Neutral Citation Number: [2019] EWHC 384 (TCC)

Case No: HT-2018-000377

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

The Rolls Building,
7 Rolls Buildings,
Fetter Lane,
London EC4A 1NL

Date: Tuesday, 5 February 2019
Start Time: 1443 Finish Time: 1601

Before:

MRS JUSTICE O'FARRELL

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Between:

DONALD INSALL ASSOCIATES LIMITED	**Claimant**
- and -	
KEW HOLDINGS LIMITED	**Defendant**

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MR PAUL COWAN (instructed by Kennedys LLP) for the **Claimant**
MR ANDREW KEARNEY (instructed by Codobo Law) for the **Defendant**

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APPROVED JUDGMENT

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MRS JUSTICE O'FARRELL:

1. This is the claimant's application for summary judgment in order to enforce an adjudication decision in its favour. The defendant resists the application for summary judgment on the grounds that the adjudicator did not have jurisdiction to deal with the dispute, and therefore the decision was an invalid one.

2. The background to this matter can be summarised as follows. The claimant, Donald Insall Associates Limited ("DIA") is a company providing architectural services. The defendant, Kew Holdings Limited ("Kew") is a company incorporated in the Cayman Islands and is the leaseholder owner of a property known as King's Observatory in Kew in Richmond. Mr Brothers, who lives in Hong Kong, is a director of Kew. In March 2010 Mr Brothers approached DIA and requested it to provide architectural services in respect of proposed works to be carried out to the King's Observatory property in order to turn it from commercial use into a residential dwelling.

3. On 9 July 2010 a fee proposal was sent by DIA to Mr Brothers. The letter was addressed to Mr Robbie Brothers personally. The letter stated:

> "We herein enclose our fee proposal for the services required for us to take the scheme from RIBA Stage C through to completion of Phase 1, the completion of the conversion of the house and re-landscaping. You will see we have set out the proposal as 4 lots of work.
>
> 1. Preplanning Historic Buildings Advisory Report on a time-charged basis.
>
> 2. Architectural services to planning stage, which would take the RIBA Stage C designs and revise them for Listed Building Consent application.
>
> 3. Architectural services to contract stage.
>
> 4. Architectural services post contract relating to contract administration and inspection and certification of the works."

4. The fee proposal that was attached to that letter stated that it was a document setting out a fee proposal for architectural services to be undertaken by DIA as part of the project to convert the former King's Observatory to residential use. It referred to the RIBA stages C through to L. The conditions that were identified as forming part of the fee proposal included that DIA's appointment would be on the basis of the RIBA standard form of agreement advised by the RIBA's Design Services for an historic building or conservation project.

5. The free proposal itself was set out at section 2 and stated:

> "Based on the exceptions and qualifications described above, our fee proposal for the services would be:

- preplanning advisory and consultation services, time charge;
- preplanning design services, £64,000;
- post-planning pre-contract £113,200;
- post-contract £49,000.
- For other services, in addition, we would propose to charge on a time basis at the rates described in the attached document, or by pre-agreed lump sum where the scope of such services can be defined."

6. Works commenced either just before or just after that fee proposal. On 3 September 2010 DIA sent a further letter to Mr Brothers as follows:

> "Please find enclosed a copy of the RIBA standard suite of appointment documents which we have completed in draft as best we can at this stage, and for discussion and completion with you as required. Whilst it seems rather voluminous, we feel it covers the matters you would be expecting to see. If we have missed the mark on this at all, do please let us know and we can review together accordingly."

Having then referred to various programming aspects of the project, the letter stated:

> "We trust this is clear and we look forward to hearing from you re concluding these formalities. We are meanwhile proceeding with the initial services according to your kind instructions as agreed."

7. Sent with that letter were the draft versions of the IRBA appointment documents, including a memorandum of agreement and standard conditions. The memorandum of agreement identified the client as RJF Brothers. The attached documents also identified the client at the bottom of the relevant pages as RJF Brothers.

8. On 14 October 2010 Mr Charrington of DIA held a meeting with Mr Brothers, at which it was agreed that the works would be taken forward on the basis of the fee proposal. The fee proposal letter dated 9 July 2010 (to which I have already referred) was signed in the following terms by Mr Brothers:

> "Confirmed: KEL Holdings Limited."

There is then Mr Brothers' signature, and then underneath that:

> "RJF Brothers.
>
> Director

14 October 2010."

9. On 26 October 2010 Mr Charrington of DIA sent an email to Mr Brothers, stating as follows:

> "Dear Robbie,
>
> Firstly, thank you for confirming our appointment by your signature on our letter of 9 July 2010 at our meeting on Thursday 14 October. I have looked with Peter into the matters discussed and can confirm as follows."

There was then a reference to the fees, including:

> "1. The lump sum fee is for the preplanning architectural design services as set out in Peter's letter of 9 July and commenced from 2 August following your instructions for those services. The time charges in invoice 16564 are for the initial advisory services as per Peter's and your letters of 31 March, and for preplanning historic building advisory/report service that you asked us to continue on the time basis, and not therefore allowed for in any lump sum. 15% of the stages C-D architectural design services lump sum fee is charged in that invoice, and this amounts to £9,600 plus VAT as an interim application against the £64,000 plus VAT lump sum fee agreed.
>
> 2. I have looked into the time charges in invoice No 16564 and can confirm that the hours relate only to time charge items.
>
> 3. Re the balance of preplanning historic building advisory report services and the preparation, pulling together and submission of the planning application, it is difficult to provide a definitive estimate of the fee costs at this stage, but Peter advises that there is likely to be quite a lot of work involved in it and believes it could be of the order of £15,000 to £20,000 plus printing and VAT. We can look more closely at this nearer to the time, subject to your instructions.
>
> 4. You mentioned at our meeting that there have been some changes required to the first stage C scheme. You should be aware though that this does present risks to the amount of work and services required from the design team, including DIA, and to the programme and therefore to the cost ultimately to the client. As we had expected only to pick up the designs prepared by Inarc there will be some extra costs associated with these changes. In addition, there have been inconsistencies with the survey drawings provided, and while we have tried to work around these they have also caused us to spend more time drafting than we had allowed for. Re Kew Holdings Limited as owner of the lease and our client, I would be grateful if you would let me have a note of the company's registered office and

> number, and also the name and address of their legal representative or agent in the UK, assuming there is one, for our records please. Also we should draw your attention at this stage to a construction legal requirement that because the owner is a company rather than individual-domestic, the project with require a CDM coordinator from the beginning, i.e. a legal health and safety requirement for the design construction and management stages of projects. Let us know if you would like us to provide some names of organisations that provide these services."

There was no response to that email.

10. During the course of the works between 2010 and 2017, all invoices were sent by DIA to Mr Brothers via email in Hong Kong. The fees were paid variously either by Mr Brothers directly, or by Kew, the defendant.

11. In 2012 there was a statutory change to the treatment of the refurbishment and conversion works that were being carried out for VAT purposes. Mr Brothers obtained advice as to the change to the zero rate of VAT for alterations to listed buildings. A copy of that advice was sent by Mr Brothers to DIA by email dated 21 March 2012. In that email Mr Brothers stated:

> "The attached from Simon Merry our VAT consultant will be self-explanatory. The new provisions contained in the Budget means that most probably we will have to adopt the 5% VAT rate applicable to conversions for residential purposes and forgo any zero-rated invoices for repairs and maintenance, which hitherto might have been possible for work to a Grade 1 listed building. I am advised I should arrange for invoices to be addressed to me personally wherever possible, as we will try to include as many costs in the end of scheme rebate claim. Invoices made out to Kew are likely to be rejected."

Thereafter all the invoices were sent by DIA to Mr Brothers, as before.

12. By 2018 a dispute had arisen as to the fees properly due to DIA in respect of its work on the project, in respect of which work had started in about 2015. On 19 October 2018 DIA served a notice of intention to refer a dispute to adjudication on the defendant Kew. The notice claimed payment in respect of outstanding invoices in the sum of £208,278.84, based on a contract said to be entered into on or about October 2010 in respect of the King's Observatory, details of which were set out in the contract, which was stated to be dated 9 July 2010 and signed on 14 October 2010 by Kew.

13. Dr Chappell was appointed as the adjudicator. A number of jurisdictional challenges were taken in the adjudication by Kew, having by then received legal advice from Codobo Solicitors. On 31 October 2018 a letter was written to the adjudicator referring to their client Kew Holdings Limited and the purported reference made by DIA. It was headed "Without prejudice to jurisdictional challenge" and stated:

> "Our client does not accept that the referring party had any entitlement to seek your nomination as adjudicator in respect of matters identified in the Notice of Adjudication. We attach a preliminary submission dealing with threshold jurisdictional challenges. The referring party has entirely failed to evidence any contract and certainly no construction contract compliant with section 107 of the 1996 Act as between the referring party and our client. Whilst that issue alone is sufficient to establish lack of jurisdiction, the preliminary submission goes on to explain why the alleged dispute in the referral cannot have crystallised as at the date of the Notice of Adjudication. You do not have jurisdiction in this purported reference. We invite you to investigate your jurisdiction to make a non-binding determination and then to stand down."

The challenge that was attached to that letter stated:

> "This submission, together with any future submissions, correspondence, or steps taken by or on behalf of the respondent within this purported adjudication are without prejudice to the respondent's contentions as to jurisdiction, primarily but not limited to that the adjudicator has no jurisdiction as there is no construction contract between the referring party and the respondent."

14. The challenges that were set out in that document are:

    i) There was no contract between DIA and Kew.

    ii) The purported contract was not in writing or evidenced in writing, as required at the time by section 107 of the 1996 Act. It is common ground that it was the original version of section 107, as opposed to any amendments made by the later legislation, that were in force. It was stated that the case was unclear as to how it was alleged that the referring party contracted with the respondent based on a fee proposal issued to a third party. Effectively, the case was that because the fee proposal had been sent by DIA to Mr Brothers personally, such an offer could not be accepted by Kew, the company.

    iii) The third challenge was an allegation that there was no crystallised dispute, the basis of which was that the invoices issued by DIA, and relied upon as establishing the alleged debt, were all issued in the name of a third party, i.e. Mr Brothers, and not Kew.

15. On 21 November 2018 Dr Chappell produced his decision, in which he considered and rejected each of the jurisdictional challenges raised by Kew and determined that DIA was entitled to outstanding fees in the sum of £173,573.20, which formed the basis of his award. The adjudicator also awarded DIA interest in the sum of £18,423.89, and continuing, and also ordered Kew to pay the adjudicator's fees and expenses in the sum of £10,512. The claimant, DIA, paid the adjudicator's fees. The defendant, Kew, failed to pay the sums awarded by

the adjudicator to DIA, and also failed to pay the adjudicator's fees. Accordingly, on 18 December 2018 DIA commenced these proceedings and sought summary judgment so as to enforce the adjudication decision.

16. One of the initial submissions made by Mr Kearney, on behalf of Kew, is that the claim form and particulars of claim do not plead a proper cause of action. I reject that submission. The particulars of claim are perhaps not very full and are not perhaps as elegant as one might like, but they identify an alleged construction contract entered into between the parties in October for architectural services, a referral to adjudication for the payment of outstanding invoices, the adjudicator's decision setting out the terms of the operative part of the award, and then a claim for those sums. Given that this was by way of adjudication enforcement, I am satisfied that that was sufficient so as to raise a proper claim that the claimant was entitled to enforce by way of summary judgment an adjudication decision in respect of a dispute arising under a construction contract.

17. The test on an application for summary judgment is set out in CPR 24.2:

> "The court may give summary judgment against a…defendant on the whole of a claim or on a particular issue if –
>
> (a) it considers that –
>
> (ii) that defendant has no real prospect of successfully defending the claim or issue; and
>
> (b) there is no other compelling reason why the case or issue should be disposed of at a trial."

18. Mr Kearney has helpfully summarised the relevant cases that are applicable. The court has to consider whether the defence, is real, i.e. not false, fanciful or imaginary. The court is not required to carry out a mini-trial in order to determine that issue. I take note of the cautionary guidance given in the cases of *Three Rivers DC v Bank of England* and *ED & F Man Liquid Products v Patel*. The criteria to be applied on a summary judgment application are not the same as the criteria that will be applied at trial. The criterion which the judge has to apply under CPR 24 is not one of probability; it is the absence of reality. However, the notes also indicate that:

> "Where a summary judgment application gives rise to a short point of law or construction, the court should decide that point if it has before it all the evidence necessary for a proper determination and it is satisfied that the parties have had an adequate opportunity to address the point in argument. The court should not allow a case to go forward to trial simply because there is a possibility of some evidence arising. Conversely, an application for summary judgment is not appropriate to resolve a complex question of law and fact, the determination of which necessitates a trial of the issue, having regard to all of the evidence."

19. The court will apply a robust approach to the enforcement of adjudicator's decisions provided that there is no issue as to jurisdiction and provided that there is no breach of the rules of natural justice. I take note of the decision and the guidance issued by Fraser J in *Dacy Building Services Ltd v IDM Properties LLP* [2018] EWHC 178, in which the court was faced with an issue as to whether or not a contract had been included. In that case the learned judge stated that:

> "It must however be emphasised that it will only be in very rare cases that adjudication enforcement applications will result in trials of issues relevant to that enforcement issue."

And he referred to the *Ester v Multifit* decision of Akenhead J:

> "In that case, Estor resisted enforcement on the basis that it was not the contracting party. Akenhead J pointed out that, in the Technology and Construction Court, if the jurisdictional point was simply a matter of law (for example of contractual or statutory construction) the court would deal with it summarily. The position was potentially different if the jurisdictional challenge was dependent on fact and evidence, where the issue that the court would have to decide would be whether the defendant had no, or a realistic, prospect of establishing that there was no contract. The issue in such cases is often whether or not there was a concluded contract at all. The courts will be reluctant to find that there was no concluded contract if the subject matter of the putative contract has been performed. For example, in *Purton (t/a Richwood Interiors) v Kilker Projects Limited*.., Stuart-Smith J had little difficulty in concluding that there was a concluded contract between the parties and not a series of works carried out by Mr Purton, for which Kilker had paid, without being under any contractual obligation to do so. It will usually be possible for such issues to be resolved summarily. A trial, with contested evidence given orally, will only in my judgment very rarely be justified. This is such a case; but it should not be seen as encouragement to parties upon enforcement generally to argue that a trial is required in order to determine issues directly relevant to that enforcement. In *Macob Civil Engineering Ltd v Morrison Construction Ltd*… Dyson J (as he then was) made it clear that the court would enforce an adjudicator's decision ordinarily through summary judgment under CPR Part 24. That approach has been reinforced innumerable times in the cases since then, and that remains the usual route to enforcement."

20. I do not read that passage as the laying down of some special provision in the case of jurisdiction that is disputed in respect of adjudication enforcement applications. The learned judge was simply making the point that on a summary judgment application to enforce an adjudication award, in most cases it will be possible for the court to resolve any matters simply by reference to the standard Part 24 test, namely whether there is a real prospect of success, and it will not

be necessary for the court to hive off and determine separately any additional factual or legal issues. However, each case has to be considered on its own facts.

21. In this case, the above jurisdictional challenges go to the heart of whether or not the adjudicator had jurisdiction. It is common ground that in order to fall within the definition of a construction contract for the purposes of the 1996 Act that was then in force, DIA would have to establish a construction contract in writing, or evidenced in writing, in accordance with the requirements set out by Ward LJ in the *RJT case* and by Jackson J (as he then was) in *Stratfield Saye*.

22. There are two issues relied on by the defendant: firstly, that there was no contract for the provision of the architectural services made between DIA and Kew; any such contract was between DIA and Mr Brothers personally; and secondly, even if DIA did have a contract with Kew, DIA's claim in the adjudication was founded on an oral variation of the contract, and therefore it could not fall within the definition of a construction contract by reference to section 107 of the 1996 Act. If the defendant is correct that there is a real prospect of Kew persuading the court that there was either no contract between DIA and Kew, or that the contract was subject to an oral variation that did not fall within section 107, then it would be able to establish that the adjudicator did not have jurisdiction to determine the dispute, and therefore any decision by the adjudicator was invalid. Therefore, the court must consider whether it would be appropriate to determine those issues now within this application for summary judgment so as to establish whether there was a construction contract that could give rise to jurisdiction in the adjudication.

23. Mr Cowan, acting on behalf of DIA, submits that there was a contract formed between DIA and Kew, as set out in the letter and fee proposal dated 9 July 2010, and formed by the written signature applied by Mr Brothers to that fee proposal on 14 October 2010. He expressly signed as Director for and on behalf of Kew Holdings Limited, confirming its acceptance of the claimant's contractual proposal. Mr Cowan's submission is that on an objective reading of those documents, it is clear that there was a contract formed for the architectural services in respect of the King's Observatory made between DIA and Kew, the defendant. Further, the claimant relies upon the email sent by Mr Charrington of DIA on 26 October 2010, which in terms referred to confirmation of DIA's appointment by the signature on the letter of 9 July made at the meeting on 14 October, and referred expressly to Kew Holdings as DIA's client.

24. Mr Cowan relies upon the fact that there was no evidence of any reply from Mr Brothers that disputed DIA's reference to Kew as client at the time. He also relies on the fact that although Mr Brothers has filed evidence by way of two witness statements in these proceedings, he has not referred to, or dealt with, Mr Charrington's email by way of response. Mr Brothers has suggested that there was an agreement with Mr Charrington that Mr Brothers would be the client in his personal capacity, and that the company's signature was applied to confirm that it was aware as leaseholder that the works were being procured, but he has offered no written evidence to support those assertions. On that basis, it is submitted that the defendant's defence is simply not a credible one, and

therefore this court should go ahead and determine this issue on a summary application.

25. Reliance is made upon the case of *Hamid v Francis Bradshaw Partnership* [2013] EWCA (Civ) 470, in which the general principles to be adopted when deciding an issue of this kind were set out by Jackson LJ at paragraph 57. He said:

> "i) Where an issue arises as to the identity of a party referred to in a deed or contract, extrinsic evidence is admissible to assist the resolution of that issue.
>
> ii) In determining the identity of the contracting party, the court's approach is objective, not subjective. The question is what a reasonable person, furnished with the relevant information, would conclude. The private thoughts of the protagonists concerning who was contracting with whom are irrelevant and inadmissible.
>
> iii) If the extrinsic evidence establishes that a party has been misdescribed in the document, the court may correct that error as a matter of construction without any need for formal rectification.
>
> iv) Where the issue is whether a party signed a document as principal or as agent for someone else, there is no automatic relaxation of the parol evidence rule. The person who signed is the contracting party unless (a) the document makes clear that he signed as agent for a sufficiently identified principal or as the officer of a sufficiently identified company, or (b) extrinsic evidence establishes that both parties knew he was signing as agent or company officer."

26. In support of his contention that the evidence gives rise to a real prospect of showing that there was no contract between the parties, Mr Kearney has drawn the court's attention to the case of *Dresdner Kleinwort Limited v Atrill* [2013] EWCA (Civ) 394, in which Elias LJ stated at paragraph 86 that:

> "…a party who in fact knows that the other party does not intend to create legal relations cannot seek to contend otherwise by asserting that the evidence, objectively analysed, supports his case. He knows the truth and should not be allowed to deny it."

All of that, of course, begs the question as to what the documents and the evidence show in this case.

27. In Mr Brother's first witness statement dated 10 January 2019, he set out his evidence on this issue at paragraph 12:

> "I met with Simon Charrington on 14 October 2010 and explained that I did not wish to enter into a full RIBA form of

> agreement but that I was prepared to agree to the fee proposal issued on 9 July. We discussed the services that would now be provided by DIA under the terms of the fee proposal. I recall that during the meeting I explained to Simon that, although as previously discussed I would be the employer in my personal capacity and I would personally procure the works and I would personally be DIA's client, the leaseholder of the Property was actually KHL. Simon was quite relaxed about this, and he seemed to fully understand the distinction between myself and KHL as separate legal persons. Simon and I agreed that whilst I was personally to be DIA's client and procure the works, given it was the leaseholder KHL should provide confirmation that it was aware that I plan to carry out the proposed works to KHL's property and accepted that they should be carried out.
>
> 13. Simon and I orally agreed at that meeting that acting in my capacity as a director of KHL I should sign a copy of the fee proposal expressly on behalf of KHL to record this confirmation. We then discussed and agreed the wording to be used.
>
> 14. I then wrote the agreed words 'Confirmed Kew Holdings Limited' on a copy of the fee proposal, signed it, and wrote below my signature 'RJF Brothers, Director.' We agreed and I used, the word 'Confirmed' to show that KHL was confirming its knowledge of the proposed works and the services which DIA was going to provide. The confirmation I agreed with Simon and provided on behalf of KHL was in no way intended to suggest that KHL was accepting any offer from DIA, and that KHL, rather than I personally, was to be DIA's client, which I am aware DIA is now trying to suggest.
>
> 15. The sole purpose of the wording which I wrote on the fee proposal was to provide reassurance to DIA that the leaseholder KHL was aware of the proposed works."

28. Mr Charrington responded to that evidence in his witness statement made on 18 January 2019. He stated at paragraph 3 of his witness statement:

> "The contract was signed on 14 October 2010 by KHL's Director Mr Brothers in front of me. Accordingly, this is the obvious conclusion based on the facts, i.e. that KHL was the contracting party.
>
> 4. This contractual arrangement was then confirmed by me in my email dated 26 October 2010, where I stated in an email to Mr Brothers: 'Thank you for confirming our appointment by your signature on our letter of 9 July at our meeting on Thursday 14 October.'"

In paragraph 5 he referred to the fact that the email identified Kew as the client, and stated at paragraph 6:

> "As can be seen from this email, it was entirely clear at the time that I understood that KHL was DIA's client, given the signature of Mr Brothers acting as a Director of KHL. Had Mr Brothers disagreed, or thought that the signature on behalf of KHL had somehow been misunderstood, he could have replied to my email on that basis. No such response was received."

He then went on to dispute that there had been any discussion with Mr Brothers or any agreement that Mr Brothers would be the client. He also annexed to that witness statement the email of 21 March 2012 (to which I have referred) and extracts from bank statements showing direct payments made by Kew to DIA.

29. Mr Brothers produced a further witness statement on 28 January 2019, in which at paragraph 8 he referred to the email sent by Mr Brothers to DIA in March 2012 dealing with the zero VAT rating for the project and requesting invoices to be sent directly to Mr Brothers. At paragraph 10 he stated:

> "The purpose of the email was simply to confirm to DIA the advice I had received as to VAT implications, and that I should arrange for invoices to be addressed to me personally wherever possible. DIA was already issuing invoices to me personally, as I was the contracting party, and had done so consistently for the previous 2 years. There was no requirement for DIA to change its conduct and no request for DIA to do so."

What is conspicuous by its absence is any attempt by Mr Brothers to address the email dated 26 October 2010, in which DIA expressly confirmed that the contracting party and client was Kew, as opposed to Mr Brothers personally.

30. In my judgment, looking at the witness statements that have been put forward and the documentary evidence, I am satisfied, as was the adjudicator, that there was a concluded contract for the provision of architectural services between the claimant DIA and the defendant Kew Holdings Limited (Kew) for the following reasons.

31. The fee proposal was signed by Mr Brothers, not in a personal capacity but expressly in his capacity as a Director of Kew. It is accepted by Mr Brothers in his witness evidence that he did sign the fee proposal in his capacity as a Director of the company Kew. In terms of offer and acceptance analysis, the fee proposal, although originally sent to Mr Brothers in his personal capacity, subsequently formed part of an offer at the meeting on 14 October 2010, which was accepted by Mr Brothers as Director and on behalf of Kew, as confirmed by his signature. That analysis is supported by the email sent shortly after that meeting by Mr Charrington of DIA on 26 October 2010, which referred to confirmation of DIA's appointment by the signature at the meeting on 14 October, and further confirmed Kew as the client. There was no response to that email. It has not been dealt with by Mr Brothers in his witness evidence and is clear contemporaneous evidence that both parties were treating the contract as being between the parties to these proceedings.

32. I consider the following matters to be background facts that do not provide conclusive evidence of the contractual arrangements. Firstly, invoices were sent by DIA to Mr Brothers directly. That could be because it was known that Mr Brothers lived in Hong Kong, and the invoices were sent directly to him in Hong Kong rather than to the company of which he was the acting Director, which was based in the Cayman Islands. It could support Mr Kearney's argument that there was a direct contract with Mr Brothers. It is not determinative of the issue because it can be relied upon by both parties. There was clearly a requirement for invoices post 2012 to be sent directly to Mr Brothers, rather than to Kew, in order to bolster up an argument that there should be zero VAT levied in respect of the development.

33. Secondly, I consider the issue of who paid the fees is not conclusive as to the parties to the contract. That is because it is common ground that the fees were paid in part directly by Mr Brothers and in part directly by Kew. So again it does not indicate which party was considered to be the contractual party.

34. The fact that the property was intended to be occupied by Mr Brothers when finally completed does not indicate one way or the other whether the contract was entered into by the leaseholder of that property, or by the person who ultimately intended to occupy it.

35. The fact that there were contracts entered into directly by Mr Brothers in his personal capacity with others again is not conclusive as to this particular contractual arrangement. In any event, the particular contract relied upon was not entered into until 2015, and therefore could not be relevant factual matrix for the purposes of the contract concluded in 2010.

36. All of those matters, in any event, would not override the very clear effect of the written contract and the confirmatory email. The clear indication by the signature of Mr Brothers on the letter of 9 July is that the intention must have been for him to sign as Director of the company as the other contracting party to that contract. The suggestion by Mr Brothers that he was simply confirming Kew's approval of the works that were to be carried out simply does not stand up to scrutiny. Firstly, that is not what the letter says in terms of the manuscript amendments by Mr Brothers. It simply states: "confirmed". It does not say "approval of the works to be carried out". Secondly, the fee proposal does not identify the works that were to be carried out by way of conversion of the property. It simply confirms the architectural work that is going to be carried out. Therefore, it could not have been used as a vehicle for Kew to give its approval as to the physical works that would then be carried out. Thirdly, the project was already afoot. Mr Brothers had approached Kew back in March 2010 because he was not proceeding further with his then existing architects. If and insofar as Kew's approval for the proposed works was required, presumably that would have been done sometime in the past. Fourthly, Mr Brothers' evidence is simply not credible, because it conflicts not only with the signature on the fee proposal itself, but because there is no response to the email of 26 October 2010. Even today, having had the opportunity to put in additional late witness statement evidence, Mr Brothers has still not engaged with it.

37. For all of those reasons, I am satisfied that there was a concluded contract on the terms of the fee proposal between DIA, the claimant, and Kew, the defendant.

38. A further challenge that has been made and pursued by Mr Kearney on behalf of the defendant is that there was no crystallised dispute. That was a matter that was raised in the initial challenge during the adjudication. The defendant relies on the fact that the invoices were sent directly to Mr Brothers and not to the company. The adjudicator found that the invoices had been sent to Mr Brothers as Director of Kew. In that finding, I am satisfied that he was correct. The mere invoicing of the fees by sending them to the Director of the company by email was simply a convenient way of notifying the company through its Director of the fees then being pursued. On that basis, insofar as all fee invoices were sent to Mr Brothers, it was in his capacity as Director of the company. There was therefore a crystallised dispute in relation to the unpaid fees that could be referred to adjudication, as happened in this case.

39. I then turn to the new arguments, namely, (a) the existence of an oral variation and/or new contract, and (b) whether or not the adjudication was a statutory or contractual adjudication. In *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical)* and *Cannon Corporate Limited v Primus Build Ltd* [2019] EWCA (Civ) 27 (cases which were heard together) the issue of jurisdictional challenges and waiver in adjudication was considered by the Court of Appeal. Having referred to all of the relevant authorities, Coulson LJ stated at paragraph 91:

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

40. At paragraph 92 Coulson LJ stated:

> "In my view, informed by that starting-point, the applicable principles on waiver and general reservations in the adjudication context are as follows:
>
> i) If the responding party wishes to challenge the jurisdiction of the adjudicator then it must do so "appropriately and clearly". If it does not reserve its position effectively and participates in the

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

41. In this particular case, there was no formal general reservation raised by the defendant. It raised three specific challenges, which have been dealt with above. The defendant did state that there was no contract which complied with section 107 of the 1996 Act. Those matters were rejected by the adjudicator. They have been rejected by the court for the reasons I have already covered.

42. The oral variation point did arise during the course of the adjudication. It is set out by Mr Kearney in his skeleton argument at paragraph 56. He states that the defendant (the responding party in the adjudication) raised a query as to the claims that were being made for time-based fees which had been included in the lump sum item of £49,000 for post contract services. The response that was given by DIA was:

> "In actual fact the lump sum of £49,000 for post-contract services had not been charged. An agreement was reached between DIA and KHL (at KHL's request) that all charges for services post tender would be based on a time charge basis and not on a lump sum basis, as set out in the attached email dated 11 October 2015. Theefore points raised regarding the £49,000 lump sum are now irrelevant."

The email in question is an email of 11 October 2015, which was written by Mr Brothers to DIA, stating that there needed to be a meeting to discuss the fees claimed.

> "This is because the billing will cover the change from the earlier fixed price arrangement to one that essentially counts the time spent. I envisage that we will have to work out where the line is to be drawn between the old and new arrangements."

43. Although it was not raised by way of the initial jurisdictional challenge, this was an issue that arose during the course of the adjudication by reference to a new point raised by the claimant, namely, a potential change in the way in which the fees would be calculated. On that basis, it seems to me that it was a specific objection that was taken in the context of the adjudication, albeit at a late stage of the adjudication, and one that the court should entertain on this application for enforcement. There was considerable discussion by way of emails between the parties and the adjudicator on this issue. On 16 November 2018 Mr Butler, the solicitor for DIA, wrote to the adjudicator and set out his understanding, based on his client's instructions, of the method of remuneration agreed. Following that, Mr Campbell, solicitor acting for Kew, set out its response, in which it was suggested that DIA's position appeared to be that the original contract was amended or varied by a further agreement, and took the point, "If so, that alleged variation amendment must be in writing to satisfy section 107", and states further, "Why was that further agreement or variation or amendment not identified or referred to in the notice of adjudication or referral? Is it DIA's position that there was a separate agreement for post contract services? That is what is suggested in Kennedy's email." He then went on to raise yet more questions, to which he did not proffer an answer. I am satisfied that he was raising the spectre of a lack of jurisdiction based on a separate contract. The claimant recognised that this is what was being suggested, because by an email dated 18 November 2018 Miss Galahad for the claimant's solicitors stated, "The contract provided for time charge items, of which numerous items fell within. There is no further or ancillary agreement despite KHL's attempts to suggest otherwise."

44. Having decided that this was a jurisdiction challenge that was fairly taken by the defendant during the course of the adjudication, the court should consider it. However, on a proper construction of the documents before the court, there is no evidence of a separate oral variation or separate oral agreement that would fall foul of section 107, thereby depriving the adjudicator of jurisdiction. The original fee proposal on which the parties' contract was based identified the fact that some of the services to be provided would be on a time charge basis, and some would be on a lump sum fee basis. The contract itself stated the items that were to be lump sum, but then said, "For other services in addition we would propose to charge on a time basis at the rates described in the attached document, or by pre-agreed lump sum where the scope of such services can be defined." Therefore, the original contract between the parties envisaged, first of all, services that were additional to the services that had been identified as at 14 October 2010; and, secondly, it identified that the parties might need to agree a basis on which such additional services would be remunerated, either by way

of a time charge basis or a lump sum fee basis. The contract itself set out the mechanism by which that would be done, namely by the parties reaching agreement on it.

45. I am satisfied, therefore, that this was a contract that provided for the additional services to be dealt with by way of payment, either on a time charge basis or a lump sum basis, and there was no need for an oral variation to accommodate such additional services. Neither party has asserted any specific oral agreement for an identified scope of work to be carried out on a lump sum basis, or on a time basis. In any event, I would have been satisfied that the email of 11 October 2015 was sufficient to evidence an agreement in writing for the purposes of section 107 in respect of the basis of valuation of the work.

46. The final challenge that is made by the defendant is unusual. It starts at paragraph 65 of Mr Kearney's skeleton in the following terms:

> "This section of this skeleton deals with the prospective unpleaded allegation that there was an express contractual right to adjudicate. …this is not part of DIA's case before the Court and DIA should not be permitted to advance this contention. It is not known whether DIA will attempt to do so."

The argument is that the contract between the parties did not incorporate an adjudication provision, and therefore any adjudication could only be by way of the statutory scheme as opposed to under the contract.

47. Having regard to the guidance given by Coulson LJ in the *Bresco* case, this is a classic case of a defendant scraping around after the event to find a potential jurisdictional challenge that was not made either in the formal jurisdictional challenge at the beginning of the adjudication, or indeed in the additional exchanges and submissions made during the course of and at the conclusion of the adjudication. It is therefore too late for the defendant to raise this argument.

48. In any event, the dispute between the parties was referred under the statutory scheme. As Mr Cowan has submitted today, it would make absolutely no difference whether the submission was under the scheme through a contractual provision, or under the scheme through the statutory provisions. In either case, it was by way of the statutory scheme that this adjudication was conducted, without any challenge being made by Kew on that ground during the course of the adjudication.

49. For the above reasons, I am satisfied that there is no real prospect of the defendant succeeding in a challenge to the jurisdiction of the adjudicator. Therefore I am satisfied that the defendant has no defence to the application for summary judgment. There was a valid contract made between the claimant and the defendant on 14 October 2010. There was a crystallised dispute that arose in 2018 in respect of unpaid fee invoices sent by the claimant to the defendant via its Director Mr Brothers. The dispute was properly referred to adjudication and the adjudication award was made in the claimant's favour. The defendant has failed to pay the sums awarded by the adjudicator. The claimant is entitled to summary judgment.

This transcript has been approved by the judge.