IN THE HIGH COURT OF JUSTICE No. HT-2021-000056

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

TECHNOLOGY AND CONSTRUCTION COURT (QBD)

[2021] EWHC 1290 (TCC)

Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 14 April 2021

Before:

MR JUSTICE WAKSMAN

B E T W E E N :

LEWISHAM HOMES LTD Claimant

- and -

BREYER GROUP PLC Defendant

MR R. CLAY appeared on behalf of the Claimant.

MR S. BRANNIGAN QC appeared on behalf of the Defendant.

J U D G M E N T

(Via Microsoft Teams)

MR JUSTICE WAKSMAN:

Introduction

1 This is an application by the claimant Lewisham Homes Limited related to the estate of the London Borough of Lewisham to enforce by way of summary judgment a decision of the adjudicator dated 6 January 2021 ("the Decision"). By that Decision he decided that the defendant to this application, Breyer Group PLC ("Breyer") should pay to Lewisham the sum of £2,728,9822.28 plus VAT. A second decision, that Breyer should pay a further sum of £210,000 odd has now been complied with, although there was originally a contest about that as well.

2 The single point of defence raised by Breyer in answer to this application is that the adjudicator, Mr Malloy, had no jurisdiction to make the Decision because he had already decided the same or substantially the same dispute in his own earlier decisions ("the Prior Decision") which was made on 24 June 2019. That in fact was a decision in respect of adjudication 2 and the instant adjudication was adjudication 6.

3 The point can be put a little more specifically in relation to this contract by reference to rule 32 of the CIC Model Adjudication procedure which governs adjudications, as opposed to para.9.2 of the Scheme. That clause said that the parties would be entitled to the redress set out in the Decision and seek summary enforcement, whether or not the dispute was finally determined and:

> "No issue decided by the Adjudicator may subsequently be referred for decision by another adjudicator unless so agreed by the parties."

4 This, of course, is an application for summary judgment which should not be given if there is a real prospect of a successful defence at trial, and as I say here that concentrates exclusively on the jurisdiction objection.

5 For the purpose of this application I have had before me the witness statements of Kieron Binney, a solicitor for Lewisham dated February 2021; Mr Fisher, who is Breyer's finance director, of 17 March 2021, together with a confidential exhibit; Andrew Lancaster, solicitor for the claimant, of 25 March; and another reply statement from Margaret Dodwell, who is the CEO of Lewisham also of that same date.

The Prior Decision

6 This can be taken shortly so far as background is concerned. By its contract with Lewisham Breyer agreed to carry out works of improvement to its extensive housing stock, including the installation of around 7,000 door sets to entrances to individual flats and blocks of flats. These need to be fireproof and fire resistant in the requisite respects. The door sets installed by Breyer were supplied to it by a number of different manufacturers, one of which was called Manse. Another was called Master Door which was an associated company and made essentially the same product. I will reply to the supplies from both companies collectively as "Manse Doors". Tests subsequently revealed that the Manse Doors did not conform with fire safety requirements. A total of 2,903 Manse Doors installed by Breyer were affected.

7 On 10 April 2019 Lewisham gave to Breyer a notice of adjudication in respect of the Manse doors and other doors which had been installed by Breyer from other manufacturers. Turning to that Notice of Adjudication, I refer in particular to the following paragraphs from the section headed "The dispute".

> "A dispute has arisen in respect of Breyer's liability for the costs of remediating the defects."

8 Then there is a reference to investigations following Grenfell. Then para.3.6:

> "3.6 The defects arise out of selection of the defective goods, specifically the selection and installation of door sets which failed to meet the relevant standard.
>
> "3.7 Breyer deny responsibility for the defects.
>
> "3.9 Breyer have failed to discharge their obligations under the contract when selecting flat entrance door sets."

9 Then at 5, "Redress sought"

> "1. To the extent any flat entrance doors installed by Breyer are defective, Breyer are liable under the contract..."

10 That is the breach of contract claim.

> "2. Particular door sets manufactured by the identified manufacturers are defective.
>
> "3. Breyer is liable for all such defective flat entrance door sets."

11 Then, importantly, remedy 4:

> "4. Breyer shall pay to Lewisham homes the sum of £3.75 million or such other sum as the Adjudicator may decide by way of payment on account for the cost of replacing the door sets manufactured by Manse."

12 So, setting to one side the doors supplied by the other manufacturers. At 5.1.6 they add:

> "5.1.6 If the Adjudicator did not decide remedies 2 or 4 there should be a declaration he has declined to decide those remedies by reason of lack of evidence."

Remedy 6 is stated as being that the adjudicator has not reached a decision regarding Lewisham Homes' entitlement to those remedies.

13 The adjudicator's formal decision on those matters is expressed thus.

> "Having regard to my findings:

(1) to the extent that any of the flat entrance door sets are defective, Breyer is liable.

(2) The flat entrance door sets manufactured by..."

- and he refers to all the manufacturers -

"... are defective by virtue of failing to meet required standards.

(3) Breyer is liable for all such defective flat entrance door sets.

(4) Lewisham is not entitled to a decision that Breyer shall pay to Lewisham the sum of £3.75 million or any sum as he may decide by way of a payment on account for the costs of replacing the door sets manufactured by Manse."

Then he deals with his fees.

14 The reasons for expressing para.4 of his conclusion in that way, it can be derived from a number of earlier paragraphs. After para.51 he says that Breyer is liable for such defective flat entrance door sets. Then he addresses the question: "Is Breyer liable to pay to Lewisham Homes a sum on account for the cost of replacing the door sets by Manse and if so by how much?"

15 He recites that Breyer says there is no entitlement under the contract for a payment on account or damages at this stage. The defects liability does not expend until 12 months after the expiry of the term contract, which is not due to expire until 30 September 2019, his award being dated 24 June 2019. So Breyer's obligation to rectify at no cost has not yet been triggered. Breyer also says it was agreed as part of a settlement agreement. Then there is another point in relation to task orders and that there was a failure to mitigate, and that Lewisham Homes a sum on account for the cost of replacing the door sets by Manse and if so by how much?

16 He recites that Breyer says there is no entitlement under the contract for a payment on account or damages at this stage. The defects liability does not expend until 12 months after the expiry of the term contract, which is not due to expire until 30 September 2019, his award being dated 24 June 2019. So that Breyer's obligation to rectify at no cost has not yet been triggered. Breyer also says it was agreed as a part of a settlement agreement. There is another point in relation to task orders and that there was a failure to mitigate, and that Lewisham, however, had said that it would be reasonable to appoint another contractor because there had been unreasonable risk to continue with Breyer. Lewisham also says that Breyer has refused to engage constructively with it.

17 While Breyer said it had the burden to demonstrate a failure to mitigate, it said it would not be reasonable for Lewisham to appoint another contractor in circumstances where the contract expressly requires any defects shall be rectified by Breyer at no cost. It has a current presence on site with the current term not due to expire until 30 September 2019, also due to be extended as a result of a recent task order on 4 June 2019.

18 At para.56 the adjudicator recites this:

> "56 In relation to its entitlement to an on account payment, as Rule 25.1 of the CPR empowers a court to grant an order for an interim payment by the defendant in respect of damages which the court may hold a defendant liable to pay, so can an adjudicator."

19 That impliedly is what Lewisham said. Breyer said the CPR is of no application to an adjudication. Breyer also said the provisions of the CPR relate to an interim payment on account of damages and not an on account payment for monies not expended in circumstances where it has not yet suffered any loss. The Adjudicator said:

> "57. I agree with Lewisham. The 12-month defects periods commenced at the date of the completion of a task order. I do not accept that defects which are identified as potentially present were the ones which conferred an obligation on Breyer to attend and rectify at no cost."

20 Then in 58, importantly:

> "58 While I note Lewisham's reference to the CPR, I agree with Breyer that it has no application to adjudication. I therefore find the references to CPR 25 of limited assistance. As there are no express provisions within the contract for Lewisham to recover an interim or on account payment, I also agree with Breyer that Lewisham is limited to a claim for damages as a result of losses caused by Breyer's failure to comply with its obligation to supply and install satisfactory door sets. In that regard, although I accept that in principle an award of damages may be made notwithstanding the costs of implementing a remedial work scheme have not yet been incurred, I have some difficulty in accepting this would be an appropriate course of action in circumstances where a contractor who is still engaged on site on a term maintenance partnering contract and was willing to undertake a remedial work scheme. However, I accept that the question of mitigation, and whether it would be unreasonable for Lewisham to appoint another contractor, is a relevant consideration in this regard."

21 He then notes, at the end of para.59, that Mr Walsh of Breyer had advised in his letter of 30 July 2018 that Breyer wanted to work with Lewisham to correct defects and there have been without prejudice discussions between the parties regarding the replacement of the door sets. As Ms Dodwell explained in her witness statement, what that single exchange was concerned with was Breyer making an offer that it would replace the doors which it had installed and which were defective provided that Lewisham paid it for the replacement, albeit at a discounted price.

22 Then at para.60 he deals with financial concerns. Then in para.61 he says:

> "The final point which I consider militates against a finding that it would be reasonable for Lewisham to engage another contractor is the fact that the term of the contract had not yet expired such that Breyer is still on site. I therefore see some merit in Breyer's submissions that to engage an alternative contractor on site at the same time is never a good idea. This is especially so in circumstances where Breyer has

> expressed a willingness to undertake a remedial scheme in the event that it is found liable.
>
> Conclusion
>
> Absent an express provision entitling Lewisham to an on account payment in circumstances where costs of remedial works have been incurred, Lewisham's entitled is based on its common law right to recovery of damages. While I accept a party may recover damages in advance of the costs being incurred, notwithstanding a finding about the commencement of the defects liability period, my view is that it would not be appropriate to make an award of damages on an on account basis in circumstances where the contract term has not yet expired with Breyer still engaged on site and willing to undertake a remedial scheme. Accordingly I find that Breyer is not liable to pay Lewisham the sum on account."

23 Precisely what all of that meant and by using those words what the adjudicator in fact decided has become the central point in the jurisdiction debate before me. But on any view it is clear that one of the points which the adjudicator was making was that there was certainly no power which was akin to CPR 25 to make a payment on account.

24 I will return to this but it is worth noting at this stage that there was no particular putative remedial scheme before the adjudicator at that stage. That is hardly surprising because at this stage liability itself was substantively in issue along with other arguments to the effect, for example, that no dispute had even crystallised. The adjudicator rejected that argument and it has not been maintained subsequently.

The Decision

By the time the termination of the original contract had expired on 30 September, and I will return to the question of expiry a little later, Breyer had not agreed any particular remedial scheme which included the placement of the doors, or offered it, and it was in the course of developing its remedial proposals which fell short of replacement and which were much less expensive. Lewisham gave them time to develop those proposals but in the end Lewisham did not accept them. Its fire expert did not accept them, and indeed they had been tested. Lewisham contended that replacement was the only option. By 17 November 2020 when it issued the notice for adjudication that led to the Decision, it had in fact instructed another contractor to replace the doors, and the doors in question here included all the doors installed and not just the Manse Doors. The notice here says:

> "3.5. Subsequent to the first decision Lewisham have requested Breyer undertake a comprehensive door replacement programme to replace the door sets with conforming product.
>
> 3.6. Breyer have refused to delivery an appropriate remedial scheme that can be supported by Lewisham and its fire expert. Lewisham has no option but to engage alternative contractors to remedy the defects."

25 Paragraph 5 as to redress said that Lewisham sought a decision that the adjudicator should decide that Breyer must, within seven days, pay £7.6 million, which is the cost of replacing all of the doors, the £241,000 which is no longer an issue, and then the fees and expenses.

26 As to a summary of the response submissions, it is worth just reciting those at this point. Firstly, Breyer said that the participation was without prejudice to its submissions as to jurisdiction. There were three objections put forward. The claim for the cost of replacing the door sets has already been determined. The dispute has already been determined. Breyer was willing to perform a remedial scheme, and the dispute had not crystallised. Then as far as defective doors is concerned:

> "Breyer Remedial Scheme offers a solution which Lewisham Homes is wrong to reject. The Adjudicator is asked to prefer the opinions and conclusions of Mr Quayle..."

-- who I take to be their expert --

> "... in support of this submission."

27 The adjudicator is invited to decide the number of properties where remedial works are requested are set out, which they say was 1,843. Then:

> "(4) The Adjudicator is further invited to decide that the sum due to Lewisham is nil as there is no evidence put forward by Lewisham that any costs have in fact been incurred. In the alternative the Adjudicator is invited to decide the maximum sum due to Lewisham is the cost of the Breyer Remedial Scheme, £403,000 odd."

28 Leaving to one side for the moment the jurisdiction objection, part of the substantive issue for the adjudicator, unless he was to resign, were as follows. I am going to start at para.17 because it summarises Breyer's over-arching substantive point.

> "17. At the close of submissions Breyer asks me to decide that in so far as defective doors require remediation, the Breyer Remedial Works scheme offers a solution which Lewisham wishes to reject. Breyer also invites me to decide the number of doors [2000 odd]. In relation to quantum Breyer asks me to assign Lewisham's entitlement to nil because there is no evidence that costs have been incurred, or the maximum is £412,000, i.e. the costs of its Remedial Scheme."

29 Then on the substantive issues, he describes them thus: (1) Is Breyer Remedial Works Scheme appropriate for the doors which were require remediation? (2) What quantity of door sets are required to be fire-resisting and require remediation? (3) Is Lewisham entitled to payment in respect of the remediation of the door sets, and if so how much? (4) Is Lewisham entitled to an abatement in respect of doors which do not have to be fire-resistant?

30 His conclusion on the first substantive issue which is about sufficiency is at para.31 and 32. Put shortly, he found that Breyer's Remedial Scheme for solid doors was acceptable, but it was not acceptable for the glazed doors. That was what led to the decision that Lewisham was entitled to about £2.7 million in respect of the defective doors because it was not entitled to the replacement cost of the solid doors, but only at the cost of the remedial works, details of which had been provided by Breyer. He rejected the other points of substance. Hence para.1.1 of his decision was that Breyer must pay £2.7 million plus VAT in respect of the cost of remediating the door sets.

31 As to the jurisdiction point, he dealt with this starting at para.13. He recited what the objections were, which I have already recited myself, and then set out what he decided in the decision which he gave prior to the substantive adjudication:

> "I am satisfied I have not already made a decision in respect of the dispute referred to in this adjudication. The dispute referred to in the previous adjudication encompassed the question of liability and Lewisham's claim for an interim payment on account. I decided that Breyer was liable for non-performance, but that Breyer was entitled to rectify at no cost. The dispute in this adjudication concerns the claim by Lewisham arising from an alleged failure on the part of Breyer to implement and accept the Remedial Work Scheme. Although Breyer explains it is willing to perform a remedial scheme, the scheme proposed is not acceptable according to Lewisham. The sufficiency or otherwise of the remedial scheme and non-acceptance of it are substantive issues. I do not accept objections 1, 2 and 3..."

Then there is a point about abatement.

32 I should make it plain that at least as far as the adjudicator was concerned the effect of the way in which the matter was then being put by Breyer to the adjudicator was that the adjudicator was entitled to do nothing so far as the adjudication was concerned, whether it be to adjudicate on the sufficiency of the scheme proposed or anything else, which is why the effect of the jurisdiction point, if it had been successful, would have been for the adjudicator to resign and there would be no adjudication at all. As we will see, the ground has shifted somewhat so far as Breyer's current position is concerned.

33 Against that brief background I consider the law. In *Brown & Anor v Complete Buildings Solutions Ltd* [2016] EWCA Civ 1, the relevant authorities were considering, including in particular *Benfield Construction v Trudson (Hatton) Ltd.* [2008] EWHC 2333 (which both parties have referred me to); *Quietfield Ltd v Vascroft Construction Ltd* [2006] EWCA 1737; *Matthew Harding (Trading as M J Harding Contractors) v Gary George Leslie Pace & Anor* [2015] EWCA 1231; and *Carillion Construction Ltd v Davenport* [2005] EWCA Civ 1358. Some of those authorities were considered further by Stuart Smith J (as he then was) in *Hitachi Zosen Inova AG v John Sisk & Son Ltd* [2019] EWHC 495. I will just at this stage note that in relation to the question that he had to decide, he said, at para.34:

> "34. In answering both these questions there is ample scope for misleading paraphrase and tendentious interpretation. In my judgment, the answer to both questions is to be found in the precise terms of adjudication referrals decisions themselves."

34 I echo the need to avoid misleading paraphrase and tendentious interpretation. Synthesizing that case law into a set of principles that builds on those set out by Coulson J (as he then was) in *Benfield*, I would, for my part, express them as follows.

(1) The parties are bound by the decision of the adjudicator on a dispute or difference until it is finally determined by the court, or an arbitration or agreement.

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

(3) The extent to which a decision or dispute is binding will depend upon the analysis and the terms, scope and extent of the dispute or difference referred to the adjudication and the term, scope and extent of the decision made by the adjudicator. In order to do this the approach has to be to ask whether or not the dispute or difference is the same or substantially the same as the relevant dispute or difference and whether the adjudicator has decided the dispute or difference which is the same or fundamentally the same as the relevant dispute or difference now before him.

(4) The emphasis on what the adjudication actually decided, however the issue referred was described or formulated, is important. This is because ultimately it is what the first adjudicator decided which determines how much or how little remains for consideration by the second adjudicator.

(5) The fact that the bar to a further adjudication is engaged not only where the dispute in question is the same, but also where it is substantially the same is again important. It is because disputes or differences encompass a wide range of factual and legal issues. If there had to be complete identity of factual and legal issues, then the ability to re-adjudicate what was in substance the same dispute or difference would deprive para.9.2 of the scheme of its intended purpose.

(6) Whether the dispute is substantially the same as another is a question of fact and degree. It seems to me that the inquiry is likely to focus on the key elements of the dispute before and the decision of the first adjudicator, even if the underlying subject matter is the same. For example, an application for an extension of time based on a particular relevant event. The particulars of its expected effects and/or the evidence used to prove them may lead to the conclusion that overall the dispute second time round is not the same as the first. Another example of that can be seen in *Hitachi* itself where the issue concerned whether the adjudicator in a second adjudication had decided about the variation which had to be valued, which in fact he did not value, and whether that was substantially the same. In that particular case, the first adjudicator had decided there was a variation that required a valuation, but for want of evidence decided that no sum was payable for the purpose of one particular payment application. He went on to find that the valuation for any other purpose in the context of the claim had not been decided, and therefore the jurisdiction point did not run. That is a good illustration of how the exercise of comparison is one of fact and degree.

(7) On the other hand the mere fact of some differences between the way the case is put on each side is not necessarily sufficient. It is especially so if in truth the second adjudication is no more than an attempt at an improved version of the first. Of relevant here, but not determinative, will be whether the point now taken could have been taken before. It seems to me overall that the exercise of comparison in addition should be conducted in a realistic and common-sense fashion.

(8) Since the jurisdictional point will usually be taken before the adjudicator in the second adjudication, their decision to reject it should be given significant weight, although of course that decision does not bind the parties or the court. The reason for according that respect, as it is put in some of the cases, is simply that the second adjudicator is the decision-maker and is being asked to say what that particular decision entails or does not entail and is therefore particularly well placed to

undertake that analysis. All the more so if, as here, the identity of the second adjudicator is the same as the first.

(9) I would add that where a particular contract provision governs the point as opposed to para.9.2 of the scheme, the court will need to consider whether the particular language of that provision affects the exercise to be undertaken.

(10) Since the underlying bar is expressly provided for in para.9.2 of the scheme or in a related contractual provision, the juristic basis for it is of secondary importance, but it can be seen as a straightforward absence of jurisdiction or a process which is unfair to whichever party had the benefit of the prior decision.

35 Against that background of the law I then analyse the issues here. A useful starting point, though as I have just emphasized only the starting point, is the nature of the dispute as referred to in each adjudication. The critical element in the first dispute referred was actually whether Breyer was liable for breach of contract in respect of the doors at all. It is common ground that the adjudicator was not asked to decide that point again, as it were, in the second adjudication. The other element was the recovery of a payment on account. That was, as asked, conceptually different to and was in fact different to the final award for damages sought subsequently. Had the interim payment order been given by the adjudicator, that would have been a decision which was provisional, even within the adjudicator's own provisional jurisdiction because it would be subject to a final determination to be made at some future date which could be more or indeed less than the sum now claimed. The adjudicator himself saw that as relevantly different, and he said so, and he explained why.

36 As to the dispute defined in the second adjudication, it was characterised in different terms because what was sought now in circumstances where no interim payment had been given was a final award of damages in a particular sum. The fact that the sum was not yet paid or could conceivably be different to what Lewisham might end up paying the new contractor, would not prejudice the adjudicator from taking a final view, just as it would not prevent a court from doing so. The adjudicator or the court would do its best on the materials presented before it, but whatever was decided would be final as far as the jurisdiction of the court or adjudicator was concerned. In my judgment that is and of itself a dispute that was not the same as that before the adjudicator in the prior decision. The fact that he concluded for a number of reasons that an interim payment was not possible or appropriate says, in my judgment, on the face of it nothing about a final award of damages.

37 The difference between the two adjudications becomes even clearer when one considers what was before the adjudicator the first time round and what was before him the second time round, and what had occurred in the meantime. There were, before the adjudicator first time round, no detailed proposals as to any particular remedial scheme contemplated. At the time of Adjudication 2, Lewisham's position was simply that all the doors should be replaced and because it wanted to replace the Manse doors urgently it sought a payment on account. Apart from rejecting Lewisham's entitlement to an interim payment as a matter of principle, Breyer's other point, apart from resisting liability, was that it should be given an opportunity to undertake or propose remedial works since at that stage the term of the contract was still running and there was then the 12 month defect liability period. What the adjudicator clearly, in my view, did not do, and was not required to do, was to evaluate any particular remedial proposals which might be forthcoming. He was not asked to do so and it would have been impossible if he had been asked. In effect, what he was doing was giving Breyer the opportunity to proffer such works. That was clearly understood by Breyer because what it then did, after that adjudication, was to set out the remedial works it

proposed which did not entail the replacement of the doors, but various ways of treating them and adding to them.

38 The history of what Breyer did and did not do is comprehensively set out in paras.5 to 10 of Ms Dodwell's witness statement. I should add that there was no proposal at that stage for Breyer to undertake any replacement of the doors, and that is perhaps understandable because Breyer did not consider that it was necessary.

39 In the intervening period Breyer also took the point, for the first time, that 700 doors were not in breach of the fire regulations in any event. That is what led to the second abatement claim, and I need say no more about it. The claim for the replacement cost made by Lewisham in respect of all the doors, apart from the 700, was clearly a claim for a final damages figure. The fact that by then not all the doors had been done did not mean that the adjudicator could not assess a final figure, which in fact is what he did. Leaving aside some subsidiary points on the figures, lying behind that was Lewisham's claim for the replacement and the adjudicator had to decide to assess whether the proposed remedial works were sufficient or not. If and in so far as they were, he would deny Lewisham damages based on replacement costs and award them only the remedial costs. On that issue of sufficiency, there was a significant body of expert evidence before the adjudicator in the second adjudication on the question of acceptability of the proposals which emerged to a clearly new factual inquiry for the adjudicator and one which was not at all before him in the first adjudication. Critically, that evidence included the result of fire-resistance testing on the doors as treated by Breyer in accordance with the proposals which it said was sufficient. In my judgment, the difference between what the adjudicator was being asked to do in each adjudication was summarised by him correctly in the section of his decision to which I have already referred.

40 So much for what was referred to the adjudicator. I now turn to what the adjudicator did or did not decide in each of the two adjudications. Notwithstanding the points persuasively put by Mr Brannigan QC to me today, there was a very clear difference between the two decisions. The first decision, quite apart from anything else, was to find that Breyer was liable. Second, it was not to award interim payment on account at that stage. No final claim for damages had been made, but the implication of that decision was that Breyer were free at least to propose remedial works effectively so as to mitigate Lewisham's loss. The second decision did not address liability. That had already been decided, but it did address and decide the adequacy of the remedial works which were not decided in the earlier adjudication. Breyer submits that the decision not to award a payment on account effectively dictating once and for all that no final damages award based on the cost of a replacement could ever be awarded. At least that, on the face of it, was Breyer's stance before the adjudicator.

41 The implication of that interpretation of what he did was that whatever the remedial scheme Breyer came up with, ultimately would have to be accepted at some point or at least perhaps that Breyer could come up with successive remedial schemes until one was found which was acceptable. In my judgment, that proposition has only to be stated to see how absurd it would be if it was correct.

42 I mentioned earlier in the judgment that the ground had shifted somewhat so far as Breyer's objection is concerned. Breyer now does not submit that the adjudicator gave a once and for all decision that there could never be a final award for damages based on replacement, but what he was saying is that there could not be such an award while Breyer was at least offering a reasonable replacement. That would be the only way to avoid the absurdity to

which I have just referred. If that is right, then contrary to the position taken before the adjudicator Mr Brannigan and Breyer was bound to accept that the exercise of the adjudicator in deciding whether the remedial scheme was reasonable or not was necessarily not barred by the earlier adjudication. That must follow from the interpretation now placed on the first adjudication which was that Breyer were to be allowed to put forward a scheme which was reasonable.

43 That, of course, then led to the difficulty for Breyer that on that basis if the adjudicator had now decided that they were not unreasonable, then it must inevitably follow that, subject to proof of quantum, the adjudicator was entitled to go on and find damages on the basis of replacement. Mr Brannigan said that he was not entitled to do that either, notwithstanding his finding on the sufficiency or otherwise of the scheme. The reason he gave for that was this: that in truth and all the while Breyer had been willing to offer a further remedial scheme, contrary to the one that it put forward which was that it would replace the doors, if that is what was required, and would do so at considerably lesser costs than the costs claimed for by Lewisham.

44 The difficulty about that is that Breyer never said that in the second adjudication. Mr Brannigan says that does not matter. What the adjudicator should have done in relation to that was at the very least to ask what Breyer's position was and, in the meantime, to hold off from making any financial award. Because he did not do that, it remained the case that he never had any jurisdiction to make the financial award, although it would appear he did have jurisdiction now to address the sufficiency of the remedial scheme. That seems to me to be a wholly unrealistic process. If one is going to start reading into the first adjudication a decision which in my view was not there, if one is going to read into it a decision that there must be an opportunity to offer a remedial scheme that is reasonable, surely the implication must be that the contractor has one opportunity at putting forward what that remedial scheme is, whether it consists of different elements, alternatively or not. It is impossible to see how it makes any sense to say that an unstated alternative should be considered by the adjudicator or alternatively left in the air until some future occasion, and that in the meantime there is a complete bar on assessing any financial award for damages. As it so happens, two days after the adjudicator's award, Breyer did put forward a scheme in the light of that award which enabled it to replace the doors rather than Lewisham. It is perfectly obvious to me why they did not put that forward for consideration by the adjudicator. That is because it had set its face against replacement while it had the chance of doing so. Once it found that it was wrong to the extent that it was, it was then seeking to achieve damage limitation by offering a replacement strategy which could easily have been put forward at any stage as an alternative in the course of adjudication two.

45 If the effect of the first decision of the adjudicator is to allow a contractor to deal with an ongoing matter in that way, it only proves that that cannot possibly have been the extent of the decision of the adjudicator in the first place. I add here that what Mr Brannigan QC effectively says is that there are three factors; the first that the contract had not expired; the second that Breyer was still on site; and the third, was that it was willing to offer a remedial scheme. He says if you just take those three factors, and I would say in isolation, they are the same in each case and therefore the dispute is the same or substantially the same. The position in relation to the expiry of the contract is somewhat more nuanced. The overall contract did expire. There was a subsequent task order which has meant that Breyer is still on site in certain locations. The value of the task order according to the adjudicator, and I see no reason to go behind what he said, was some £944,000. I accept that there was a contractual basis for them to remain on site in that regard, but I do not accept, in so far as it matters, that that means that the contract as a whole had been extended.

46 The second factor remained the same in that Breyer were on site in some places, but not in other places. I have no doubt in much fewer places by the time of adjudication 6 than adjudication 2.

47 The third factor was that Breyer was willing to offer a remedial scheme, but simply to look at those three factors and leave it there is misconceived in my judgment. That seems to me to be an entirely superficial and incomplete characterisation of the positions at the time of the second and sixth adjudications. Crucially it misses out the fact that there was no proposed scheme before the adjudicator in adjudication 2, whereas there was, later. It also ignores, in my judgment, what the adjudicator decided. In that regard, as I have already said, I do not read into the adjudicator's decision in adjudication 2 the sort of far-reaching decision going into the future as has been contended for by Breyer before me.

48 In my judgment, all he was doing was, for the various reasons he gave, including the lack of a power to do it, that it was not appropriate at that stage and in those particular circumstances to make an order for an interim payment. That is all he needed to say and that is effectively what he did say. In my judgment, his decision went no further than that. I agree with Mr Clay that really all he was saying was that since Breyer appeared to be making the right noises and had expressed a willingness to help Lewisham, that that was something which meant it was not appropriate, even if he could have done, to make the interim payment order there. It did not entail the further proposition that Lewisham must always stick with Breyer effectively until it produces a satisfactory solution, even on one, two or even three iterations and even if in successive adjudications.

49 I then just take account of the particular wording of the contractual provision here. Despite what Breyer contends, in truth the adjudicator did not decide an issue in the first adjudication which Lewisham was seeking to refer again to in the second adjudication, but I should add that the position would have been the same if para.9.2 of the scheme had applied.

50 In conclusion if one applies the principles as I have set out earlier, applying those principles it necessarily follows that there is nothing in the jurisdiction points. The disputes as referred were not the same or substantially the same as between the first and the second, nor were the disputes as decided by the adjudicator whose own decision on the matter I consider was clear, and should be given weight, especially he is the same person and especially as he clearly thought about the matter and asked himself the right question. The overall exercise of comparison is one of fact and degree but any realistic exercise here points only one way; that conclusion is fortified if one applies the contractual provision in question.

51 That brings me to Breyer's second argument which is on the basis not of jurisdiction but for time to pay the judgment which must now be awarded to enforce the adjudicator's decision since there is no real prospect of any defence to it.

52 The adjudicator gave seven days in which to pay. Breyer seeks further time and has offered a payment plan with instalments spread over a 10-month period running from 24 March to 21 January. In making that offer, Breyer says that that will effectively keep Lewisham in pocket in terms of the likely payments to be made out to the new contractor to replace the doors which themselves will be paid out over stages; and that on the taking of a final account it is said that there is in fact security for Lewisham because at the end of the day it is going to have to pay Breyer £10 million in any event. Put broadly, because there is a confidential matter, but to the extent that this was referred to openly by Mr Brannigan QC, Breyer says that there may not be enough to pay in terms of straight cash the £3.24 million

in one go without having an effect on payment to other contractors which will be disruptive. It is not said that paying this at once would cause Breyer to go under, and that is unsurprising when one sees their latest accounts.

53 I should add that in their latest accounts it rather looks as if they have in fact made provision for this very claim. At least it has made a provision of £3.08 million as an exceptional item following the whole question of combustibility failings on door and cladding systems. That is to be found at p.418 in section D of the bundle.

54 It is said to be an exceptional case here because this is not a case where the payee needs the money straightaway and then there is the question of this £10 million. As to the law, Breyer refers to the decision of Akenhead J in *Gipping Construction Ltd v Eaves Ltd* and *Ansalem (t/a MRE Building Contractors) v Raivid & Raivid*. Both of those decisions were concerned with adjudication enforcement. In fact both of those were then considered by Field J in *Gulf International Bank v Al Ittefaq Steel Products & Ors* [2010] EWHC 2601. It seems to me that is the only case I need to refer to since it refers to the others. It sets out, at para.18, what happened in Gipping where Akenhead J said:

> " 'Therefore the normal rule is that judgment sums should be paid within 14 days unless the judge otherwise orders. The judge has an absolute discretion. ... if a party wishes to persuade the court that a period greater than 14 days should be allowed for payment, it is necessary that that application is supported by proper evidence. ... It is unlikely that mere inability to pay will suffice to justify the extension of the normal fourteen-day period; usually, inability to pay is no defence and an insolvent debtor must take the usual consequences of its insolvency."

Then his other decision of the same year, saying that -

> " 'It is a feature of civil justice that the court does not automatically enforce ... It is up to the judgment creditor [to do so].'
>
> "7. Parliament has given a successful judgment creditor those rights [including in relation to winding-up] and it should be an exceptional case ... where the court interferes with those rights given by Parliament."

55 He said in that case he would be prepared to consider extending the 14-day period if there was a realistic prospect that substantial sums could be paid and could be offered within the next few weeks and months, but nothing was ordered. Mr Justice Field goes on to say:

> "20. Short extensions of a week or so for the payment of incidental sums awarded by the court ... are not uncommonly made..."

-- but in his experience, apart from stay applications-- these sorts of applications for extensions are virtually unheard of.

> "For certain, if [they] have been made, they will have been made extremely rarely".

56 Then he adopts what Akenhead J has said and makes the point that if they were in a parlous financial condition, then that is not a reason for extending the time for payment.

> "24. ... this court will only exceptionally extend time ... then only where the judgment debtor is solvent and for relatively short periods ... the court will give careful consideration as to whether .. interest [will be paid as well]"

Mr Brannigan QC says if that was the stumbling block interest would be paid.

57 Mr Brannigan QC accepts the force of those authorities. He puts it very fairly on the basis that this has to be established as an exceptional case, and he says that here it is. I disagree. The first point is Breyer is a commercial entity. The second is that Lewisham, the payee, in one sense is not, although this is a branch of its operations which is constituted by a limited company but it is a manifestation of the local authority. It is not suggested by Breyer that it would go under in due course as a result of having to make the payment. What is essentially said is that its cash flow will or may be affected and its business will or may be disrupted. That might have had some force if a short period was asked for, but this is a very long period of nine months. I do not consider that it is of any real relevance that Lewisham may only be expending money on the door replacement going forwards. Otherwise that is an argument which could be made in many cases where damages are assessed on the basis of costs incurred and to be incurred. It needs the security of having that payment now.

58 So far as the £10 million is concerned, that may be what Breyer asserts but it is not the position according to Lewisham. At para.22 of her witness statement, Ms Dodwell, the CEO of Lewisham, deals with that. She says that the current position is that there is a lump sum due from the defendant to the claimant of £1.2 million due to past over-payment. If Breyer was to pay that sum, then it would have received a net payment of £87 million. That is the total that has been received under the contract so far. She fairly says, the final figure may fluctuate, she has advised any change will fall far short of Breyer's expectations of £10 million. In those circumstances I am certainly not prepared to assume that £10 million will be coming Breyer's way in the future, and that can represent a security for Lewisham. If there had been some real security offered in the form of guarantees or something of that kind, that might have been, and I stress "might have been" a different situation, but it does not arise here.

59 There are two particular aspects of Breyer's evidence which trouble me. The first is that Mr Fisher, in his witness statement, deals with what the position might be if Breyer were to extend its banking facilities, or extend its bank overdrafts. All he has said about it is that he does not think that those facilities would be extended, but he has not asked. This looming liability has been known for some time and Breyer is a large company. I cannot understand why it has not even approached its bankers to provide further facilities as a possible means of limiting the disruption to its cash flow. So, that is one area which, in my judgment, is simply unexplored.

60 The second area which concerns me is the question of insurance. There is nothing of any real detail given in Breyer's evidence about this. That was a position which was unsatisfactory for me and frankly was unsatisfactory for Mr Brannigan QC because there was very little by way of concrete evidence he could point to. All he could say, obviously

on instructions, was that there was no expectation of a pay out by insurers, although he understood the position to be that insurers have repudiated liability but there was to be an arbitration. The question of available insurance in a case of this kind is an obvious one. If Breyer decide not to put any real evidence before the court about it, it cannot expect the court to give it the benefit of the doubt. Overall, in my clear judgment, there is nothing exceptional about this position so far as Breyer is concerned at all, and I reject the application for time to pay.

61 That means there is an immediate judgment. Lewisham was content with a 14-day order, which is quite normal, and that is the order I will make for the sum claimed.

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