



Neutral Citation Number: [2023] EWHC 301 (TCC)

Case No: HT-2022-000444

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

Royal Courts of Justice  
Rolls Building  
London, EC4A 1NL

Date: 15/02/2023

**Before :**

**MR ROGER TER HAAR KC**

**Sitting as a Deputy High Court Judge**

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**Between:**

**J & B HOPKINS LIMITED**

**Claimant**

**- and -**

**A&V BUILDING SOLUTION LIMITED**

**Defendant**

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**James Frampton** (instructed by **Hawkswell Kilvington**) for the **Claimant**  
**Alex Paduraru** (a director of the Defendant Company) for the **Defendant**

Hearing date: 19 January 2023

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## **Approved Judgment**

This judgment was handed down remotely at 10.30am on Wednesday 15 February 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives

(see eg <https://www.bailii.org/ew/cases/EWCA/Civ/2022/1169.html>).

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**Mr Roger Ter Haar KC :**

1. This is a claim for enforcement of an Adjudication Decision issued by Mr. Don Smith, FRICS, DipArb, FCI Arb.

**Representation**

2. The hearing before me was a virtual hearing conducted over Microsoft Teams.
3. The Claimant (“J&BH”) was represented by Mr James Frampton, a member of the English Bar.
4. The Defendant (“A&V”) was not represented by counsel or a solicitor. Before the hearing I received a skeleton argument signed by Mr. Alex Paduraru who described himself in that document as “Litigant in Person”.
5. As I understand the position, Mr. Paduraru is a director and shareholder in A&V. At the hearing before me he was accompanied by Mr. Judd, who is a surveyor, but not an officer of, or shareholder in, A&V.
6. I was told that the skeleton argument to which I have referred was drafted by Paduraru and Mr. Judd together.
7. It rapidly became apparent that Mr. Paduraru would find it difficult to make the somewhat complex arguments which A&V wished to put before me in resisting this enforcement claim.
8. Mr. Frampton, for J&BH, drew my attention to the helpful guidance in the judgment of Hildyard J. in *Bank St Petersburg v Arkhangelsky (No. 2)*<sup>1</sup> at paragraphs [73] to [76]:

“73. After I had completed most of this judgment in draft, I received from the Claimants' Counsel a Note I had requested on a further issue which arose in the course of the hearing as to the Court's power to grant a right of audience on an *ad hoc* basis to a party's McKenzie friend when that party is a body corporate rather than an individual acting in person.

“74. Though no authority has been found, that Note (for which I am very grateful) helpfully sets out the applicable framework as regards McKenzie friends. It suggests the conclusion that, given that *CPR 39.6* does now allow an employee of a body corporate duly authorised to do so by it to appear at trial on its behalf with the permission of the Court, the Court does have jurisdiction to allow a body corporate the assistance of a McKenzie friend, and in appropriate (and exceptional) circumstances to allow that McKenzie friend a right of audience on an *ad hoc* basis. The Note also identifies a case where it appears that the Court assumed that to be so:

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<sup>1</sup> [2015] EWHC 2997 (Ch.); [2016] 1 WLR 1081

namely, *Tracto Teknik GmbH v LKL International* [2003] EWHC 1563 (Ch);

“75. I agree that the Court has such jurisdiction, as part of its power (in the absence of specific restriction) to regulate its own proceedings and, in circumstances where otherwise the body corporate would have no-one capable of speaking for it, to prevent a failure in the administration of justice (and see also *A.L.I. Finance Ltd v Havelet Ltd* [1992] 1 WLR 455 at 460-461). I agree further that the Legal Services Act 2007 at Schedule 3 assumes and recognises such jurisdiction (as did its predecessor, the Courts and Legal Services Act 1990) even if it does not expressly confer it. Thirdly, I consider that since the jurisdiction is inherent, neither Rule 39.6 nor Practice Direction 39A is an exclusive and complete code, so that the Court may give permission in exceptional cases even where neither that rule nor the Practice Direction (which prescribes the form of the evidence of authority which must be provided where a company or corporation is to be represented by an employee) has been complied with.

“76. In that latter context the Note provided to me very properly referred me to two cases in the Court of Appeal which might be read as having assumed the contrary (that is, that *CPR 39.6* and *PD 39A* provide a complete code): see *Watson v Bluemoor Properties Ltd* [2003] BCC 382 (particularly paragraphs 7 and 11-15) and *Avinue Ltd v Sunrule Ltd* [2004] 1 WLR 634 (particularly at paragraph 25). However, it does not seem to me that in either case the issue whether the Court retains jurisdiction in exceptional circumstances to permit someone other than a director or employee to represent a body corporate was directly addressed. I note that it does not appear that the *A.L.I. Finance* case was cited in either of the two cases. In my view, there is nothing in either of those cases which binds me to hold that the jurisdiction of the Court, as propounded in the *A.L.I. Finance* case at a time before the *CPR*, has been restricted by rules intended to introduce, not less but greater, flexibility. I also consider that it is unlikely that the jurisdiction should be so limited in the case of a body corporate, but unconfined in the case of a litigant who is an individual.”

9. In the event, I permitted Mr. Judd to make A&V’s submissions, as I considered this to be in the interests of justice. This he did in a careful, measured and helpful way.

### **The Adjudication**

10. On 11 June 2022 A&V started the adjudication out of which the Decision which J&BH seeks to enforce arises.

11. The Adjudication arose out of a Sub-Contract under which A&V, as Subcontractor, undertook to carry out plumbing installation works at Mouslecoomb University campus.
12. In the Referral A&V alleged that J&BH was in breach of the Sub-Contract in a number of respects. The principal contractual provisions relied upon by A&V were as follows:

**Clause 7.4:** If in the opinion of the Contractor, the Sub-Contract works are failing to progress in line with the Contract Programme requirements, then after due notice of 7 days being given, and if resultant actions are not undertaken, it shall be J & B Hopkins's prerogative to supplement the onsite labour requirements for the Sub-Contractor recovering all resultant costs as a deduction from the Sub-Contractor account.

**Clause 8.1:** J & B Hopkins may instruct a variation to the Sub-Contractor's access date to the Site as may be set out in the Agreement by giving notice in writing to the Sub-Contractor at any time up to 5 business days prior to such date. The Sub-Contractor shall not be entitled to an increase in the Sub-Contract Sum and/or loss and expense as a result of or in connection with such variation.

**Clause 8.2:** J & B Hopkins may, at any time prior to Principal Practical Completion, by notice in writing require the Sub-Contractor to carry out a variation to the Sub-Contract Works. Notwithstanding anything to the contrary elsewhere in this Sub-Contract, no variation to the Sub-Contract Works shall be made necessary by reason of negligence, omission or default of the Sub-Contractor, its servants, agents and suppliers and in such event the Sub-Contractor shall not be entitled to any increase in the Sub-Contract Sum or any extension of time to the Completion Date.

**Clause 8.3:** The Sub-Contractor shall implement a variation immediately upon receiving notice of the same and the Sub-Contractor shall provide a quotation for the variation to J & B Hopkins within five days from receipt of the notice. A failure by the Sub-Contractor to provide a quotation pursuant to this clause and/or if such quotation is not agreed the Sub-Contractor shall not be excused from implementing the variation and in such event the Sub-Contractor shall be paid a fair and reasonable price for the variation.

**Clause 8.4:** The Sub-Contractor's quotation shall comprise the following:

- (1) The value of the adjustment to the Sub-Contract Sum for performing the additional work supported by all necessary calculations for reference, where relevant, to the quantified schedule of rates in support of the Sub-Contractor's tender and including, where appropriate, allowance for any adjustment of preliminary items;

- (2) Any adjustment to the period specified in the Sub-Contract Order and/or the Agreement and/or an agreed programme for the completion of the Sub-Contract Works to the extent that such adjustment is not included in any other extension of time which has been granted to the Sub-Contractor, or included in any other quotation accepted by J & B Hopkins in accordance with this Clause 8.0;
- (3) The value of the adjustment to the Sub-Contract Sum for any delay and/or disruption likely to be caused to the regular progress and/or completion of the Sub-Contract Works by reason of the instruction to carry out the additional work;
- (4) The method of carrying out the additional work; and
- (5) Any other information required by J & B Hopkins.

**Clause 8.5:** Within 7 days of J & B Hopkins receipt of the Sub-Contractor's quotation, J & B Hopkins shall by written notice to the Sub-Contractor state whether it accepts the Sub-Contractor's quotation. The acceptance by J & B Hopkins of any quotation provided by the Sub-Contractor in accordance with Clause 8.0 shall be in full and final settlement of the matters and process contained in the Sub-Contractor's quotation and the Sub-Contractor shall not be entitled to any further change to the Sub-Contract Sum and/or any further extension of time to the Completion Date other than as set out in the quotation accepted by J & B Hopkins.

**Clause 8.6:** If J & B Hopkins does not accept the Sub-Contractor's quotation, J & B Hopkins shall by written notice to the Sub-Contractor either direct that the additional work shall be performed (which, after completion of the same by the Sub-Contractor, shall be measured and valued by J & B Hopkins by reference to the rates specified in Appendix 8 for the like or analogous work but if there are no such rates J & B Hopkins shall be entitled at its complete discretion to make up the Sub-Contractor's tender and apply those assessed rates), or direct that the additional work shall not be performed.

**Clause 9.5:** The Contractor may not later than five days after the due date in Appendix 6, give a notice ("Payment Notice") to the Sub-Contractor specifying:

- (1) The amount the Contractor considers to be due to the Sub-Contractor showing the basis on which that sum has been calculated, less retention, or such other amount as specified in Appendix 6, less any money previously paid;
- (2) In relation to a Payment Notice, it is immaterial that the amount then considered to be due may be zero.

**Clause 11.1:** J & B Hopkins shall have the right to suspend performance of the Sub-Contract Works by the Sub-Contractor for any period J & B Hopkins requires upon giving written notice to the Sub-Contractor who shall forthwith comply with such notice....

**Clause 13.2:** If the Sub-Contractor shall be delayed in the execution of the Sub-Contract Works by:

- (1) Force Majeure; or
- (2) The order of any variation to the Sub-Contract Works under clause 8; or
- (3) Any breach of the Sub-Contract or act of prevention by J & B Hopkins; or
- (4) Suspension of the Sub-Contract Works in accordance with clause 11

then the Sub-Contractor shall be entitled to such extension of time to the Completion Date as J & B Hopkins may determine acting reasonably provided always that any such extension of time shall not exceed any extensions of time to which J & B Hopkins is properly entitled under the Principal Contract.

**Clause 13.3:** It shall be a condition precedent to the Sub-Contractor being granted an extension of time pursuant to clause 13.2 that the Sub-Contractor shall notify J & B Hopkins in writing within 14 days of such event occurring that it is or may be prevented from completing the Sub-Contract Works by the Completion Date. Except for suspension of the Sub-Contract Works pursuant to clause 11.2, a failure to comply with this clause shall prevent the Sub-Contractor from being entitled to an extension of time to the Completion Date.

**Clause 15.1:** If the Sub-Contractor:

- (1) Fails to proceed regularly and diligently with the Sub-Contract Works after being required in writing so to do; or
- (2) Without reasonable cause suspends the carrying out of the Sub-Contract Works; or
- (3) Refuses or persistently neglects after notice in writing from J & B Hopkins to remove defective work or improper materials; or
- (4) Becomes insolvent as set out in clause 15.2; or
- (5) Fails to comply with any applicable legislation; or
- (6) Is in breach of this Sub-Contract

then, without prejudice to any other rights and remedies it may have J & B Hopkins may except in the case of sub-clause (4), by written notice (the “Notice”) to the Sub-Contractor require the Sub-Contractor to remedy such failing and/or breach within 7 days from the date of the Notice. In the case of sub-clause (4), or if the Sub-Contractor fails to remedy its failing and/or breach within 7 days from the date of the Notice, J & B Hopkins may forthwith determine the Sub-Contractor’s employment under the Sub-Contract and may elect to employ a third party to complete the Sub-Contract Works or complete the Sub-Contract Works itself.

13. In the Referral, A&V alleged 7 breaches of the Sub-Contract:

(a) Without instructions and being beyond the Contract completion date of the 12<sup>th</sup> March 2021 J&B chose to force upon A&V supplementary labour and undertake the remaining works themselves this being a breach of contract under clause 7.4 and 15.1 and requires due formal notice which has not been provided.

(b) Failure and/or breach to provide instructions relating to A&V correspondence/quote dated 15<sup>th</sup> March 2021 (issued in accordance with Clause 8.4).

(c) Failure and/or breach to make payments and/or provide Notices relating to Payment cycle 18 (A&V application 22<sup>nd</sup> March 2021 refers) and/or payment cycles since in accordance with Appendix 6.

(d) Failure and/or breach in not providing “notice” to suspend the works from 12<sup>th</sup> March 2021 to actual completion but by default and breach preventing A&V from undertaking the works to actual completion by engaging others and removing A&V from the IAuditor system without agreement. Removing A&V ‘s access to the IAuditor system prevented A&V from being able to properly progress the works.

(e) Failure and/or breach to extend the contract period and unreasonably and deliberately preventing any further works being undertaken by A&V by employing others to complete A&V works and removing A&V from the IAuditor system. Removing A&V’s access to the IAuditor system prevented A&V from being able to properly progress the works. Additionally, J&B subsequently blaming A&V for delays to the works but a clear misrepresentation as a result of a recorded telephone conversation between J&B and A&V on the 5<sup>th</sup> March 2021 noted in Judd correspondence 26<sup>th</sup> May 2022 and attached as part of this Referral ....

(f) Failure and/or breach of Contract to certify the Practical Completion of the works and the subsequent release of retention monies and the process of the final account.



(g) Failure and/or breach by J&B employing others to undertake works without prior 7 day “notice” and/or advising of any purported breaches or failures. J&B unreasonably and without agreement and/or correctly served Notices sought to forcibly undertake A&V contract works by engaging others.

14. The Referral Notice concluded as follows:

#### **4 Conclusion/Summary**

4.1 A&V contend that as a result of the breaches and/or preventions J&B has and continues to unreasonably withhold payment of sums due under the Contract to A&V and this not being in accord with notices and payment provisions of the Housing Grants Construction Regeneration Act and/or the Contract.

The Adjudicator is requested to consider and decide on the outstanding sums and associated costs as detailed below or costs that the Adjudicator considers appropriate.

Outstanding sums as above	£429,341.07
Interest on the above	£25,760.46
RICS appointment fees	£425.00
<b>Total Sums considered due plus Vat</b>	<b>£455,526.53</b>

#### **5 The Adjudicators award**

5.1 The Adjudicator is requested to review and decide on matters pertaining to the Referring Party’s claim for the breaches and subsequent Final Account for outstanding payment/late payments considered due for the works to the Moulscomb project in the sum of £455,526.53 plus vat or such other sum as the Adjudicator shall determine and

A) Order payment of a late payment penalty (interest) under the Late Payment of Commercial Debts Regulations 2002 for the late payment of the Referring party’s account.

B) Order the Responding Party to pay all of the Adjudicators costs and expenses.

C) Order the Responding Party to pay the Adjudicator appointment fee via the RICS in the sum of £425.00.

D) Order payment of any sum awarded to the Referring Party within 3 days of the decision.

15. The Adjudicator entered upon the reference.

16. On 6 July 2022 the Adjudicator issued his Decision. In the final section of the Decision he concluded as follows:

**DECISION**

85. A&V has failed to prove any entitlement to the further sum of £455,526.53 plus VAT.

86. A&V has failed to prove any entitlement to a payment of interest.

87. I declare that the true value of the Sub-Contract Works is £289,182.31 (Two Hundred and Eighty Nine Thousand One Hundred and Eighty Two Pounds and Thirty One Pence) and taking into account previous payments and retention of 2.5% a balance of £82,956.88 (Eighty Two Thousand Nine Hundred and Fifty Six Pounds and Eighty Eight Pence), less any release of retention as appropriate.

88. A&V shall no later than 5<sup>th</sup> December 2022 pay to JBH the sum of £82,956.88 (Eighty Two Thousand Nine Hundred and Fifty Six Pounds and Eighty Eight Pence), less any release of retention as appropriate.

89. A&V shall be responsible for payment of my fee in the VAT inclusive sum of £13,962.00 and in the event A&V fails to pay such fee and JBH is obliged to make payment, JBH is entitled to recover the sum paid as part of this Decision.

90. A&V has shown no entitlement to a re-payment of the RICS nomination fee.

In making this Decision, I have taken account of all matters before me, whether or not they are specifically mentioned.

17. It is this Decision that J&BH seeks to enforce, claiming the awarded amount of £82,956.88 and the Adjudicator's fee of £13,962.00.

**Alleged Failure to Comply with the Pre-Action Protocol**

18. This matter was heard by me on 19 January 2023. On the day before the hearing, A&V issued an application asking me to suspend the Enforcement Proceedings and issue judgment in A&V's favour.
19. The ground for the application was that J&BH had not complied with the TCC Pre-Action Protocol by failing to respond to a letter sent on behalf of A&V dated 2 December 2022.
20. That letter commenced as follows:

Further to A&V Final Account letter dated the 26<sup>th</sup> May 2022 matters of the Final Account have yet to be satisfactorily

concluded between the parties. Hopkins have not provided any formal meaningful response to A&V and matters of the account only being commented upon by Hopkins within an Adjudication in June 2022.

A&V now sets out its claim in this letter of claim. The letter of claim is issued in accordance with the Pre-Acton Protocol for Construction and Engineering Disputes.

21. The letter then enters into a 15 page analysis of the state of the account between the parties before ending with a summary which I set out in full because it is a very useful exposition of A&V's complaints about what happened in respect of the Sub-Contract:

A&V contend there is sufficient evidence available to conclude that Hopkins with their acts of prevention and/or otherwise breached the Contract to the detriment of A&V as follows:-

The delays were the responsibility of Hopkins and they breached Contract clauses 13.2 and 13.3 by not extending the contract completion date for:- suspension for covid and other periods; delays as a result of unavailability of floor areas; issuing extended programme 15.6.2020 in knowledge of a completion date beyond A&V contract completion Date; in the knowledge that the completion of the works was likely to extend for a further 5-6 months; in the knowledge that there were significant other design changes and variations that would extend the contract period.

J&B would advise in the adjudication there were suspension delays of 2 months due to covid but failed to issue a suspension notice in accordance with clause 11.1 and/or extended the contract period in accordance with clause 13.2 and 13.3.

Hopkins forcibly undertook A&V Contract works by employing others without good reason and/or without the required "notices" in accordance with Contract clause 7.4 and 15.1. By Hopkins confirming engaging and managing others to undertake A&V works this was an act of prevention stopping A&V from undertaking and managing their contract works.

Hopkins removed A&V from the QA procedural and management system of the IAuditor system and did not reinstate this. Contrary to J&B contentions in the adjudication this system was fundamental to the management of the works as evidenced by A&V and a requirement of the Hopkins QA system. Hopkins actions were an act of prevention and thus without reinstatement was a breach of Contract stopping A&V from undertaking their contract works.

A&V have evidenced instructions requested of Hopkins in respect to additional time periods and additional costs in

accordance with clause 8.5, 8.6, 13.2 and 13.3. Hopkins without issuing instructions to A&V prior to or at the date of A&V contract completion date 12<sup>th</sup> March 2021 are considered to have breached the contract. Without instructions beyond the Contract completion date and without either a further suspension or termination the Contract was in breach or “at large”. The only beneficiary of this would be Hopkins as they retained considerable sums considered due to A&V in addition to attempting to avoid paying for the additional claims for the extended periods and costs thereto detailed by A&V during the contract works. As a result of the above Hopkins further in breach of the contract failed to issue payment Notices in accordance with clause 9.5.

As a result of the above breaches and acts of prevention by Hopkins this resulted in A&V not being able to complete their contract works nor receive further valuations or payments to A&V’s financial detriment. Hopkins cannot benefit from its own act of prevention and breaches of Contract. A&V’s Final Account reflects the value of the works undertaken and not paid for to date, values relating to the breaches and includes for recovery of losses as a direct result of Hopkins breaches and/or acts of prevention.

The general remedy for breach of contract is a payment of damages amounting to the financial loss suffered as a result of the breach. The common law position is to place the party impacted by the breach of Contract in the same position as if the contract had been properly performed with no breach of Contract. As well as the financial loss, A&V have claimed for compensatory damages as a result of the breach.

Hopkins during the works and at meeting[s] thereafter confirmed that the delays to the Contract were not of A&V responsibility and that they would not be seeking to make claims against A&V. As part [of] the adjudications Hopkins disingenuously and without any evidence seek to purport the delays being of A&V responsibility and claim contracharges.

The above unreasonable behaviour by Hopkins is despite A&V providing a reasonable level of labour throughout the works to Hopkins programmes and requirements. Hopkins unreasonably and in breach of the contract took over all of the A&V remaining works and did not provide any alternative options/instructions as per clauses 8.5 and 8.6 to A&V letter 15<sup>th</sup> March 2021 nor an extension of time in accordance with clause 13.2 nor confirmed or provided further monies to complete the project that had been requested. Hopkins prevented A&V from completing their contract works.

As such the sums for the contract works undertaken to date by A&V have not been paid nor as requested by A&V any recompense from A&V by failing to comply with their own contract by extending the contract period and/or agreeing additional sums as may be appropriate. By contrast Hopkins have sought to unreasonably and vexatiously blame A&V for lack of labour which A&V do not concur as evidenced above.

....

22. The letter concludes as follows:

A&V claim a total final account in the sum of £675,687.27 and based on Hopkins previous payments to date (£364,909.64 this notes a total **sum due and/or outstanding on £276,917.62 plus V.A.T.**

You are required to acknowledge the letter of claim within 14 days and to provide a response to the letter of claim within 28 days of the date of the letter of claim.

Based on the breaches and the existing correspondence evidencing a dispute between the parties if Hopkins do not comply with the Pre-Action Protocol, A&V will commence proceedings to recover the sum due in relation to the Final Account.

23. By its application A&V contends that J&BH did not respond to this letter within the period provided for in the Pre-Action Protocol and that accordingly the enforcement proceedings should be stayed.
24. There are a number of problems with the application.
25. Firstly, it was only filed on the day before the hearing before me. Indeed, Mr. Frampton was not aware of the application before the hearing started.
26. Notwithstanding this, Mr. Frampton was able to deal with the application once he understood what it was about. Accordingly, lateness of the application was not in itself fatal to my considering it.
27. Secondly, the Pre-Action Protocol does not apply to adjudication enforcement proceedings. Accordingly, it was not necessary for J&BH to respond to A&V's letter as a pre-condition to proceeding with its application to enforce the Adjudicator's Decision.
28. Thirdly, whilst J&BH was a little late in answering A&V's letter, I am told it did so. If I had a discretion to apply any sanctions to J&BH for failure to respond to the letter, I would be slow to do so.
29. Finally, at the end of the day, either J&BH is entitled to enforcement of the Decision or it is not. If it is, then the Pre-Action Protocol letter changes nothing.

30. Accordingly A&V's application is refused.
31. However, as I have said, the letter is useful in highlighting the substantive case which A&V has, which in short is that after the time for completion of the Sub-Contract had expired, instead of J&BH giving A&V necessary instructions and access to an important management system (the IAuditor system), A&V were left without instructions. Instead, J&BH brought on other labour to complete the Sub-Contract.
32. These were in substance some of the arguments placed before the Adjudicator and repeated before me. I will return to those submissions below, but must first address the nature of the task before this Court in an adjudication enforcement application.

### The Relevant Principles in deciding an Adjudication Enforcement Application

33. In *J & B Hopkins Limited v Trant Engineering Limited*<sup>2</sup>, Fraser J. said at paragraphs [12] to [16]:

12. The procedure for enforcing adjudication decisions in the Technology and Construction Court by way of summary judgment is well known, as is the policy of the court in respect of enforcement. It does merit repetition in this short judgment that there are only very limited grounds upon which adjudicators' decisions will not be enforced by means of summary judgment. The very first case on enforcement was a decision of Dyson J (as he then was, who became Lord Dyson and also the Master of the Rolls) in a case called *Macob Civil Engineering Limited v Morrison Construction Limited* [1999] EWHC Tech 254, and [1999] BLR 93, in which it was made clear that an adjudicator's decision will be enforced by summary judgment, regardless of errors of law or errors of fact contained within it, or the merits of the underlying dispute resolved by the adjudicator.

13. The starting point is that if the adjudicator has decided the issues referred to him or her, whether he or she is right or wrong in fact or in law, as long as they have acted broadly in accordance with the rules of natural justice, that decision will be enforced by summary judgment. That is a principle that has been around for, as at today, over 20 years, but if a modern statement of that principle were required the best place to look is *Hutton Construction Limited v Wilson Properties (London) Limited* [2017] BLR 344 at [3]. It is *dicta* of Coulson J (as he then was). He also said in that same case at [14]:

"If the decision was within the Adjudicator's jurisdiction and the Adjudicator broadly acted in accordance with the rules of natural justice, such defendants must pay now and argue later."

<sup>2</sup> [2020] EWHC 1305 (TCC)

14. There are on contested enforcement applications, therefore, two bases only upon which a decision will not lead to summary judgment as the jurisprudence is conventionally understood. These are if the decision was one made without jurisdiction; and the other is if the decision was made in the presence of material breaches of natural justice. Neither of these features are contended for here.

15. The principles of enforcement are subject to two narrow exceptions. They are identified in *Hutton v Wilson* [2017] BLR 344 as well at [4]. The first is an admitted error; the second is a self-contained legal point concerning timing, categorisation or description of payment notices or payless notices, in respect of which the potential paying party has issued Part 8 proceedings seeking a final determination of that or those substantive points. That is dealt with at [5] of *Hutton*. Neither of those two exceptions apply here either.

16. Another statement which is worth repeating is at [9] in a case called *PBS v Bester* [2018] EWHC 1127 (TCC), a judgment of Stuart-Smith J, who explained the rationale for this approach by the courts on enforcement, which is as follows:

"Adjudication is all about interim cash flow and it is routine to enforce decisions that require substantial allocations of cash to one party or another in the knowledge that it may prove to be merely an interim measure. The fact that the basis of an adjudicator's decision is to be challenged in other proceedings is of itself seldom, if ever, a ground for non-enforcement."

34. Mr. Frampton put forward the following propositions, all of which are well founded:

(1) An adjudicator does not need to provide an answer to each and every issue which may be raised in the parties' submissions: *Amec Group Ltd v Thames Water Ltd*.<sup>3</sup>;

(2) An inadvertent failure to consider an issue within a dispute will not ordinarily render a decision unenforceable: *Pilon Ltd v Breyer Group plc*<sup>4</sup>; *Coulson on Construction Adjudication*, 4<sup>th</sup> Edition, 2018, paragraphs 13.38 to 13.55;

(3) In *Broughton Brickwork Ltd v F Parkinson Ltd*<sup>5</sup>, an inadvertent failure by an adjudicator to consider a particular document was held, at its highest, to be a procedural error which did not amount to a breach of natural justice.

35. I now turn to consider the arguments put forward by A&V against that legal background.

#### **Ground 1: Clause 7.4**

<sup>3</sup> [2010] EWHC 419 (TCC) at paragraph [93]

<sup>4</sup> [2010] EWHC 837 (TCC) at paragraph [22];

<sup>5</sup> [2014] EWHC 4525 (TCC) at paragraphs [28] to [29]

36. Clause 7.4 of the Sub-Contract permits J&BH to bring labour onto the site to carry out works within A&V's Sub-Contract if A&V fails to respond to a notice complaining of lack of progress.
37. As I understand A&V's position, it is that J&BH brought such labour onto site before the expiry of a relevant notice.
38. This is essentially a factual issue.
39. The Adjudicator dealt with this point at paragraphs 20.4 to 20.6 of the Decision:

20.4 With regard to Clause 7.4, I have considered the documentary evidence and witness statements and I can find no breach of Clause 7.4. JBH notified A&V of its concerns regarding not only the lack of on site labour, but also the reduced hours being worked by A&V's operatives and issued warning notices confirming its intention to supplement A&V's labour, prior to so doing.

20.5 I prefer the evidence of JBH to that of A&V and find that JBH was not in breach of Clause 7.4 by supplementing A&V's labour resources.

20.6 As a general point that applies to all of the alleged breaches (a) to (g), A&V has failed to explain the consequences of any breach of the Sub-Contract and it is unclear how, or why, such alleged breaches caused A&V loss, as relating to a specific breach.

40. It is clear from these paragraphs that the Adjudicator has considered the points put forward by A&V and rejected them, largely on factual grounds.
41. As the case law to which I have referred makes clear, it is not for me to judge whether the Adjudicator has reached the correct conclusion on the facts as found by him or on the law.
42. **I reject Ground 1** as a ground for resisting enforcement of the Decision.

#### **Ground 2: Clause 8.4**

43. As I understand A&V's position before the Adjudicator and before me, it was that in March 2021 A&V wrote letters putting forward quotations as required by the variation machinery in Clause 8 of the Sub-Contract, but received back no instructions to proceed from J&BH. Thus A&V was left without instructions on how to proceed.
44. I can understand that the effect of Clause 8 taken as a whole can be taken as providing a framework under which J&BH must decide whether it wishes to proceed with proposed varied work or not.



45. However the important letter of 15 March 2021 upon which A&V's case appears to depend does not seem to fit within that framework.
46. In its submissions to the Adjudicator, J&BH said this:

2.6 A&V's position that JBH has acted in breach of clauses 8.5 and 8.6 is impossible to fathom. It fails to make reference to any specific variations and A&V has failed to explain the consequences of the alleged breaches of clauses .. 8.5 and 8.6.

2.7 Clauses 8.5 and 8.6 deal with the mechanism for JBH considering a Sub-Contractor quotation issued in respect of a variation. These clauses follow clause 8.4 which provides that A&V shall implement a variation upon receiving notice of the same from JBH, and A&V shall provide a quotation for the works associated with the variation to JBH within five days of a receipt of a notice of variation.

2.8 In supposed support of its position, A&V refers to its letter dated 15 March 2021 in which various proposals are put forward by A&V. This letter does not, however, refer to any specific variation(s) of the Sub-Contract and is, instead, A&V's attempt to explain why elements of its Sub-Contract Works remain to be completed.....

47. The Adjudicator correctly understood that A&V's case was that it sought, but did not receive, explicit instructions in respect of proposed variations. He dealt with this case at paragraphs 21.2 to 21.6:

21.2 Reliance is placed by A&V on its correspondence dated 15/03/21 and 16/03/21, which explicitly requested instructions, which JBH did not provide. Reliance is also placed by A&V upon paragraph 162 item 8 and paragraph 231, of the decision in a previous Adjudication, in support of its assertions. Furthermore A&V asserts that Clause 22 of the Sub-Contract requires a notice to be sent by recorded delivery.

21.3 JBH has pointed out that Clauses 8.5 and 8.6 relate to the pricing of variations to the Sub-Contract and in its submissions A&V has made no reference to any specific variation. In addition, reliance is placed by JBH on the Part 8 claim, where the Judge found that the Sub-Contract does not require a notice to be sent by recorded delivery.

21.4 I prefer the case put by JBH to that of A&V. The correspondence of 15/03/21 and 16/03/21, upon which reliance is placed by A&V does not relate to a variation to the Sub-Contract Works, as envisaged by Clause 8 of the Sub-Contract, but to "*alternative agreement proposals*", and confirming the fact that, "*Because we are beyond our 52 week programme key*

*date, and we are waiting for JBH further instruction and agreement to cost to proceed.”*

21.5 Clearly these are not variations to the Sub-Contract, as envisaged by Clause 8. From the wording of the letter of 16/03/21, it appears to be the case that A&V is of the opinion that it must cease its Works at the conclusion of the 52 week Sub-Contract period, whether, or not, the Works were complete.

21.6 For the above reasons, I find on the facts that A&V has failed to show any breach of Clause 8 of the Sub-Contract by JBH.

48. It seems to me that paragraph 21.5 is a little truncated: taking it together with J&BH's argument I understand the Adjudicator to be saying that A&V had no continuing obligation to carry on works, in the absence of an express instruction, simply because the original contract period had expired.
49. That seems to me to be correct in law. Further, like the Adjudicator, I find it impossible to spell out of the facts in this case a breach of Clause 8.
50. Accordingly, I reject Ground 2 as a ground for resisting enforcement of the Decision.

### **Ground 3: Breaches relating to extensions of time and acts of prevention**

51. There are interlinking points under this Ground, but there are two principal points – firstly that J&BH failed to grant extensions of time which should have been granted; and secondly that by preventing A&V having access to the IAuditor system, J&BH prevented A&V carrying out its works.
52. These allegations, particularly the second, were dealt with by Mr. Hill, J&BH's Operations Manager, in a witness statement placed before the Adjudicator:

13. I understand that A&V has made numerous references to A&V's removal from JBH's IAuditor system and asserted that because JBH prevented A&V's access to IAuditor this was a breach of the Sub-Contract and prevented A&V from completing any further work. This is incorrect. There is nothing in the Sub-Contract which gives A&V a contractual entitlement to access JBH's IAuditor system and access to this system is not a site requirement. IAuditor is an internal paperwork system put in place by JBH to monitor quality and handovers back and forth between JBH and its sub-contractors. It simply allows us to be more productive on site when carrying out QA inspections and handovers between sub-contractors, JBH and BYUK.

14. IAuditor was used to accept work face areas from BYUK and for JBH to manage the quality of works being undertaken. The sub-contractors that used it would use the system to inform

JBH an area has been completed and was ready for JBH to carry out inspections. It was also used to track on what date areas were completed and returned to JBH. IAuditor has lots of JBH forms that the sub-contractors use to record any site management issues, H&S concerns and upload test certificates for example.

15. Handover and QA was a full-time job for the JBH site management with 2 to 3 people always employed to monitor and manage. QA handovers [were] required for 1<sup>st</sup> fix, 2<sup>nd</sup> fix and testing.

16. On the 22 March 2021 A&V had no labour working on site and, following JBH's letter dated 19 March 2021 in which it was confirmed to A&V that its position regarding delays etc was not accepted, A&V made it clear it would not be carrying out any further work. I had been advised that this was voiced by Alex Paduraru on site to a number of JBH personnel.

17. This being the case JBH had to assign new labour and site management to carry on A&V works. Part of the site management A&V were doing was completing the IAuditor paperwork. Therefore when Alex Paduraru said he was leaving site we removed him from IAuditor. There were two main reasons for this. Firstly, we needed to assign his licence to a new site manager so we could carry on handing over areas to our QA team. Secondly, A&V had started to make false accusations that its works were being sabotaged and, rightly or wrongly, JBH became concerned that A&V could tamper with/delete information already recorded in IAuditor (which A&V had full access to).

18. The decision to remove A&V from IAuditor was to make sure the running of site was not disrupted. To be clear, IAuditor is simply a software package, and not linked in any way to access to the site or workfaces. Access to the site was controlled by BYUK via a Biosite system.

19. A&V still therefore had access to site to complete works on week commencing 22 March 2021. If A&V wished to allocate resource to progress its Sub-Contract Works it could have done this and then updated progress via emails, photographs etc outside of the IAuditor system. JBH have never stopped access to anyone onto site (as long as they were inducted through the requirements of the contract).

20. Whilst IAuditor was used by a number of sub-contractors, as it made application claims easier to track, there were a number of other sub-contractors who didn't use IAuditor. These sub-contractors simply notified and handed back areas via email which we would track. A&V could have continued

to do this but, as above, A&V had already made the decision to leave site.

21. In addition to Alex Paduraru's verbal confirmation that A&V would not be returning to site, A&V's actions also made this clear. For example, despite sub-contractors retaining JBH plant for ongoing use during their works, on 19 March 2022, A&V returned all JBH plant to JBH. Given the process on site for checking plant, parts and crimp heads, this meant that A&V would not have any plant available to use on the following Monday 22 March 2021. Furthermore, A&V returned the keys for the materials and copper coffins to JBH where everything, including free issue materials etc, were stored. Sub-contractors were not required to return keys at the end of each day/week but instead retained keys etc throughout the duration of their works in order to gain access to whatever materials they required.

This Ground relates to Clause 1.4.4(e) of the Referral, which I have set out at paragraph 13 above.

53. The Adjudicator dealt with this at Section 24 of the Decision. He does not refer expressly to the IAuditor system, but he does refer to Mr. Hill's evidence and sets out clearly his reasoning in respect of extensions of time and what he regarded as being A&V's abandonment of site:

24.2 Reliance is placed by A&V on various correspondence and retrospective comparison between the Sub-Contract Programme of 10/12/19 and an updated programme of 15/06.20. In addition, A&V relies upon a telephone conversation between Mr Padurara of [A&V] and M Hill of JBH on 05/03/21. A&V is of the view that Mr Hill agreed that the Sub-Contract Works were 100% complete, that JBH would not contra charge A&V for labour which was provided by JBH to supplement that of A&V and A&V was not culpable for any delays. The telephone conversation was recorded by A&V, without JBH's knowledge and has been presented in evidence in this Adjudication.

24.3 In his first witness statement, Mr Hill, while accepting that he told Mr Paduraru there would be no charge for supplementing A&V's labour in small discrete areas, he denies agreeing that the Works of A&V were 100% complete and that A&V was not culpable for any delays.

24.4 JBH is of the view that A&V has failed to explain by reference to contemporaneous records that it has suffered any delay and no evidence has been provided by A&V to show its compliance with Clause 13. JBH points out that A&V has not provided any critical path/cause and effect analysis in support of its alleged delays, but relies upon a series of emails which

show that there was limited access to workfaces, which JBH asserts is commonplace on a project of this nature.

24.5 A further argument by JBH is that if, as asserted by A&V, the Works were 100% complete at the Sub-Contract Completion Date, why would A&V be entitled to an extension of time.

24.6 With regard to this alleged breach, I prefer the evidence of JBH to that of A&V. I have listened to the recorded telephone conversations of 05/03/21 and must conclude that taking into account the situation on site at that time, it would take a giant leap of faith to accept that the content of the recordings supports A&V's understating<sup>6</sup> in the conversations. I much prefer the evidence of Mr Hill in that he was trying to encourage A&V to complete its Sub-Contract Works and had it been known that A&V was soon to abandon the site, he would have conducted the conversation differently.

24.7 I have not been shown any notices under Clause 13.3, referring to the causes of delay set out at 13.2 (1) to (4) of the Sub-Contract. No evidence has been provided identifying the cause of a delay and the effect which it will have on the Completion Date. While on a "labour only" Sub-Contract such as this it may be asking too much for a critical path analysis to be provided in substantiation of any alleged delay, a simple, "as planned" – v – "as built" programme, with annotations of any delaying factors would be reasonable to illustrate the effect of any delaying factors on the completion date. AS A&V is professionally represented, I would expect such evidence to be provided in support of A&V's claims.

24.8 While I have been unable to find any reference to Clause 13.4 in the submissions, I consider it to be relevant.

*"13.4 The Sub-Contractor shall constantly use its best endeavours to prevent or minimise any delay in the progress of the whole or any part of the Sub-Contract Works."*

24.9 I fail to see how A&V could have complied with this clause by its abandonment of the Sub-Contract Works.

54. This part of the Adjudicator's Decision has been heavily criticised by A&V.
55. Firstly, it is undoubtedly unfortunate that there was no mention of the IAuditor system in this part of the Decision. However, it is clear that Mr Hill had dealt with that issue, and that the Adjudicator accepted Mr. Hill's evidence.
56. Secondly, it is perhaps unfortunate that this Adjudicator did not refer to the Decision of a previous Adjudicator, Mr. Blizzard, who had found in A&V's favour. However,

<sup>6</sup> This is the word used in the decision. I think it must be an error for "understanding"

as to that, I accept the following arguments put forward by Mr. Frampton:

- (1) A&V did not argue before this Adjudicator that he was bound by any findings by Mr. Blizzard. Its position in front of this Adjudicator was that he could revisit issues addressed by Mr. Blizzard;
- (2) In any event, JBH continues to contest Mr. Blizzard's jurisdiction and the validity of his decision and, irrespective of its validity, it was not on its own terms binding as:
  - a) He was concerned with a claim for interim payment and was not deciding the final account;
  - b) The parties had not provided all the documents required to deal with the alleged breaches of contract or the conclusion of the Sub-Contract;
  - c) A dispute as to the final account could be the subject of a separate adjudication.
- (3) Finally, the decision as to whether he or she is bound on a particular issue is a question for an adjudicator to answer. If the adjudicator reaches the wrong answer, it is not a matter going to jurisdiction, so long as the adjudicator has not, overall, decided the same or substantially the same dispute as has been decided in a prior decision.

57. Finally, it would have been better for the Adjudicator to have raised the clause 13(4) point with the parties.
58. Despite those points, I reject Ground 3. At the end of the day the Adjudicator had a clear position before him on J&BH's evidence, which was that A&V had made it clear to J&BH that it was going to stop work. That position was, on Mr. Hill's evidence, not linked to the IAuditor issue.
59. It may well be that if this dispute is referred to a Court or Arbitrator that a different result may prevail. However, applying the authorities which I have referred to above, it seems to me that the Adjudicator has made a Decision based upon factual and legal conclusions at which he was entitled to arrive, and there has been no breach of justice of the type which would entitle me to set aside or refuse to enforce the Decision.

#### **Ground 4: Contra charge of £14,560**

60. By Ground 4 A&V complains that the Adjudicator allowed J&BH's Contra Charge for subsidising A&V's labour in the sum of £14,560.
61. In a sense this contra charge may be thought to flow from the decision rejecting A&V's case under Clause 7.4 (Ground 1 above). In any event, it seems to me that the Adjudicator's conclusion on this is a matter of fact with which this Court will not interfere on an application such as this.

#### **Ground 5: Contra Charge for Completing the Works**

62. Ground 5 challenges the decision by the Adjudicator to allow JBH's contra charge for the additional cost of completing the works in the sum of £62,280.24.
63. Given the other conclusions at which the Adjudicator had arrived along the way, it seems to me that this part of his Decision followed those conclusions, and stands or falls with those conclusions.

### **Grounds 6 and 7: The Wider Attack**

64. I have dealt with the 5 specific grounds of defence relied upon by A&V. However, I now deal with some wider issues which are raised in A&V's skeleton argument as grounds 6 and 7.
65. The Decision which I am here considering must, when received, have come as a considerable shock to A&V.
66. Firstly, it was the party seeking payment, but ended up with a decision that it was liable to J&BH.
67. Secondly, whilst it had previously been successful before Mr. Blizzard, this Adjudicator came to conclusions directly contrary to those reached by Mr. Blizzard.
68. Thirdly, there is no doubt that on at least the issue of compliance with Clause 13(4) it would have been better for the Adjudicator to raise it with the parties before expressing a view upon it.
69. Fourthly, it would have been desirable for the Adjudicator to set out his reasoning on the IAuditor issue.
70. Finally, I am told, and can readily believe, that the decision in J&BH's favour is financially ruinous for A&V.
71. The first argument which was put before me was, in effect, that this Decision was so riddled with error as to show that the Adjudicator did not do his duty under the Scheme and that there was in the result a denial of natural justice. A&V also contrasted the time spent on this adjudication with the time spent by Mr. Blizzard in the other adjudication.
72. I firmly reject this wider attack, which, if accepted, could have very wide implications. It amounts to saying that because of the numbers of errors made by the Adjudicator, coupled with the perceived limited time spent on the adjudication, there has been bias and a breach of natural justice on the part of the Adjudicator.
73. In my judgment there is nothing before me which justifies the allegation of bias.
74. As to the errors alleged, as will have been seen above, I have not accepted the matters raised by A&V.
75. Delving into what was put before the Adjudicator reveals that, not unusually, he was faced with a mass of material not always accompanied by a clear route map as to how best to proceed.

76. He appears to me to have entered into that process, in the limited timescale afforded to Adjudicators, diligently and thoughtfully. If there are, as I have suggested, some areas where, with the benefit of hindsight, things might have been done differently, there is nothing in the matters raised before me which crosses the threshold so as establish a breach of natural justice which would justify me in refusing to enforce the Decision.
77. There is one further matter upon which I should comment: as I have said, although A&V brought the adjudication, it was A&V who was held to be the party who should make payment.
78. Insofar as the result of the Adjudicator's conclusions was to show that a sum was due or would become due to J&BH, that seems to me to be a legitimate conclusion.
79. However, I have some doubt as to whether it was within his jurisdiction to go on to order payment. Nevertheless, in my judgment I should now grant summary judgment, since the conclusion that monies were due to J&BH is still binding upon A&V, and I should give effect to it.

### **Conclusion**

80. In the result there will be summary judgment for the Claimant in the sum of £96,918.88 being the sum found due to the Claimant under the Sub-Contract and the amount of the Adjudicator's fees.