with the dispute about the 'true' value, has been the mantra that it does not really matter, because the prohibition only applies to interim applications, and does not apply to the final application. Again, as a matter of first principles, there seems to me to be nothing whatsoever to justify this different treatment. There is nothing in the Act or the Scheme which draws any such distinction: on the contrary, s.110A, s.110B and s.111 of the 1996 Act apply to both interim and final payments.

87. Moreover, there is no justification for such a distinction in the JCT form. As to interim applications, I have already pointed to Clause 4.9 of the contract, which identifies that what is payable in the case of a missing or deficient payment or Pay Less Notice is "the sum stated as due" by the contractor. I have differentiated that from Clause 4.7, which refers instead to "the sum due". But this critical distinction between "the sum due" and "the sum stated as due" is also maintained in respect of the final account. Clause 4.12 deals with the final statement. Clause 4.12.2 refers to "the balance due". But clause 4.12.7 addresses the position where there has been a payment notice and a failure to serve a timeous pay less notice and, again, what is due in that situation is "the sum stated as due" by the contractor, not "the sum (or balance) due". So in respect of both interim and final applications and payments, the same distinction between "the sum due", on the one hand, and "the sum stated as due", on the other, is maintained. I conclude that there is no difference between the payment rights and obligations of the parties in respect of interim payments, and those arising in respect of the final payment.

88. Mr Speaight noted that the final payment provisions in the JCT form were different to the interim payment provisions in one respect, because they envisaged the possibility of a final payment from the contractor to the employer, which the interim provisions do not. But that is hardly surprising: without such a provision at the final account stage, the contractor may have been overpaid and never be obliged to repay the excess. So in my view, this additional provision makes no difference to the underlying

principle, which is that there is no material difference between the valuation and payment regimes for interim and final payments.

89. Accordingly, in my view, there is no contractual basis for treating interim and final applications/payments in different ways. The contract treats them in the same way. So too should the parties, the adjudicators and the courts. On that basis, therefore, whether what is in dispute is an interim payment or a final payment, the employer has the right in principle to refer to adjudication the dispute about the 'true' valuation.

90. Accordingly, for these six reasons, it seems to me to be clear that an employer in the position of Grove must pay the sum stated as due, and is then entitled to commence a separate adjudication addressing the 'true' value of the interim application. But of course, the matter does not end there. It is necessary now for me to consider the extent to which that conclusion is supported, contradicted or qualified by the relevant adjudication authorities. First, I consider the Court of Appeal authorities – because they are binding on me – before going on to consider the TCC cases. The TCC cases should generally be followed "unless there is a powerful reason for not doing so": see paragraph 9 of the judgment of Lord Neuberger in ***Willers v Joyce and another (No. 2)*** [2016] 3 WLR 534.

6.3 Analysis: The Court of Appeal Adjudication Authorities

91. In many ways, the most important Court of Appeal case dealing with adjudication remains ***Rupert Morgan Building Services v Jervis*** [2003] EWCA Civ. 1563. In that case, the Court of Appeal agreed that, in the absence of a withholding notice (under the unamended Act), the builders were entitled to payment. But they went on to say that an interim certificate[11] was not conclusive evidence that the works had been done in accordance with the contract and that the employers were not precluded from subsequently showing overpayment.

92. In his analysis, Jacob LJ pointed out at paragraphs 8-10 that, although there had been an earlier attempt to distinguish between interim and final certificates, in fact the position was the same for both[12]. It was the debate about the final certificate which brought out the true nature of the contractual provision relating to interim applications. At paragraph 11 he said:

> "The sum is the amount in the certificate. The due date is 14 days from certificate date. The certificate may be wrong – the architect may (though this is unlikely because he will be working from the builder's bill) have missed out work done (which would operate against the contractor) or he may have included items not in fact done or items already paid for (which would operate against the client). In the absence of a withholding notice, s.111(1) operates to prevent the client withholding the sum due. The contractor is entitled to the

[11] Although Mr Speaight attached significance to the fact that the contract in ***Rupert Morgan*** was concerned with certificates, not notices, I consider that that makes no difference at all to the issue I have to decide. It is simply an indication of the age of the standard form used. As I have already noted, for present purposes, there is no difference between a certificate and a notice: they both give rise to an obligation to pay the sum stated in the document.

[12] The same view I have reached on the JCT form, at paragraphs 86-89 above.

> money right away. The fundamental thing to understand is that s.111(1) is a provision about cash-flow. It is not a provision which seeks to make any certificate, interim or final, conclusive. Analysed this way one sees that there is something inconsistent about the clients' argument here. Their duty to pay now and the sum they have to pay arise only because of the certificate. Yet they wish to ignore the certificate to reduce the amount they have to pay."

93. In addition, just to make the point crystal clear, at paragraph 14(a) of his judgment, Jacob LJ said that, although in the absence of a withholding notice the sum certified had to be paid, that did not preclude the employer "who has paid from subsequently showing he was overpaid. If he is overpaid on an interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication or if necessary arbitration or legal proceedings." On the face of it, Jacob LJ was expressly answering the question before me: without a valid Pay Less Notice, Grove, as the employer, must pay up, but if they have overpaid, they "can raise the matter by way of adjudication".

94. Mr Speaight sought to argue that, although Jacob LJ does not say so, he must have had in mind, by his use of the word "otherwise", the final account process, with no adjudication as to the 'true' value being permissible before then. I am bound to observe that, if that is what Jacob LJ meant, he would have said so, and he does not. It seems to me that the natural reading of his words is that, in a case involving an interim certificate, the money certified/stated to be due had to be paid. Thereafter, any dispute as to value may be capable of being put right in a subsequent interim certificate, but if that was not what the employer wanted or there was some other difficulty with that course, then the dispute as to value/overpayment could be referred to adjudication. That is therefore entirely in line with my analysis in **Section 6.2** above.

95. ***Harding v Paice*** [2015] EWCA Civ. 1231 is the next relevant Court of Appeal case. The first adjudicator agreed with the contractor that the employers had failed to serve an effective Pay Less Notice and that they were entitled to the sum claimed in full. The employers started a further adjudication, to address the 'true' value of the works. The contractor sought an injunction to restrain the second adjudication, on the basis that it concerned the same dispute. Both Edwards-Stuart J and then the Court of Appeal refused the injunction. The Court of Appeal agreed with the judge that the first adjudicator had decided only the question of the validity of the pay less notice, and that therefore the employer was entitled to refer the dispute as to the true valuation to a second adjudicator.

96. On the face of it, this case would also appear to answer the issue before me in the same way as ***Rupert Morgan*** and my analysis in **Section 6.2** above. The only point of potential distinction is that ***Harding v Paice*** was concerned with a final payment (because the contract was terminated), not an interim payment. But there is no part of the Court of Appeal's reasoning which seeks to differentiate between interim and final payments and, for the reasons that I have given at paragraphs 86-89 above, I do not regard it (certainly under this form of contract) as a valid point of difference in any event.

97. At paragraph 67 of his judgment in ***Harding v Paice***, Jackson LJ noted two TCC cases on this topic (***ISG Construction Limited v Seevic College*** [2015] 2 All ER Comm. 545 and ***Galliford Try Building Limited v Estura Limited*** [2015] BLR 321), both of which are analysed in detail in **Section 6.4** below. He described them as cases where Edwards-Stuart J "took a somewhat different line" from the approach in ***Rupert Morgan***. However, since the Court of Appeal was agreeing with Edwards-Stuart J in ***Harding v Paice*** that the employer could challenge the 'true' value of the contractor's application in that case, they did not feel the need to consider those authorities further.

98. ***Brown and another v Complete Building Solutions Limited*** [2016] EWCA Civ. 1 is a case again concerned with what a second adjudicator could or could not do in the light of the decision of the first. The Court of Appeal followed the decision in ***Harding v Pace*** and noted that what mattered was what the first adjudicator had actually decided. Only if the second dispute was the same or substantially the same as the first would an adjudicator not have the necessary jurisdiction. That test came from ***Quietfield Limited v Bascroft Construction Limited*** [2006] EWCA Civ. 1737, another Court of Appeal adjudication authority.

99. It is instructive to apply that test here. Would a second adjudicator who was asked to consider the 'true' value of interim application 22 be deprived of jurisdiction because that was a matter that had already been decided by Mr Eyre in the third adjudication? The answer to that question, on the application of the principles in ***Quietfield v Vascroft***, must be a resounding No. Mr Eyre was concerned only with the alleged deficiencies of the Pay Less Notice. He was not concerned in any way with the 'true' value of interim application 22. Again, therefore, the analysis in ***Brown*** would support the approach set out in **Section 6.2**.

100. A similar point arose in the insolvency case of ***Wilson & Sharp Investments Limited v Harbour View Developments Limited*** [2015] EWCA Civ. 1030, where in paragraph 66, Gloster LJ said that "the fact that an employer accepts that interim payments have become due, because of a failure to serve a pay less notice, is not prejudiced by such acceptance when it seeks to raise a serious and genuine cross claim". She relied on the reasoning in ***Rupert Morgan***.

101. Lastly, there is the recent decision of the Court of Appeal in ***Adam Architecture Limited v Halsbury Homes Limited*** [2017] EWCA Civ. 1735. That was another case concerned with the application of ***Rupert Morgan***. Jackson LJ described the employer's obligation as being to pay in the absence of a withholding notice, and to argue about it afterwards. He said that after any "subsequent arbitration, litigation, mediation or other dispute resolution procedure, the employer can recover any amount which it is overpaid." It is plain that he meant "adjudication" instead of "mediation", since "mediation" would be covered by the words "other dispute resolution procedure" and there was no reason to omit adjudication. Jackson LJ also stated that, although ***Rupert Morgan*** was dealing with the unamended version of the 1996 Act, Jacob LJ's observations were equally applicable to the current version of the Act. Jackson LJ described the analysis in that case as "making good sense".

102. Echoing his interpretation of Jacob LJ's analysis in ***Rupert Morgan***, Mr Speaight sought to argue that, whenever in these authorities the Court of Appeal talked about the employer's right to raise "later" the question of revaluation and repayment, they meant "right at the end", at the final accounting stage, and not before. In my view,

there is nothing in any of these Court of Appeal authorities to support that contention. I consider that they meant "later" in the same way as Chadwick LJ in ***Carillion*** said that the process of adjudication was encapsulated in the rubric "pay now, argue later": i.e. after payment. On Grove's analysis that is what would be happening here. The employer has to pay the sum stated as due, and could thereafter, if they wished, raise the question of the 'true' valuation in a subsequent adjudication.

103. In my view, the Court of Appeal authorities all point the same way. An employer who has failed to serve its own payment notice or pay less notice has to pay the amount claimed by the contractor because that is "the sum stated as due". But the employer is then free to commence its own adjudication proceedings in which the dispute as to the 'true' value of the application can be determined.

104. It follows therefore that the conclusions set out in **Section 6.2** above are supported and confirmed by the Court of Appeal adjudication authorities, which are of course binding upon me. That is therefore a second, separate reason why I conclude that Grove, having paid the sum stated as due, would be entitled to start an adjudication as to the 'true' value of interim application 22.

6.4 Analysis: The TCC Cases

105. I address the TCC (and other first instance) cases in chronological order, setting out as I go through them one or two areas where, as a result of the points made in **Sections 6.2** and **6.3** above, I depart from the learned judges' reasoning.

106. ***VHE Construction Plc v RVST Trust Co Limited*** [2000] BLR 187 was an earlier adjudication enforcement. In that case there were two adjudications, and the true value of the applications had been determined before the claimant's attempt to enforce the first adjudicator's decision (which had been on a technical basis only). The claimant sought only the net valuation in any event (i.e. taking into account both decisions). The case therefore does not assist in the current debate, although as Mr Nissen rightly points out, it was plain that at least at that early stage of the 1996 Act, the notion that there could be a second adjudication to deal with the true value did not come as a surprise to anyone.

107. Another early case was ***Watkin Jones & Son Limited v Lidl UK GMBH*** [2002] EWHC 183 (TCC). In that case, HHJ Humphrey Lloyd QC was concerned with the particular clauses of the contract in question. The first adjudication concluded against Lidl that they had not provided a proper notice. HHJ Lloyd said that in those circumstances, it was not open to either party to this contract to go back over the valuation which ought to have been the subject of the payment.

108. On the face of it, that would appear to provide some assistance to S&T in the present case. But the judgment makes plain that it was a decision determined by the contract provisions in the case, which are very different to the contract provisions here. Indeed, that appears to be the reason why Judge Lloyd concluded that neither the employer nor the contractor could refer the dispute as to the 'true' valuation to a second adjudication, a position which is contrary to the Act and the Scheme: as noted in paragraphs 84-85 above, both expressly envisage the contractor's right to do just that. For these reasons, therefore, I derive little assistance from ***Watkin Jones***.

109. In the insolvency case of ***R&S Fire & Security Limited v Fire & Defence Plc*** [2013] EWHC 4222 (Ch), Newey J (as he then was) made clear that the fact that an employer was obliged to make an interim payment did not preclude them from challenging disputed items at a later date, and that therefore R&S were entitled to raise their cross claim for the amount in excess of the petition debt.

110. I next turn to the case of ***ISG v Seevic*** already referred to at paragraph 97 above. This is the first of the two cases in which Jackson LJ said that Edwards-Stuart J had taken "a somewhat different line" to the approach in ***Rupert Morgan***. The explanation for that may be simple: ***Rupert Morgan*** was apparently not cited to the judge. It is this case above all where Mr Nissen suggests that the law took a wrong turn.

111. Edwards-Stuart J had, of course, already decided ***Harding v Paice*** at first instance ([2014] EWHC 3824 TCC), in which in respect of a final payment (because the contract had been terminated), he concluded that the employer could start a second adjudication as to the 'true' value of the application. But he came to a different view in ***ISG v Seevic,*** which was concerned with an interim application.

112. Edwards-Stuart J followed the approach of Judge Lloyd in ***Watkin Jones***. At paragraph 28 of his judgment, he said that he agreed with Judge Lloyd's conclusion "that if the employer fails to serve any notices in time it must be taken to be agreeing the value stated in the application, right or wrong. In my judgement, therefore, in that situation the first adjudicator must be in principle taken to have decided the value of the work carried out by the contractor for the purposes of the interim application in question." This analysis comes towards the end of a section of the learned judge's judgment which has a heading "*The Value Has Already Been Determined*". The judge concluded that, in the absence of a Pay Less Notice from the employer, that employer has agreed (or must be taken to have agreed) the value stated in the contractor's payment application. In this way, he said, the true value of the application "has already been determined".

113. Edwards-Stuart J had the opportunity of reconsidering ***ISG v Seevic*** shortly afterwards in the case of ***Galliford Try Building Limited v Estura Limited*** [2015] EWHC 412 (TCC). It was argued that his decision in ***ISG v Seevic*** was contrary to his own decision in ***Harding v Paice***. He distinguished the two on the basis that ***Harding v Paice*** was concerned with a final payment following termination, whilst ***ISG v Seevic*** was concerned with an interim payment. At paragraph 18, he expanded on his reasoning in ***ISG v Seevic*** by saying that "if an employer fails to serve the relevant notices under this form of contract it must be deemed to have agreed the valuation stated in the relevant interim application, right or wrong."

114. Accordingly, the principal reason for the decisions in both ***ISG v Seevic***, and in ***Galliford Try***, was the judge's conclusion that, by failing to serve a notice in time or with proper contents, the employer had agreed, or must be deemed to have agreed, that the amount claimed was the 'true' value of the interim application. For a number of reasons, I cannot agree with that analysis.

115. First, there is usually no basis *in fact* for any alleged agreement. This case is typical. To say that Grove ever agreed the claim set out in interim application 22, in circumstances where they sent a spreadsheet to S&T showing a plethora of disagreements many of which had existed for months, flies in the face of reality.

116. Secondly, there is no basis for *deeming* any such agreement either. What has happened, certainly, under the form of contract used here, is that the employer has failed to serve a proper pay less notice, and has therefore raised no effective challenge to "the sum stated as due". So that stated sum is due under the contract. But the employer cannot be deemed to have agreed that that sum represents the 'true' value of the application; there is nothing in the Act, the Scheme or the words of the JCT contract which indicates any such deemed agreement.

117. Furthermore, if the failure to serve a counter-notice is to be taken as a deemed agreement to the valuation in the interim application, then where would the deemed agreement stop? If the employer is taken to have agreed a figure for a particular element of the work in a particular application, merely because they have not provided an effective pay less notice, then what are the limits of that deemed agreement? What are its terms? How long does it last or have effect? Why is it not a binding agreement for all time?

118. In my view, the concept of a deemed agreement, which lies at the root of ***ISG v Seevic*** and ***Galliford Try v Estura*** is not only unjustified, but it is also an unnecessary complication, given the clear distinction in the contract between 'the sum due', on the one hand, and 'the sum stated as due', on the other.

119. This proposition is perhaps best demonstrated by the actual result in ***Galliford Try***. Although that was an interim payment case (and on the judge's reasoning, the value of that interim amount was deemed to be agreed), he recognised that, because of the likely delay until the final account, there was the risk of injustice if the whole sum was paid over to the contractor. That led to a stay of execution in respect of more than half the sum which had been 'agreed' as due. The stay was an attempt to do justice (because the judge recognised the potentially draconian effect of refusing the employer an early chance to argue about the 'true' value), but it was still unsatisfactory: if the employer was to be deemed to have agreed the full amount claimed, how could they be entitled to a stay of execution in respect of any part of it? In my view, it is clearer and simpler (which, as Mr Speaight continually urged me, were the watchwords of the 1996 Act) to order payment of the sum stated as due, in order to maintain the contractor's cashflow (subject to any arguments about the risk of a failure to repay, which is a different point) and then allow a second adjudication to proceed as to the 'true' value.

120. Unlike in ***ISG v Seevic***, ***Rupert Morgan*** was cited to Edwards-Stuart J in ***Galliford Try***. In response, the judge said this:

> "I do not consider that there is anything in the judgments in the Court of Appeal in ***Rupert Morgan Building Services*** that amounts to authority for the proposition that, in the absence of relevant notices, the employer can resist paying the sum stated in an interim application by asserting that work has not been done to the value claimed. Indeed, the judgment of Jacob LJ is to contrary effect. If in those circumstances the employer is not allowed to withhold payment on the ground that the sum stated in the application is wrong, which is clearly the case, I cannot see on what basis he can immediately refer that issue to

> adjudication; to permit that would be to undermine the provisional validity of an unchallenged interim application."

121. In my view, this passage elides two different issues. Of course, the judge was right to say that ***Rupert Morgan*** is not authority for the proposition that the employer can refuse to pay the sum stated as due if he has not served the necessary counter-notice. But with respect, the judge was asking himself the wrong question when he went on to say that he could not see "on what basis he [the employer] can immediately refer *that issue* to adjudication". It is not *that issue* (i.e. whether or not the employer must pay the sum stated as due by the contractor) which would be in dispute in the second adjudication. The dispute in the second adjudication, on the basis that the employer acknowledges and pays the sum stated as due in the contractor's application, is different: it is the 'true' value of that application. That is not an argument or a scenario that Edwards-Stuart J addressed. Thus, he does not consider paragraph 14(d) of the judgment of Jacob LJ, which expressly said that the question of overpayment could be raised 'later' by the employer by a way of a further adjudication.

122. Accordingly, I do not believe that either ***ISG*** or ***Galliford Try*** deals directly with the submission that Grove now make to me, which is that, following payment of the sum stated as due, the employer should be able to commence an adjudication as to the 'true' value of the interim application. To the extent that the judgments in those cases answer that question in the negative, I consider that they are contrary to first principles (**Section 6.2** above) and contrary to the adjudication authorities in the Court of Appeal (**Section 6.3** above). They are a 'different line', as Jackson LJ described them, and in my view, they should not be followed.

123. I can deal relatively briefly with the remaining cases because, unsurprisingly perhaps, they largely adopt the ***ISG*** line. So, in ***Kilker Projects Limited v Purton*** [2016] EWHC 2616 (TCC), Finola O'Farrell, sitting as a Deputy High Court Judge, decided that there could be a second adjudication as to value where the payment was a final payment (following ***Harding v Paice*** in the Court of Appeal) but that this would not be possible in respect of an interim payment (following ***ISG v Seevic*** and ***Galliford Try***). The case was in fact concerned with a final payment and the deputy judge therefore concluded that the second adjudicator did have the necessary jurisdiction. The result in that case is therefore consistent with my conclusions.

124. The same cannot be said of ***Kersfield Developments*** (to which I have already referred at paragraph 28 above). There O'Farrell J (as she had by then become) dealt with a myriad of issues raised on adjudication enforcement and a separate claim. At paragraph 93-97, the learned judge adopted a similar analysis to her summary in ***Kilker***. This time the case was concerned with an interim application, so the result was contrary to my conclusions noted above. There was no consideration of ***Rupert Morgan***.

125. In addition, in ***Kersfield*** there was a discussion about whether or not an adjudicator in a second adjudication had the power, via paragraph 20 of the Scheme, to decide the true value of the works that are the subject of the claim in the payment notice. To the extent that in ***Kersfield*** (when following ***Estura***) O'Farrell J indicated that there were limits on the powers of an adjudicator, I think that this failed to take into account ***Henry Boot***, and the analysis at paragraphs 68-76 above.

126. The learned judge rightly said that s.111(8) can be invoked by both the contractor and the employer because "either party is entitled to refer such dispute to adjudication as provided in section 108 of the Act". But I think she was wrong to say that s.111(8) was concerned with the parties' rights: s.111(8) was not providing any substantive rights as between the parties, because those were provided by paragraph 20 of the Scheme and s.108 of the Act. All s.111(8) does is to recognise that, although there was a right on the part of the contractor to adjudicate the 'true' value, the consequential right to an additional payment fell due at a stated time.

127. The most recent judgment in the TCC on the issue of a second adjudication as to value can be found at paragraphs 195-212 of the judgment of Fraser J in ***Imperial Chemical Industries Limited v Merit Merrell Technology Limited (No. 2)*** [2017] EWHC 1763 (TCC). The case was largely concerned with termination/repudiation and the judge found in favour of Merit on these issues. However, an issue arose as to ICI's right to recover overpayments for executed works at the time of the repudiation. That arose because Merit had had the benefit of an adjudicator's decision on the last interim certificate before the termination/repudiation, which was decided on the absence of a pay less notice. Fraser J held that it was not correct to say that ICI did not have an accrued legal right to repayment until a later payment certificate was issued.

128. In reaching his conclusion, Fraser J tackled the line of authorities which started with ***ISG v Seevic***. He pointed out that the case was decided before ***Harding v Paice*** and ***Brown v Complete Building Solutions***. At paragraph 204, he said that those two Court of Appeal authorities "cast some real doubt whether [***ISG v Seevic***] would be decided in the same way now." He said that ***ISG v Seevic*** was a case concerned with timing rather than substantive underlying rights and he identified various passages in the judgment which he said made that plain. Having considered ***Galliford Try*** he said:

> "In other words, the value of the works executed is not definitely determined by the figure in the interim assessment (or an adjudicator's decision on that interim assessment). Nor could it sensibly be argued otherwise given the nature of adjudication."

129. Mr Speaight pointed out that the underlying contract in ***ICI*** was the NEC3 form, which contained, amongst other things, a right to issue a negative certificate (which is different to the JCT form). But that was immaterial to the analysis in the judgment because there had been a repudiation, so the right to a negative certificate had never arisen. That was why Fraser J had to analyse the ***ISG v Seevic*** line of cases.

130. It follows, from the analysis already undertaken that I respectfully agree with the conclusions of Fraser J. I note that Merit sought permission to appeal on this one point, which was refused by Jackson LJ.

131. I should deal with two final points in connection with the TCC cases.

132. First, underpinning Mr Speaight's submissions was the suggestion that there was no clear payment mechanism by which any sum could be repaid to the employer if, as it turned out, the interim application was in too high a sum. As noted, he contrasted the JCT form of contract with the NEC 3 form of contract (which expressly provides for

negative certificates). He also stressed the common law position that, absent contractual terms, a contractor is not entitled to interim payments at all.

133. I do not see any difficulty with a repayment mechanism. That was the subject matter of the Supreme Court's decision in ***Aspect v Higgins***. They found that, if it turned out that a contractor had been overpaid, the employer was entitled to recover the overpayment, either by way of an implied mechanism in the contract or by way of restitution. It seems to me that precisely the same analysis must apply here.

134. Mr Speaight suggested that, because the contract did not expressly deal with what might happen if, in the second adjudication, the adjudicator concluded that the employer was entitled to recover an overpayment, there was no contractual entitlement to such recovery. I reject that submission. Not only is it contrary to ***Aspect v Higgins***, but it is an artificial reading of the contract. An adjudicator must decide any dispute referred to him. Once the adjudicator has reached his or her decision, it might affect the parties' rights and obligations (at least on a temporary basis) in all sorts of ways. It might mean, for example, that an extension of time has to be granted; or it might mean that an amount of liquidated damages has to be repaid; or it might mean an amount of loss and expense is due. The contractual provisions as to extension of time, liquidated damages and loss and expense, do not expressly cater for what happens when an adjudicator reaches a decision on a particular dispute. But they do not need to, because the parties have agreed to be bound by the adjudicator's decision. Extra-contractual decisions and their consequences cannot all be exhaustively dealt with in the express terms of the contract: the JCT forms are long enough as it is. The parties' over-arching obligation to comply with the adjudicator's decision is enough.

135. In the same way, I can see no need for the interim payment provisions to deal expressly with what happens when or if an adjudicator decides that, on this premise, an employer is entitled to recover an overpayment. The adjudicator has decided that there has been an overpayment, and pursuant to the contractual obligation to comply with the adjudicator's decision, the contractor must therefore repay the excess. Moreover, that does not affect or run counter to the common law rule that there is no general entitlement to interim payments; it is simply an adjustment – justified on the basis of implied terms or restitutionary principles – to the existing contractual mechanism.

136. The second point is what might be called the "doomsday scenario" to which Edwards-Stuart J devotes some time at paragraphs 47-53 of his judgment in ***ISG v Seevic***. The suggestion, which Mr Speaight argued fully before me, was to the effect that, if an employer could start a second adjudication as to the 'true' value, it would destroy the policy underlying the 1996 Act.

137. I do not fully understand that submission: I certainly do not accept it. One of the purposes of the 1996 Act was to ensure that the contractor was entitled to maintain proper cash-flow. On my analysis, the contractor would not be prejudiced in respect of cash-flow at all, because he would be recovering the full amount for which he had claimed in his interim application. That amount would have to be paid by the employer. So there is no threat to cash-flow.

138. If a second adjudication took place thereafter, which concluded that the contractor had over-claimed and therefore been overpaid, the contractor would have to repay the amount of the overpayment. What could possibly be wrong with that? It was *not* one of the policies underlying the Act that the contractor was entitled to hang on for lengthy periods to sums to which, on a proper analysis, he was not entitled. Cash-flow must not be confused with the contractor retaining monies to which he has no right.

139. In any event, it is only in the sorts of cases which have come before the TCC so often since 2015, where the interim payment mechanism cannot deal with the problem (because it is a claim on the penultimate application), that this problem has arisen at all. The court cannot shy away from the fact that these cases have arisen in circumstances where, if the contractor is entitled to hang on to the money stated to be due, because of an absent or defective notice, it might be months or even years before there is a determination of the 'true' value of the application, as part of the final account process. It is that particular problem which has given rise to this case. I consider that it is better met by an analysis which, following payment of the relevant amount, allows a second adjudication as to the 'true' value, rather than some sort of ad hoc and partial stay of execution. In truth, the potential 'doomsday scenario' works the other way: if there is no right to obtain a decision on the 'true' value by way of a second adjudication, the risk is that, whilst an over-valued application may be capable of being put right at the next interim stage whilst the contract works are ongoing, an over-valued application at the last interim stage, almost always issued after practical completion, cannot be put right until the final account[13]. So at the very time when the cases show that the right to adjudicate as to the 'true' value is most needed, it will not be available.

140. There is also the suggestion that, if this analysis is right, the notice regime under the 1996 Act and/or this form of contract will be undermined, because every employer who misses the relevant deadline for the pay less notice will simply start a second adjudication as to the true value. But why would they? In most cases, such a course would be inefficient and costly: the employer will still have to pay the sum stated as due in the interim application. If the employer can then resolve the alleged over-valuation point in the next interim payment round, no second adjudication would be necessary.

141. Even if we assume that the relationship between the employer and the contractor is poor, so that there is a second adjudication in any event, the adjudications will still be dealt with, by the adjudicators and by the courts, in strict sequence. The second adjudication cannot act as some sort of Trojan Horse to avoid paying the sum stated as due. I have made that crystal clear. And as I have said, if the interim payment cycle is coming to an end, then the risk of injustice to the employer increases and an adjudication as to the 'true' value becomes an important remedy. In my judgment, none of that threatens the whole edifice of construction adjudication.

142. In addition, I note that the contractor has always had the right to raise the question of the true value of a pay less notice in a second adjudication, and it has never been suggested that that is somehow contrary to policy or the operation of the 1996 Act.

[13] I do not suggest, of course, that application 22 in this case was over-valued; that is a matter for the adjudicator to address if the Pay Less Notice was out of time and there is an adjudication as to the 'true' valuation.

The sky has not fallen in, just because the contractor has a residual right to challenge the 'true' value of the sum stated as due in a pay less notice. I am confident that there will be no significant adverse consequences if the employer is able to exercise a similar right.

143. For all these reasons, therefore, I do not consider that the conclusions which I have reached strike at the heart of the adjudication system. On the contrary, I believe that it will strengthen the system, because it will reduce the number of 'smash and grab' claims which, in my view, have brought adjudication into a certain amount of disrepute.

144. Finally, though, I should say this. In all my time in the TCC, I am not conscious that I have ever concluded that one of my colleagues, past or present, was wrong in deciding an issue in a certain way. I am not entirely comfortable about doing it now, particularly given the distinguished nature of Edwards-Stuart J's service to this court. But the conflict in the cases is all too apparent and, for the reasons which I have given, I find myself unable to follow the "different line" that he took in ***ISG v Seevic*** and ***Galliford Try v Estura***. It follows that I consider that my departure falls squarely within paragraph 9 of the judgment in ***Willers v Joyce***, in that there is a powerful reason for not following those two cases (and any decisions which in turn have followed them).

6.5 Summary on Issue C

145. For the reasons set out in **Section 6.2** above, I consider that, on first principles, Grove are entitled to raise the dispute as to the 'true' valuation of interim application 22 in a subsequent adjudication. For the reasons set out in **Section 6.3** above, I consider that that conclusion is confirmed by a consideration of the relevant Court of Appeal authorities, which are binding on me. For the reason set out in **Section 6.4** above, I consider that the analysis in ***ISG v Seevic*** and ***Galliford Try v Estura*** is erroneous and/or incomplete. I consider that the analysis and certainly the result in ***ICI v Merit*** is in accordance with first principles and the Court of Appeal authorities.

146. I therefore answer Issue C in favour of Grove.

7. ISSUE D: THE NOTICES UNDER CLAUSE 2.29

7.1 The Issue

147. The parties have agreed Issue D in this form:

> "Whether the Notices which Grove served in April 2017 were not sufficiently sequential and so were ineffective to entitle Grove to withhold or deduct liquidated damages."

This is an issue raised by S&T which arises out of the notices in respect of liquidated damages which an employer has to serve in accordance with Clause 2.29.

7.2 Analysis

148. Clause 2.29 requires the employer takes three steps before it can deduct liquidated damages. The first, the issue of a non-completion notice in accordance with Clause

2.29.1.1, occurred in the present case as long ago as 13 October 2016. It is the next two stages which are controversial. Clause 2.29.1.2 requires a notice that the employer "may require payment of, or may withhold or deduct, liquidated damages." Mr Speaight called this 'a warning notice'. Clause 2.29.2 then permits a second notice pursuant to which the employer "requires" the contractor to pay liquidated damages and/or that the employer "will" withhold or deduct liquidated damages. Mr Speaight called this 'a deduction notice'.

149. In the present case, a warning notice pursuant to Clause 2.29.1.2 was sent by Grove to S&T on 18 April 2017. The metadata shows that it was sent at 17:01 and received at 17:03 by S&T.

150. A deduction notice pursuant to Clause 2.29.2 was sent on the same day. The metadata shows that it was sent immediately after (ie within seconds) the warning notice and was received by S&T immediately after (again within seconds) that warning notice.

151. Accordingly, it is not disputed that Grove sent, and S&T received, warning and deduction notices pursuant to Clause 2.29.1.2 and Clause 2.29.2 in the correct sequence. The issue raised by S&T is that the deduction notice was invalid because they were not given time to read/understand/digest the warning notice. Another way of putting what was effectively that same point was S&T's argument that the deduction notice was sent before the warning notice was received. It is said that this was a failure on the part of Grove properly to notify in accordance with clause 2.29.

152. The starting point is this. The contract required two separate notices and it required those notices to be sent, and received, in a particular sequence. If one or both of those notices was not received, or if they had been sent or received in the wrong order, they would be *prima facie* invalid. But that is not this case. The only issue that arises here is the length of time between S&T's receipt of the two notices.

153. I have some sympathy with S&T's complaint about the brevity of the interval. It might be said that the requirement to provide two distinct notices is intended to have a more meaningful purpose than merely acting as a procedural obstacle for the employer to clear before being able to deduct liquidated damages. But, on analysis of the contract terms as a whole, I do not believe that it is possible to say that what Grove did was contrary to the contract.

154. There may be cases where it might be useful to warn the contractor that the employer may deduct liquidated damages: hence the requirement for the notices to be provided in sequence. But the precise need for or importance of any warning notice will always depend on the particular facts. That is to be sharply contrasted with the provisions of Clause 8 of the JCT form, which deal with termination. There, pursuant to Clause 8.4, the employer is required to adopt a two-stage notice process, with a specified gap between the two notices to allow for remediation or a change of course by the contractor. Thus, under Clause 8.4.1, the employer must give the contractor a notice specifying its default, and can only serve a second notice terminating the contractor's employment under the contract if that specified default is continued by the contractor for a period of 14 days from receipt of the first notice.

155. Contrast that with the provisions of Clause 2.29. Clause 2.29 has no specified period between the warning notice and the deduction notice. The contract does not require

the employer to give a warning notice in order to give the contractor the opportunity to remedy a default. So by contrast with Clause 8, it would appear that no particular period must be given to the contractor between the two notices.

156. In my view, that also makes commercial sense. If the employer is considering termination, he must give the contractor the opportunity to put right the default, and thereby avoid termination altogether: hence the specified period. But in respect of the liquidated damages, the warning notice can only be issued at all after the non-completion notice. So by the time the warning notice is issued, there is culpable delay, and the contractor cannot take any steps to rectify that default. It is too late; the delay has already occurred.

157. Furthermore, how could the contract be operated if there had to be a prescribed interval between a warning notice and a deduction notice? In the absence of an express period, there would have to be an implied term that there must be a reasonable interval between the two notices. But leaving aside the obvious proposition that no such term would be required to give the contract business efficacy, and would not therefore be implied, what would that period be? An hour? A day? A week? Would it all depend on the facts? Such uncertainties would make the contract impossible to operate sensibly.

158. I do not consider that the alternative argument (that the deduction notice was sent before the warning notice had been received) adds anything or makes any difference to my conclusions. The warning notice was received by S&T before the deduction notice was received, and that is all that mattered under the contract. No interval or time period between the two was specified; neither was it stipulated that the first notice had to have been received before the second notice was sent.

159. Accordingly, I have come to the conclusion that, provided – as here – the two sets of notices were served in the correct sequence and were received in the correct sequence, they cannot be said to be defective. I therefore answer Issue D in Grove's favour.

7.3 Subsequent Events

160. I ought to add this. Following the decision in the second adjudication, an adjustment was required in the amount of liquidated damages (because Mr Eyre found that S&T were entitled to an extension of time to 9 January 2017). This meant that the sum of £276,605.14 fell to be paid by Grove to S&T (because, even assuming the validity of the Pay Less Notice, the award of the extension of time meant that Grove were not entitled to deduct all that they had deducted by way of liquidated damages, and that this net repayment was due to S&T). Further notices pursuant to the contract were then given in December 2017 to reflect the decision in the second adjudication, with a period of one day between each. No complaint is made about those periods or notices. On that basis, Issue D may be regarded as somewhat academic.

8. CONCLUSIONS

161. For the reasons set out in **Section 4** above, I decide Issue A in favour of Grove. The Pay Less Notice was not deficient because it properly incorporated the detailed spreadsheet sent on 13 April 2017 by reference.

162. For the reasons set out in **Section 5** above, I decide Issue B in favour of Grove. I have finally determined the question of the Pay Less Notice so that the third adjudication decision is no longer material or enforceable.

163. For the reasons set out in **Section 6** above, I decide Issue C in favour of Grove. I do so on first principles and the binding decisions of the Court of Appeal. I do not agree with some of the reasoning in ***ISG v Seevic*** and ***Galliford Try v Estura*** but I do agree with the approach in other TCC cases, in particular ***ICI***.

164. For the reasons set out in **Section 7** above, although I have some sympathy with S&T's position, I decide Issue D in favour of Grove. The notices were sent and received in the correct sequence and that is sufficient.

165. If, as seems likely, this is my last substantial judgment in the TCC, after almost 14 years as a judge of the court, I cannot leave it without pointing out all those aspects of this case which, in my experience, are so typical of TCC litigation, and which make the court so attractive to a busy judge: the well-prepared bundles; the clear and direct skeleton arguments; the proper concessions made by each side; and the excellence of the oral advocacy. I will miss it very much.