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Case No: HT-2021-000245

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

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

Date: 7th September 2021

Before:

HH JUDGE EYRE QC

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Between :

DOWNS ROAD DEVELOPMENT LLP	**Claimant**
- and -	
LAXMANBHAI CONSTRUCTION (U.K.) LIMITED	**Defendant**

- -
- -

Luke Wygas (instructed by **Nicholas & Co Solicitors Ltd**) for the **Claimant**
Justin Mort QC (instructed by **Edwin Coe LLP**) for the **Defendant**

Hearing dates: 11th August 2021

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APPROVED JUDGMENT

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

COVID-19: This judgment was handed down remotely by circulation to the parties' representatives by email. It will also be released for publication on BAILII and other websites. The date and time of hand-down was 10.00am on 7th September 2021.

HH Judge Eyre QC:

Introduction.

1. The parties' dispute arises out of the Claimant ("the Employer")'s engagement of the Defendant ("the Contractor") to perform construction works on the terms of the standard JCT Design and Build Contract (2011 edition) with amendments which are immaterial for present purposes. The parties' dealings were governed by the Housing Grants, Construction and Regeneration Act 1996 ("the HGCRA").

2. A dispute arose as to the operation of the payment regime for the works and this led to a reference to adjudication in respect of payment cycle 34. The adjudicator's decision ("the Decision") determined the sum due in respect of the Contractor's Interim Application 34.

3. The Employer commenced Part 8 proceedings challenging the enforceability of the Decision on the footing that the adjudicator had failed to address a line of defence asserted by the Employer. The Employer contends that the Decision is nonetheless binding as to the proper figure for the gross value of Interim Application 34 and so as to the net sum due pursuant to that application before account is taken of the potential defence. The Contractor seeks a declaration as to the invalidity of the Employer's payment notices. It contends that the Decision is enforceable but also says that notwithstanding the adjudication decision it is entitled to payment of the sum set out in the Interim Application.

The Factual Background.

4. By a contract dated 24th September 2018 ("the Contract") the Employer engaged the Contractor to undertake construction works in connexion with the development of land at 1A Downs Road, London E5. The works involved the demolition of the existing buildings on the land and the construction of four buildings containing a total of seventy-nine residential units and associated works. The original contract sum was £27,390,000.

5. The Contract was an amended form of the standard JCT Design and Build Contract (2011 edition). For current purposes the payment regime set out at clause 4 is relevant.

6. The Contract Particulars had provided that Alternative B (the periodic payments regime) was to apply and clause 4.7 stated that:

> ".1 Interim Payments shall be made by the Employer to the Contractor in accordance with section 4 and whichever of Alternative A (Stage Payments) or Alternative B (Periodic Payments) is stated in the Contract Particulars to apply.
> .2 The sum due as an Interim Payment shall be an amount equal to the Gross Valuation under clause 4.13 where Alternative A applies, or clause 4.14 where Alternative B applies, In either case less the aggregate of:
> .1 any amount which may be deducted and retained by the Employer as provided in clauses 4.16 and 4.18 ('the Retention');
> .2 the cumulative total of the amounts of any advance payment that have then become due for reimbursement to the Employer in accordance with the terms stated in the Contract Particulars for clause 4.6; and
> .3 the amounts paid in previous Interim Payments."

7. Interim applications and due dates were governed by clause 4.8 in these terms:

".1 In relation to each Interim Payment, the Contractor shall make an application to the Employer (an 'Interim Application') in accordance with the following provisions of this clause 4.8, stating the sum that the Contractor considers to be due to him and the basis on which that sum has been calculated.

" .2 …

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

".4 Interim Applications may be made before, on or after completion of the relevant stage or the monthly date and shall be accompanied by such further information as may be specified in the Employer's Requirements."

8. At clause 4.9 the Contract set out the terms as to the date and amount of interim payments in these terms:

".1 The final date for payment of an Interim Payment shall be 28 days from its due date.

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

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

".4 If the Employer intends to pay less than the sum stated as due from him in the Payment Notice or Interim Application, as the case may be, he shall not later than 5 days before the final date for payment give the Contractor notice of that intention in accordance with clause 4.10.2 (a 'Pay Less Notice'). Where a Pay Less Notice is given, the payment to be made on or before the final date for payment shall not be less than the amount stated as due in the notice.

".5 If the Employer fails to pay a sum, or any part of it, due to the Contractor under these Conditions by the final date for its payment, the Employer shall in addition to any unpaid amount that should properly have been paid, pay the Contractor simple interest on that amount at the Interest Rate for the period from the final date for payment until payment is made. Interest under this clause 4.9.5 shall be a debt due to the Contractor from the Employer.

".6 Acceptance of a payment of interest under clause 4.9.5 shall not in any circumstances be construed as a waiver of the Contractor's right to proper payment of the principal amount due, to suspend performance under clause 4.11 or to terminate his employment under section 8."

9. Clause 4.10.1 set out the requirements for a valid payment notice thus:

> "Each Payment Notice under this Contract shall specify the sum that the Party giving the notice considers to be or have been due at the due date in respect of the relevant payment and the basis on which that sum has been calculated."

10. Clause 4.10.2 then proceeded to make provision for service of a pay less notice.

11. Finally, for current purposes clause 4.14 set out the mechanism for the calculation of the Gross Valuation.

12. The Employer adopted an approach of sending two payment notices (or purported payment notices) in each payment cycle. Thus in cycle 31 a payment notice was sent stating that the net amount for payment was £1. That figure resulted from the gross valuation less retention being put at a sum £1 greater than the total amounts previously certified. That notice had been sent under cover of an email dated 5th December 2020 stating "we confirm that a further Payment Notice will be issued to you in due course, most likely on Monday, 8th December 2020, and this will not affect your payment date." In due course a payment notice in a larger amount was sent. That approach was repeated in payment cycles 32 and 33 save that in those cases the net amount for payment stated to be £0.97 as a result of applying the retention of 3% to the figure of £1.

13. The current dispute relates to payment cycle 34.

14. On 26th February 2021 the Contractor sent Interim Application 34 with supporting documents. This identified the sum due as £1,888,660.70 (I will use VAT exclusive figures throughout) on the footing of a gross valuation of £22,398,182.73 less retention of £671,945.48 and the sum previously certified of £19,837,576.55.

15. On 3rd March 2021 the Employer's Agent sent Payment Notice 34. The covering email said "we confirm that a further Payment Notice will be issued to you in due course and will not affect your payment date." The email went on to say that assessment of the Contractor's applications over the preceding four months had been taking longer than anticipated. It attributed this to the way in which the applications were set out and the consequent difficulty of reviewing the figures to ascertain what was properly due in respect of variations. The email also noted that in the past the Contractor had provided the application several days before the due date which had given time for the Employer's Agent to review the figures but it said that in the preceding months the application had been issued "late in the afternoon of the due date". That combined with the volume of information being provided and the form in which it was provided "[made] it a lot more difficult to get the valuations assessed in a timely manner to ensure the valuations are fairly assessed."

16. Payment Notice 34 stated that the net amount for payment was £0.97. This figure was reached by giving a gross valuation of £20,451,110.85 which after deduction of retention at £613,533.33 gave sub-total of £19,837577.52 which was £0.97 more than the total amounts previously certified of £19,837,576.55.

17. On 9th March 2021 the Employer's Agents sent a further email to which they attached Payment Notice 34a and a valuation assessment. Payment Notice 34a gave a net amount for payment of £657,218.50. This figure was reached by giving a gross valuation of £21,128,654.70 which after deduction of retention at £633,859.64 gave a sub-total of

£20,494,796.06 from which the total amounts previously certified of £19,837,576.55 were deducted giving the sum of £657,218.50.

18. The Employer paid the sum of £657,218.50 on 26th March 2021.

19. On 13th April 2021 the Contractor gave notice of adjudication. This stated that the dispute was as to "the correct sum due to the Referring Party in Interim Payment Nr 34". The redress sought was to be that the Employer pay £1,307,169.59 as a result of findings that the amount to be added to the Contract Sum by reason of variations was £903,884.72 and that the sum contractually due for interim payment purposes was £22,476,252.23.

20. Mr. Mark Entwistle was appointed as adjudicator and was sent the Referral dated 16th April 2021. In the Referral the Contractor said that the Employer had failed properly to assess the sums due by way of interim payments and, at [3.7], that the Contractor was accordingly seeking to adjudicate on "the correct sum due under the current interim payment cycle". At [4.6] the dispute was stated to be as to "the true value of the sum due pursuant to Interim Payment No 34 as at the Due Date of 26th February 2021".

21. At [6.1] – [6.4] the Contractor set out its contention that no valid payment notice had been issued. However, at [6.5] it said that notwithstanding its right to seek payment pursuant to clause 4.9.3 (by reason of the Employer's alleged failure to serve a payment notice) it was seeking "determination of the correct valuation of the works done as at 26th February 2021." The reasoning underlying the reference to adjudication and the decision to seek a true value determination was explained further in the Contractor's Reply to the Employer's Response where the Contractor said, at [2.4]:

> "We would state that the reason why this Adjudication was required to be initiated and why a true valuation is being sought (rather than a `smash & grab' approach which, for the avoidance of doubt, [the Contractor] considers it could have commenced) is in part to establish a way forward for the proper administration of the Contract so as to enable [the Contractor] to receive fair cash flow for work undertaken until such time as the works are completed. Had a `smash & grab' adjudication been sought this would have permitted [the Employer] to continue to unfairly devalue sums due in the following interim payments."

22. In its Response the Employer said that the adjudicator's jurisdiction did not extend to the final gross valuation of the variations advanced by the Contractor but was confined to the position at the date of the Interim Application. The Employer challenged the amounts advanced by the Contractor as making up the gross valuation. At [90] and following the Employer asserted two contracharges. One related to the non-provision of a warranty and is not contentious for current purposes. The other asserted a breach of contract on the part of the Contractor in respect of the capping beam. It was said that this had not been designed or built in accordance with the Contract Documents and had been installed higher than provided for in the Contract. The Employer said that this meant that some basement units would have less natural light than would have been the position if the beam had been installed correctly. That, in turn, meant that there would be a loss of rental income in respect of those units. The Employer contended that it had suffered loss in the sum of £149,692.30 being the capitalised value of the rental reduction.

23. In its Reply the Contractor addressed the capping beam claim in some detail (running to 15 sub-paragraphs and 4 pages of the text of the Reply). In summary it denied that

the positioning of the capping beam amounted to a breach of contract; disputed the figure of £149,692; and said that because any loss had not yet been suffered there was to be no deduction from the interim payment in respect of it.

24. The adjudicator gave his decision on 16th June 2021. There were errors as to the figures in the initial version of the Decision but those were corrected two days later and I will refer solely to the corrected figures.

25. Mr. Entwistle took a narrower view of his jurisdiction than certainly the Contractor had hoped he would take. I have set out at [99] and following below some of the detail of the view which the adjudicator reached as to his jurisdiction but in short he concluded that his task was limited "exclusively to the proper valuation of [Payment Application 34]" and that it was not open to him to give the general guidance for which the Contractor had hoped.

26. The adjudicator reviewed the figures in some detail making reference to the contentions set out in the material which had accompanied Payment Notice 34a. He concluded that the net sum due at the time of Interim Application 34 was £771,045.48. That figure resulted from his conclusion that the correct gross valuation was £21,246,002.09. That contrasted with the Contractor's figure of £22,476,252.23 and the Employer's of £21,128,654.70. After deduction of the sum of £657,218.50 which had been accepted as due in Payment Notice 34a this, after the deduction of £10,000 as a consequence of the non-provision of warranties ,left a further sum of £103,826.98 which was due to the Contractor.

27. The adjudicator had addressed the capping beam contracharge at [258] – [260]. He decided that he did not have jurisdiction to rule upon that claim and accordingly took no account of it in determining the amount due. Mr. Entwistle set out his reasoning in these terms:

> "258. I am not persuaded that this claim falls within my jurisdiction here. I accept that a defendant ([the Employer] here) possesses very broad rights of defence, to introduce elements beyond the strict confines of the Notice. However, the dispute referred here relates to the proper valuation of interim account No. 34 and, thus, requires me to effectively take a snapshot of the position between the Parties at that time.
>
> "259. I note that, at the time this account was a live issue between the Parties, no mention was made, on behalf of [the Employer], of any counterclaim related to the design or construction of capping beams.
>
> "260. [The Employer's Agent] made no mention of it in its evaluation and certification. Thus, whilst accepting that [the Employer] may be able to bring a future claim for breach of contract in respect of this matter, I do not accept that it was, at the relevant time, part of the dispute between the parties that has been referred. I decide that this matter is not within my jurisdiction to rule upon."

28. On 24th June 2021 the Contractor threatened to suspend performance of the works if payment was not made pursuant to the Decision and that led to the commencement of proceedings by the Employer's Part 8 Claim of 28th June 2021.

29. On 20th July 2021 the Employer paid the Contractor a further £420,000. In the email informing the Contractor of that payment the Employer's Agent maintained the stance that any liability in respect of Payment Application 34 had been superseded by the adjudication but said that if that position was found to be incorrect the payment was to

be treated as being on account of any liability the Employer had in relation to that payment cycle. Further correspondence followed culminating (subject to a response from the Employer's solicitors) in the Contractor's letter of 27th July 2021. In that letter the Contractor gave notice of intention to suspend works unless payment was received in the sum of £913,996.70 being the balance remaining due on the Contractor's case in respect of the sum of £1,888,660.70 identified in Payment Application 34 after deduction of the payments made.

The Pleadings and the Issues.

30. In its Part 8 Claim the Employer sought a declaration that the Decision was unenforceable because of Mr. Entwistle's decision not to address the defence based on the capping beam claim. It also sought a declaration that the Contractor was not entitled to suspend works because the Employer had failed to pay the amount said to be due under the Decision. In its Acknowledgement of Service the Contractor sought declarations that Payment Notices 34 and 34a were invalid and that the Decision was valid and enforceable.

31. Before me Mr. Wygas for the Employer accepted that Payment Notice 34a was out of time and, accordingly, invalid. He contended that Payment Notice 34 was valid saying, in summary, that it provided an agenda for adjudication and thereby satisfied the requirements of section 110A (2)(a) of the HGCRA and clause 4.10.1 of the Contract. The Employer said that the Decision was not binding as to the conclusion that the sum of £103,826.98 was due because the adjudicator had failed to consider its capping beam cross-claim. However, the Employer contended that the Decision was to be seen as involving decisions on two separate issues: first, that of the sum due in respect of Interim Application 34 and, second, the extent of the set-off available to the Employer against that sum. It said that although the adjudicator's conclusion as to the latter of those issues was not enforceable the Decision was binding as to the former. It followed, the Employer said, that the Contractor was no longer able to rely on Interim Application 34 as originally formulated on a "smash and grab" basis but only as to the amount identified by the adjudicator.

32. For the Contractor Mr. Mort QC said that Payment Notice 34 was not valid because it failed to satisfy the requirements of section 110A (2)(a) of the HGCRA and clause 4.10.1 of the Contract. The Decision was, he said, enforceable in its entirety. Alternatively, if it was not enforceable then it was not open to the Employer to say that it was enforceable in part. Mr. Mort said that the effect of the Decision not being enforceable would be that there was no valid payment notice and no enforceable adjudication decision and the consequence of those matters would be that the notified sum was the amount set out in Interim Application 34 and that the Employer was required by section 111 (1) of the HGCRA to pay that sum. Indeed, Mr. Mort went so far as to say that the Employer was obliged to pay that sum even if the Decision was enforceable and that the Employer's redress after having paid that sum would then be to seek to recover any overpayment.

33. It follows that the issues I am to address are:

    i) The validity or otherwise of Payment Notice 34.

ii) The enforceability of the adjudicator's decision that the sum payable was £103,836.98 with no account being taken of the capping beam cross-claim.

iii) The effect of the adjudication on the parties' rights and obligations in respect of Interim Application 34. That involves consideration of the sub-issues of (a) whether if the Decision as to the amount to be paid is unenforceable by reason of the adjudicator's failure to address the cross-claim there can be severance to treat it as nonetheless binding as to the proper amount of Interim Application 34 and potentially of (b) whether the Contractor can require payment to be made pursuant to that interim application notwithstanding the referral to adjudication.

34. There was some difference between counsel as to the order in which those issues should be addressed but I am satisfied that Mr. Mort was right to say that logic requires them to be addressed in the order I have just stated.

35. I have set out above the parties' cases as they were advanced to me and the issues as they became in the light of the contentions at the hearing. It will be noted that they extend beyond the issues set out in the pleadings. It is also of note that matters have moved on somewhat and there have been a number of further payment cycles in which payments have been made. Although I will set out my conclusions on the arguments advanced at the hearing it will be necessary to consider separately what relief is now appropriate.

The Validity of Payment Notice 34.

36. As noted above the Employer's Payment Notice 34 set out a gross valuation of £20,451,110.85 which was £1 more than the previously certified sum. It stated that after retention the net amount for payment was £0.97. The accompanying email said that a further payment notice would be issued in due course. That mirrored the approach which the Employer had taken in previous payment cycles of sending an initial payment notice certifying £1 or £0.97 as the net amount for payment followed by a further payment notice in a different and larger figure. In payment cycle 34 the initial payment notice was followed by Payment Notice 34a. That gave a gross valuation of £21,128,654.70 with a net amount for payment of £657,218.50 and was accompanied by detailed calculations.

37. Section 110A (2)(a) of the HGCRA provides that a payment notice complies with the subsection if it specifies:

> "(i) the sum that the payer considers to be or to have been due at the payment due date in respect of the payment; and
>
> "(ii) the basis on which that sum is calculated."

38. The statutory language was replicated in clause 4.10.1 of the Contract which provided that:

> "Each Payment Notice under this Contract shall specify the sum that the Party giving the notice considers to be or have been due at the due date in respect of the relevant payment on the basis on which that sum has been calculated."

39. Mr. Wygas submitted that Payment Notice 34 satisfied that those requirements. Mr. Wygas referred to the decisions of Akenhead J in *Henia Investments v Beck Interiors*

Ltd [2015] EWHC 2433 (TCC) and of Mr. Alexander Nissen QC, as a deputy judge, in *Surrey & Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd* [2017] EWHC 17 (TCC). In the light of those authorities he said that the test of whether the payment notice in question satisfies the statutory requirements is whether it provides an agenda for adjudication and said that if it does so then the requirements of the subsection are met. Mr. Wygas argued that Payment Notice 34 did satisfy that test in that it set out the amount which the Employer contended was due and said why that sum was due (namely because of the modest addition to the previous valuation). He pointed out that there could well be circumstances where it was legitimate for a subsequent payment notice to be for a modest sum even if works had been undertaken since an earlier payment. This could be the position if, for example, it had been found that the works had been overvalued in the earlier stages.

40. Mr. Mort said that Payment Notice 34 was not valid. It did not set out the sum which the Employer genuinely considered to be due and nor did it set out a proper basis of the calculation. Instead, it was a place holding exercise to gain the Employer time in which to make a fuller assessment and to present a fuller case in response to Interim Application 34 and to avoid the consequences of having failed to serve a payment notice while it was taking those steps.

41. It is to be noted that the terms and circumstances of Payment Notice 34 were very different from the notices which were considered in *Henia Investments v Beck Interiors Ltd* and in *Surrey & Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd* and from the context in which Akenhead J and Mr. Nissen made reference to a notice providing an adequate agenda for adjudication.

42. In the *Henia Investments* case Akenhead J was concerned with a pay less notice which said that "£0" was due but which explained that result by reference to the amount of a certificate issued by the contract administrator and to the employer's entitlement to liquidated damages for delay. It was in that context the judge said, at [32], that the notice "would have provided an adequate agenda for an application as to the true value of the Works and the validity of the alleged entitlement to liquidated damages for delay". There the employer's case as to each of those elements appeared from the notice. It is also of note that Akenhead J said that "there was no suggestion that the Employer was acting in anything other than a bona fide way."

43. In *Surrey & Sussex Healthcare NHS Trust v Logan Construction (South East) Ltd* the issue which Mr. Nissen had to address was identified at [56] and was whether:

> "a document which, it is accepted, contains all the material information which should be conveyed by a Pay Less Notice cannot serve as a Pay Less Notice because, viewed objectively, the sender did not intend it to be a Pay Less Notice and did not describe it as such."

44. That was self-evidently a very different situation from that which arises in the current case. It was in that context that Mr Nissen made reference to the approach in *Henia* and concluded, at [61], that the documents provided an adequate agenda for an adjudication. The Deputy Judge's conclusion in that regard was dependent on his assessment that the documents provided "a detailed breakdown of [the employer's] position" and that "there is nothing more which [the contractor] needed to know".

45. The requirements for a valid payment notice are those which are set out in section 110A (2)(a) and I do not understand either Akenhead J or Mr. Nissen to have been purporting to create a different test. Rather they were addressing the adequacy of particular documents for the purpose of that test. The analysis of the notices in question in those cases was in reality directed to whether the basis on which the figures being contended for in the notices had been calculated was adequately identified. I do not understand either case as supporting the proposition that a purported notice which does not set out the sum which the relevant employer genuinely considers due together with the basis on which that sum is calculated can be valid if it can in some way otherwise be regarded as providing an adequate agenda for an adjudication.

46. Mr. Wygas submitted that his case was supported by the provision at section 111 (3) of the HGCRA and clause 4.10.2 of the Contract for the subsequent service of a pay less notice in a lower sum than an earlier payment notice. He referred to this as showing the Employer being given a "second bite of the cherry" and said account was to be taken of this when considering the validity or otherwise of a payment notice. I do not find this of assistance. It is right that these provisions envisage a pay less notice being in a different amount from that of a payment notice and also right that such a difference invalidates neither the payment notice nor the pay less notice. That does not mean, however, that a payment notice does not have to meet the requirements of the HGCRA and the Contract. Such a notice must set out the sum which the Employer considers due at the payment due date and the basis on which that figure is calculated. That requirement is neither removed nor diminished by the knowledge that the figure may be altered subsequently.

47. It cannot realistically be contended that Payment Notice 34 accurately stated the sum which the Employer considered to be due at the payment due date. That is evident from the fact that the covering email said that a further notice would be issued. The Employer clearly envisaged that the further notice would set out a different figure which would be the figure which the Employer in fact considered to be due. It follows that Payment Notice 34 did not set out the figure which the Employer actually considered to be due. It may well be that at the date of Payment Notice 34 the Employer had not formed a view as to the precise amount which it believed was due but it clearly did not believe that the figure was just £0.97 and it is not credible to suggest that the Employer did not realise that a substantially greater sum was due. In that regard it is to be noted that in Payment Notice 34a which was sent only six days later the Employer said that it considered the sum due to be £657,218.50.

48. Similarly, Payment Notice 34 did not set out the basis of the calculation. Mr Wygas sought to argue that the basis of the calculation of £0.97 as the sum owing was shown because the notice set out a figure for the gross valuation and deducted from that the retention and the amounts previously certified showing that £0.97 resulted as a matter of arithmetic. That is not sufficient to show the basis of the calculation because in the absence of any accompanying material the notice does not show how the Employer had arrived at the crucial figure of the gross valuation.

49. Mr. Mort is right to say that it is relevant to note that the approach which the Employer adopted in Payment Notice 34 was a repetition of the stance which had been taken in previous payment cycles. This was not a case where the Employer had concluded that the earlier valuations had been too high or where there had been some special circumstance causing the Employer genuinely to conclude that despite the passage of

time since the previous payment cycle only £0.97 was due by way of further payment. Rather it was an instance where the Employer had adopted a practice of sending payment notices valued at £1 or £0.97 to gain time in order to make an assessment of the sum it actually believed to be due. It is not necessary to find that the Employer was acting in bad faith in some way in order to conclude that this was not an appropriate course to adopt. The payment notices were followed by subsequent notices setting out the very much greater sums which the Employer actually believed were due and the Employer made it clear that it was not seeking to prejudice the Contractor's rights as to the payment date. Nonetheless it is clear that where this practice was adopted the payment notices (and Payment Notice 34 in particular) did not set out the amount which the Employer actually considered to be due.

50. Although Mr. Wygas strove to argue to the contrary it cannot, in my judgement, credibly be contended that Payment Notice 34 provided an agenda for adjudication. That is in large part because it set out no basis for the contention that the gross valuation had only increased by £1 and so there was no material on which the validity of that contention could be assessed. In that respect the contrast with Payment Notice 34a is telling. Not only did that notice put forward a markedly larger figure but it was also accompanied by detailed calculations showing how the Employer had arrived at the figure which was being put forward. It is significant that Payment Notice 34a did in fact provide an agenda for the adjudication and that the adjudicator's approach to the figures involved an analysis of the sums advanced by the Contractor by reference to particular headings which were substantially those which appeared in the material accompanying Payment Notice 34a. That exercise would not have been possible using Payment Notice 34 alone.

51. In those circumstances I conclude that Payment Notice 34 did not satisfy the requirements of section 110A (2)(a) or clause 4.10.2 and so was not a valid payment notice.

Was the Adjudicator's Decision vitiated by a Breach of the Requirements of Natural Justice?

52. Was the adjudicator's decision not to address the Employer's defence based on the Contractor's alleged breach of contract in relation to the capping beam a breach of the requirements of natural justice by reason of being a deliberate decision not to address a material part of the dispute before him?

53. The test to be applied is that a deliberate failure to address a material issue which was before the adjudicator on a proper view of his jurisdiction will be a breach of natural justice. An issue will be material for these purposes if it is shown to have had the potential to make a significant impact on the overall outcome of the adjudication. I derive those propositions from Coulson J's analysis in *Pilon Ltd v Breyer Group Plc* [2010] EWHC 837 (TCC). At [17] and following the learned judge considered the various authorities concluding, at [22], with this summary of the applicable principles which both sides before me accepted as an accurate statement of the relevant law:

> "22.1 The adjudicator must attempt to answer the question referred to him. The question may consist of a number of separate sub—issues. If the adjudicator has endeavoured generally to address those issues in order to answer the question then, whether right or wrong, his decision is enforceable: see *Carillion v Devonport*.

> "22.2. If the adjudicator fails to address the question referred to him because he has taken an erroneously restrictive view of his jurisdiction (and has, for example, failed even to consider the defence to the claim or some fundamental element of it), then that may make his decision unenforceable, either on grounds of jurisdiction or natural justice: see *Ballast, Broadwell* and *Thermal Energy*.
>
> "22.3. However, for that result to obtain, the adjudicator's failure must be deliberate. If there has simply been an inadvertent failure to consider one of a number of issues embraced by the single dispute that the adjudicator has to decide, then such a failure will not ordinarily render the decision unenforceable: see *Bouygues* and *Amec v TWUL*.
>
> "22.4. It goes without saying that any such failure must also be material: see *Cantillon v Urvasco* and *CJP Builders Limited v William Verry Limited* [2008] EWHC 2025 (TCC). In other words, the error must be shown to have had a potentially significant effect on the overall result of the adjudication: see *Keir Regional Ltd v City and General (Holborn) Ltd* [2006] EWHC 848 (TCC).
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> "22.5. A factor which may be relevant to the court's consideration of this topic in any given case is whether or not the claiming party has brought about the adjudicator's error by a misguided attempt to seek a tactical advantage. That was plainly a factor which, in my view rightly, Judge Davies took into account in *Quartzelec* when finding against the claiming party."

54. Where the adjudication is concerned with a party's entitlement to be paid money then a defence which would if successful remove that entitlement or diminish the sum to be paid will potentially be an issue in the adjudication.

55. In *Quartzelec Ltd v Honeywell Control Systems Ltd* [2008] EWHC 3315 (TCC) HH Judge Stephen Davies referred, at [28], to the principle, enunciated by Akenhead J in *Cantillon v Urvasco* [2008 EWHC 282 (TCC), that "it is open to a respondent to an adjudication to raise any ground which would amount in law or in fact to a defence of the claim". Judge Davies addressed the application of that approach to an adjudication involving a claim for payment thus, at [30]:

> "… Where the dispute referred to adjudication by a claimant is one which involves a claim to be paid money, it is difficult to see why a respondent should not be entitled to raise any defence open to him to defend himself against that claim, regardless of whether or not it was raised as a discrete ground of defence in the run-up to the adjudication, and subject to any considerations of natural justice. The adjudicator has jurisdiction to, and should, consider any such defence…"

56. In *Pilon* at [19] – [21] Coulson J analysed the decision in *Quartzelec* and said that "it should be treated as something of a special case". However, that qualification of the approach taken in the earlier case was with regard to the modest value of the potential defence there in the context of the value of the claim as a whole. Reference was made to the fact that the line of defence which had not been considered by the adjudicator was only part and arguably only a modest part of the defence as a whole. That was contrasted with cases where the adjudicator had "done a calculation which only looked at one side of the balance sheet". That analysis of *Quartzelec* is not to be regarded as casting doubt on the proposition that an adjudicator has jurisdiction to consider any defence which would entitle a party to avoid or reduce its liability to pay a sum said by the other side to be due. Indeed Coulson J reaffirmed that principle in these words at [25]:

> "... Adjudicators should be aware that the notice of adjudication will ordinarily be confined to the claim being advanced; it will rarely refer to the points that might be raised by way of a defence that claim. But, subject to questions of withholding notices and the like, a responding party is entitled to defend himself against a claim for money due by reference to any legitimate defence (including set off), and thus such defences will ordinarily be encompassed within the notice of adjudication."

57. In this case the Employer says that consideration of its contention that it had a defence arising out of the Contractor's alleged breach in respect of the capping beam was within the adjudicator's jurisdiction because it was a potential defence operating to reduce the sum payable in response to Interim Application 34. The Employer says that it was a material matter because the amount of the contracharge advanced on this basis was £149,692.30 which was greater than the amount of £103,826.98 which the adjudicator concluded remained unpaid in respect of application 34. It follows, the Employer says, that consideration of this defence could have led to a conclusion that there was no balance outstanding.

58. Alternatively, Mr. Wygas submited that the issue was within the adjudicator's jurisdiction because jurisdiction had been conferred on him by reason of both parties having advanced reasoned submissions on the issue. They are to be taken has having done so, the Employer says, on the footing that they were accepting that this was an issue which the adjudicator had jurisdiction to determine.

59. For the Contractor Mr. Mort said that the adjudicator was right to say that the potential claim in relation to the capping beam was outside his jurisdiction. This was because clauses 4.7 and 4.14 of the Contract made provision for the calculation of interim payments laying down how the gross valuation was to be calculated and the sums which were to be deducted from that valuation in the calculation of the amount of the interim payment. The claim in relation to the capping beam did not fall within the scope of any of the deductions which were provided for there and so could not operate as a defence to the assertion that a sum remained outstanding in respect of Interim Application 34. It is to be noted that this was not a stance which the Contractor had adopted in the adjudication where it had put forward detailed arguments explaining why it was not in breach and why, if there had been a breach, the amount of the contracharge was excessive.

60. The first question is whether Mr. Entwistle was right to conclude that he did not have jurisdiction to rule on the Employer's claim in relation to the capping beam. The adjudicator set out his reasoning at [258] – [260]. There he accepted that the Employer had "very broad rights of defence" and was entitled to introduce matters "beyond the strict confines" of the Notice of Adjudication. Nonetheless he concluded that this line of defence was outside his jurisdiction. He did so by reason of his assessment of whether it was part of the dispute between the parties "at the relevant time". That appears to be a reference back to the analysis which adjudicator had set out at [120] and following. There Mr. Entwistle had explained that he interpreted the notice as requiring a "`snapshot' to be taken at the relevant moment in time" and that the relevant date was 26th February 2021. The adjudicator regarded his jurisdiction as confined to the determination of the correct sum due to the Contractor in respect of Interim Application 34. At [259] adjudicator said that "at the time this account was a live dispute between the Parties" no mention had been made of the claim in respect of the capping beam and

so it was not "at the relevant time part of the dispute between the parties that has been referred".

61. I find that in adopting that approach the adjudicator took an unduly narrow view of his jurisdiction. The exercise in which he was engaged in his decision was to address the sum due in a particular payment cycle. He set out a conclusion as to the correct figure and stated that interest was payable on the outstanding balance. The capping beam claim was being put forward as a matter which the Employer said reduced the amount which was due in that cycle. It was, accordingly, being raised as a defence in respect of the matter in issue in the adjudication and in respect of which Mr. Entwistle had jurisdiction. The arguments which Mr. Mort advanced to the effect that the provisions of the Contract meant that the capping beam claim was not to be taken into account in calculating what was due by way of an interim payment are on proper analysis not arguments as to jurisdiction. They are in fact arguments as to whether the capping beam claim was a valid defence to the Contractor's contentions in respect of the sum owing. Those arguments were in essence to the effect that because the capping beam claim did not fall within the scope of the deductions from the gross valuation provided for in the contractual terms which governed calculation of the interim payment it could not be used to reduce the sum payable in the payment cycle. In those terms they could have been advanced in the adjudication as arguments as to why no deduction should be made and put on that footing they might have considerable force. They do not, however, mean that the Employer's capping beam defence was not a matter to be addressed in the adjudication. If the adjudicator had considered the capping beam claim and had concluded that the defence did not operate to reduce the amount due his decision would have been unimpeachable. The adjudicator could have founded such a conclusion on either the interpretation of the Contract which Mr. Mort now advances or on the arguments as to the merits or quantum of the capping beam claim which the Contractor in fact advanced in the adjudication. The distinction between an adjudicator addressing a defence and concluding that it fails and an adjudicator deliberately declining to address a defence can be a narrow one but it is a real one. I am satisfied that by deliberately deciding not to address this defence the adjudicator was declining to address a defence which the Employer was entitled to advance and entitled to have considered by the adjudicator.

62. In the light of that conclusion it is not necessary for me to address the Employer's alternative contention that the parties had vested the adjudicator with an *ad hoc* jurisdiction to address this question. I will, however, briefly explain why I would not have accepted that analysis.

63. Mr. Wygas said that the adjudicator had jurisdiction to determine the capping beam claim because both parties had advanced arguments to him on the merits of that claim and neither had sought to argue that determination of it was outside his jurisdiction. As authority for that approach Mr. Wygas relied on the decision of the Court of Appeal in *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358. That was, however, a very different case from the matter before me. For current purposes the relevant issue in that case was whether the adjudicator had jurisdiction to make an award of interest. The claimant had referred that issue, along with others, to adjudication and the defendant had acquiesced in that approach and had advanced arguments as to the merits of the interest claim. The adjudicator had made an award which included an award of interest and it was only then that the defendant sought to

argue that the decision was unenforceable by reason of an absence of jurisdiction. That was the context in which Chadwick LJ, giving the judgment of the court, said, at [94], that the conclusion that the parties had agreed that the question of the award of interest was within the scope of the adjudication was "irresistible" and that "by agreeing that the adjudicator shall decide whether interest should be paid the parties conferred on him a jurisdiction to award interest he would not otherwise have had". The situation in this case was very different. The capping beam claim was not part of the initial referral. It was a matter which was put forward by way of a defence on the Employer's part and which the Contractor then addressed. I do not understand the decision in *Carillion* to be authority for the proposition that the fact that the parties have addressed an issue in their submissions necessarily gives the adjudicator a jurisdiction to determine that issue with the consequence that an adjudicator who concludes that he does not have jurisdiction in that regard is declining to exercise a jurisdiction which he or she in fact has. It follows that if contrary to my analysis the adjudicator did not have jurisdiction to determine the capping beam defence by reason of the nature of the issues in the adjudication then the references to it in the parties' submissions would not have given him such jurisdiction.

64. It follows from my conclusion at [61] that here the adjudicator deliberately declined to address a defence which he had jurisdiction to determine and which he should have addressed. He thereby failed to that extent to answer the question before him.

65. It then becomes necessary to determine whether that failure was a material one satisfying the conditions set out by Coulson J in *Pilon* at [22.4] such as to amount to a breach of natural justice. This is not a case where the adjudicator's calculation resulted from only looking at one side of the balance sheet. Instead Mr. Entwistle had paid careful attention to the material which the Employer had advanced in support of Payment Notice 34a and it was substantially that material which had caused him to reduce the sum due from the sum of £1,888,660 appearing in Interim Application 34 to the sum of £771,045. That was nonetheless £103,826.98 more than the amount for which the Employer had accepted liability. In these proceedings the Employer points out that the capping beam claim was advanced as being worth £149,692.30 and that if the adjudicator had accepted its validity and relevance the conclusion would have been that nothing remained outstanding as payable to the Contractor.

66. I am satisfied that the failure on the adjudicator's part was a material one. Although not the major part of the Employer's case (the predominant argument was as to the valuation which the Employer put at £20,236,120.55 as against the Contractor's figure of £21,726,237.25) the capping beam claim was far from being a trivial part of that case. The Employer is right to say that its materiality is demonstrated by the fact that acceptance of it would have made the difference to whether there was a balance due to the Contractor or not. It follows that there was a material breach of the requirements of natural justice because the adjudicator deliberately decided not to address a line of defence in respect of which he had jurisdiction and which could determine the state of the balance lay as between the Employer and the Contractor.

67. The adjudicator's decision that the sum of £103,826.98 remained outstanding in relation to Interim Application 34 was as a consequence of that breach unenforceable.

Is there Part of the Decision which can safely be enforced?

68. Through Mr. Wygas the Employer says that even though the adjudicator's decision that £103,826.98 was payable to the Contractor was not enforceable the Decision is nonetheless binding on the parties as to the sum due in payment cycle 34 absent the cross-claim. Thus the parties are bound by the adjudicator's conclusions that the gross valuation was £21,246,002 and that after deduction of the retention and the sums previously certified the amount due was £771,045.48. Mr. Wygas contended that the adjudication and the Decision addressed two separate issues: first, the sum due in respect of Interim Application 34 and, second, the amount of any set off on which the Employer could rely against that sum. The decisions on those issues were distinct and the unenforceability of the adjudicator's decision as to the availability of the set off did not, on the Employer's case, mean that the parties were not bound by the decision on the first of those issues.

69. Mr. Wygas submitted that the approach as to the severance of different elements of an adjudication decision was to the be that set out by Pepperall J in *Willow Corp SARL v MTD Constructors Ltd* [2019] EWHC 1591 (TCC) and by the Inner House of the Court of Session in *Dickie & Moore Ltd v McLeish* [2020] CSIH 38 which I will consider below. Applying that approach the "core nucleus" of the relevant part of the Decision could be identified and safely enforced as binding on the parties notwithstanding the unenforceability of Mr. Entwistle's conclusion as to the amount ultimately payable.

70. In his oral submissions by way of reply Mr. Wygas supplemented that argument by referring to paragraph 20 of the Scheme for Construction Contracts ("the Scheme") as set out in the Scheme for Construction Contracts (England and Wales) Regulations 1998. By paragraph 20 (a) an adjudicator has power to "open up, revise and review any decision taken or any certificate given by any person referred to in the contract ...". Mr. Wygas said that the adjudicator's conclusion as to the amount due was to be seen as such a revision or review and as being binding.

71. For the Contractor Mr. Mort said that it was not open to the Employer to seek to sever the Decision in this way. It was impermissible for the Employer to say that the Decision was not binding or enforceable as to the final conclusion reached but was binding as to part of the process of reaching that conclusion. Such a course, the Contractor said, amounted to the Employer asserting that the Decision that the sum of £103,826.98 was due to be paid by the Employer was not binding but also asserting that the Contractor was not able to rely on the sum set out in Interim Application 34. This would amount to the Employer picking and choosing which elements of a single decision it accepted.

72. I did not find Mr. Wygas's invocation of paragraph 20 (a) of the Scheme persuasive. The adjudicator was not exercising the power given by that sub-paragraph to "open up, revise [or] review" a decision taken or a certificate given and was not purporting to do so. Instead he was exercising the power given by paragraph 20 (b) to decide the Employer's liability to make payment and the amount of that liability. The Decision is not to be seen as having amended Interim Application 34 so that it contained the sum in which the adjudicator assessed the gross valuation. Rather it involved a finding as to whether the sum set out in that interim application was truly due.

73. There was no dispute as to the principles governing the approach to be taken to severance of an adjudicator's decision and to the enforcement of some parts but not others of a decision. There was, however, considerable dispute as to the application of those principles to the circumstances here. In the light of that I will deal with the evolution of the approach to be taken comparatively briefly though it will be relevant to note the circumstances of the cases in which that evolution has taken place.

74. In *Pilon* the adjudicator had determined the employer's liability following the contractor's interim application in respect of batches 26 – 62 of the works in question. Coulson J held that there was a material breach of natural justice in the adjudicator's failure to take account of the employer's defence that it had overpaid in respect of batches 1 – 25. The adjudicator concluded that £207,617 had been due. That was a reduction from the figure of £337,000 which had been the amount of the interim application. The adjudicator took no account of the sum of £147,774 allegedly overpaid in respect of the earlier batches. Coulson J addressed the question of whether notwithstanding the breach of natural justice the decision should be enforceable as to £60,000 odd being the balance after taking account of the alleged overpayment. He held, at [40], that, applying the approach enunciated by Akenhead J in *Cantillon v Urvasco* [2008] EWHC 282 (TCC) at [65], as the adjudication involved a single dispute the decision was not severable and that the contractor was not entitled to judgment for the sum of £60,000 odd. Coulson J said that it might be time to review the rules as to severance in such cases but added that even if the decision had been severable in principle that would not have been appropriate in practice because of the risk the decision as a whole was tainted by the adjudicator's error. It will be noted that the relevant issue for present purposes was whether there could be enforcement of the balance of £60,000. The question of whether the contractor was bound by the adjudicator's reduction of the amount of the interim application from £337,000 to £207,617 was not raised.

75. In *Working Environments Ltd v Greencoat Construction Ltd* [2012] EWHC 1039 (TCC) the adjudicator had concluded that the contractor was owed £250,860. In arriving at that figure the adjudicator had rejected most of the elements of the employer's withholding notice. Akenhead J held, at [32], that the adjudicator had not had jurisdiction to adjudicate upon items 11 and 12 of that withholding notice. Those items totalled £21,149 in value. At [34] Akenhead J held that the decision was enforceable but only as to £229,711. That approach was on the footing that the no account was being taken of the adjudicator's rejection of the two items which he had not had jurisdiction to consider.

76. In *Beck Interiors Ltd v UK Flooring Contractors Ltd* [2012] EWHC 1808 (TCC) the claimant had referred to adjudication its claim for the costs of obtaining the required carpet in the sum of £31,148 and a claim for liquidated and ascertained damages in the sum of £36,000. The adjudicator had upheld those claims in the sums of £19,763 and £33,600 respectively. Akenhead J held that the claim to liquidated damages had not formed part of a crystallised dispute referrable to adjudication at the time of the notice of adjudication and that as a consequence the adjudicator had not had jurisdiction in respect of that claim. At [21] the judge noted that "there are many different types of jurisdictional challenge" and said that "different considerations as to severability may arise in relation to different jurisdictional challenges". At [32] – [34] Akenhead J explained that the two claims had been addressed separately and it was possible to

identify clearly what the adjudicator had decided in relation to each claim and to sever the decision on the matter over which the adjudicator had jurisdiction from that over which he did not. Accordingly, judgment was given in the sum of £19,763 being the amount attributable to the claim in respect of the additional costs.

77. In *Lidl UK GmbH v R G Carter Colchester Ltd [2012] EWHC 3138 (TCC)* Edwards-Stuart J was concerned with an application to enforce an adjudicator's decision as to the claimant's entitlement to deduct liquidated damages from the sums otherwise due. It was accepted that as to part of the decision the adjudicator had decided matters which had not been referred to him. The claimant contended that this part of the decision, involving a finding that £125,000 was due for liquidated damages in respect of two periods of time, was independent of the balance of the decision and that it was entitled to judgment in respect of the balance. The defendant said that because there was a single dispute before the adjudicator the decision was not severable and fell in its entirety. Edwards-Stuart J found that the decision was severable and enforceable as to the balance because the extraneous matters the adjudicator had addressed had had no bearing on the other issues.

78. At [61] Edwards-Stuart J accepted that the "general principle" was that "a decision cannot be severed where only one dispute or difference has been referred". He said that "the rationale underlying this principle" was that:

> "Where a single dispute or difference has been referred it will generally be difficult to show that the reasoning in relation to the part of the decision that it is being sought to sever had no impact on the reasoning leading to the decision actually reached, or that the actual outcome would still have been the same. If this is the case, the part cannot be safely severed from the whole."

79. Edwards-Stuart J said that the decision in *Working Environments Ltd v Greencoat Construction Ltd* did not in fact conflict with this principle because:

> "... Where, in the case of the referral of a single dispute additional questions are brought in and adjudicated upon, whether by oversight or error, there should be no reason in principle why any decision on those additional questions should not be severed provided that the reasoning giving rise to it does not form an integral part of the decisions as a whole."

80. It is to be noted that Edwards-Stuart J then said that where that was not the position "the entire decision will be unenforceable."

81. In *Willow Corp* the adjudicator had rejected the employer's claim for liquidated damages and had concluded that it was liable to pay £1,174,854. The employer sought a declaration that the adjudicator's rejection of its liquidated damages claim in the sum of £715,000 was unenforceable. It also resisted enforcement by reference to a number of alleged breaches of natural justice. Pepperall J rejected the allegation of breaches of natural justice. However, he did find that the adjudicator had erred in his construction of the relevant agreement and that he had wrongly concluded that the employer was required to accept that practical completion had been achieved.

82. At [67] and following Pepperall J reviewed the authorities to which I have already referred. At [74] he set out the applicable approach thus:

> "I agree with Edwards-Stuart J that in the context of a single dispute or difference it can often be difficult to divorce any significant flaw in the adjudication from the balance of

> the decision. Indeed, significant breaches of natural justice are particularly prone to infect and therefore undermine the entire decision. In my judgment, the proper question is not, however, to focus on whether there was a single dispute or difference but upon whether it is clear that there is anything left that can be safely enforced once one disregards that part of the adjudicator's reasoning that has been found to be obviously flawed. Such analysis need not be detailed and, in many cases, it may remain the position that the entire enforcement application should fail. It would, however, further the statutory aim of supporting the enforcement of adjudication decisions pending final resolution by litigation or arbitration if the TCC were rather more willing to order severance where one can clearly identify a core nucleus of the decision that can be safely enforced."

83. It is apparent from the opening words of that paragraph that what Pepperall J had in mind when he referred to it being "safe" to enforce part of the decision was the question of whether the relevant part could properly be said to be unaffected by the deficiencies in reasoning or approach which had affected the unenforceable part.

84. In the light of that analysis Pepperall J then turned to the adjudication decision. He concluded that the adjudicator's error of construction had been limited to the dismissal of the liquidated damages claim and had not infected the balance of the decision. Accordingly, "the good can should be severed from the bad" with the consequence that the decision was enforceable as to the balance over and above the liquidated damages sum of £715,000.

85. Those authorities together with Scottish decisions addressing the same point were considered by the Inner House of the Court of Session in *Dickie & Moore Ltd v McLeish.* The contractor there had brought proceedings to enforce an adjudicator's decision as to the sums owed on the final account. The judge at first instance had held that parts of the dispute described in the notice of adjudication had not crystallised before service of that notice. He concluded that the adjudicator had not had jurisdiction in respect of those matters but proceeded to sever those parts of the decision and ordered enforcement of the balance doing so by reference to Pepperall J's approach of considering whether there was a core nucleus which could safely be enforced.

86. Delivering the judgment of the court Lord Drummond Young emphasised, at [25], that the "fundamental purpose" of the HGCRA and the Scheme (or rather its Scottish equivalent) was to "enable contractors and sub-contractors to obtain payment of sums to which they have been found due without undue delay". It was in the light of that purpose that the court said:

> "in relation to an adjudicator's award that is partially valid and partially invalid, the valid part should in our opinion be enforced if that is reasonably practicable. That will depend on whether the valid and invalid parts of the award can be severed from each other, but in approaching severance we consider that the court should adopt a practical and flexible approach that seeks to enforce the valid parts of the decision unless they are significantly tainted by the adjudicator's reasoning in relation to the invalid parts."

87. The court proceeded from that statement of principle to consider "the fundamental issue" of "whether the valid parts of the adjudicator's decision can be severed from the *ultra vires* parts, and enforced independently" [26]. It was in considering how that issue should be approached that the court set out its review of the authorities.

88. That review caused the court to conclude, at [40], that there had been a move away from applying a rigid distinction between cases where a single dispute had been referred to adjudication and those where more than one dispute had been referred. That distinction was no longer decisive but remained "a factor in a flexible and practical approach". At [42] the court said that "if the single/multiple dispute test is rejected, it is important to determine the test for severability". The court noted that Pepperall J's test of assessing whether the conclusion was "safe" had not attracted support in Scotland but said that it believed that a test along those lines was appropriate and gave guidance to the applicable approach in these terms:

> "42. … In considering whether a decision which is partially *ultra vires* of the adjudicator can be severed and the valid part enforced, the correct approach in our opinion is that the court should make the assumption that the parts of the decision that are invalid, for example because the dispute had not crystallised, did not exist. On that basis, it should then consider whether the remainder of the decision can be enforced without its being tainted by the invalid part of decision.
>
> "43. The subject matter of the *intra vires* and *ultra vires* parts of the decision will normally differ substantially, but there may be some overlap, either in the facts or in the process of legal reasoning – applying the provisions of the contract and the general law to those facts. To the extent that there is overlap, the court must consider whether the adjudicator's reasoning in the *ultra vires* part of his decision affects his conclusions in the *intra vires* part to any material extent. Obviously, the greater the overlap, the more likely it is that there will be an influence. If there is an a significant influence, the *ex facie intra vires* part of the decision will be tainted, and cannot be enforced. That might happen, for example, because inferences of fact drawn in the uncrystallised part of the dispute are relevant to the remainder or because reasoning on the application of law of the law develops in the uncrystallised part is treated as relevant to the remainder.
>
> "44. ... Breach of the principles of natural justice inevitably casts an element of doubt over the whole of the adjudicator's reasoning.
>
> "45. Acting outwith jurisdiction in respect of one aspect of the dispute, however, does not necessarily taint the remainder. The whole relationship of the *intra vires* and *ultra vires* parts of the decision must be examined, to determine how far the reasoning in the latter has influenced the former. ... The critical question is whether the adjudicator's reasoning in the invalid part of his decision has had a significant effect on his reasoning in the *ex facie* valid part. If there is a significant influence, it is likely that severance will be impossible, the result of the whole decision must fall. "We should add, in agreement with the views of Edwards—Stuart J in *Lidl*, quoted at paragraph [38] above, that the existence of a single dispute or difference is relevant in that it may make it more difficult to show that the reasoning in the invalid part of the decision had no effect on the reasoning in the *ex facie* valid part."

89. The decision of the Inner House is not strictly binding on me but it is highly persuasive and in my judgement it sets out the approach which is normally to be taken to determine whether the relevant part of an adjudicator's decision can be safely enforced notwithstanding the invalidity of other parts (to adopt Pepperall J's wording) or whether it is tainted by the errors of reasoning or other flaw in the invalid part (to follow more closely the language of the Inner House).

90. In is in the light of those authorities that Mr. Wygas contended that the adjudicator's conclusion as to the gross valuation and, accordingly the amount due in respect of interim application 34 absent the set off, is an identifiable core nucleus which can be

safely enforced. The adjudicator fell into error when he decided that he was not entitled to take account of the capping beam claim but, the Employer says, the conclusions he reached before that point in his reasoning were unimpeachable separate decisions which were not tainted by that error. For the following reasons I am not persuaded by that contention.

91. I am satisfied that the approach set out by Pepperall J and the Inner House is that which is normally applicable. However, it is to be noted that the courts in *Willow Corp*, in *Dickie & Moore Ltd v McLeish*, and in the other cases to which I have referred were dealing with the question of enforcement of an adjudication award in favour of the party who was successful in the ultimate outcome in the adjudication. The effect of the severance where it occurred was that the award in favour of that party was upheld but in a lesser amount than would have been the position if the adjudicator's decision had stood unchallenged. In those circumstances it is readily understandable that severance leading to a partial enforcement of the adjudication decision is seen as compatible with the policy underlying the HGCRA and the Scheme of maintaining cashflow in the construction industry by enabling contractors to obtain prompt payment of sums which are due. Rather different considerations come into play when severance would lead not to enforcement of the adjudicator's award in a lesser amount but to enforcement of a particular part of the decision in question with that part having been a stage in the process prior to the ultimate decision.

92. I will proceed on the footing that severance is potentially available in such cases but particular care will be needed to determine whether the part in question can "safely" be enforced separately from the decision as a whole (to adopt Pepperall J's language) and whether the decision on the part has been "tainted" by failings affecting the overall decision (in the language of the Inner House). The court must also, in my judgement, guard against creating an artificial outcome which could not have been the result of a proper decision by the adjudicator. The court will need to consider whether the adjudication is properly to be seen as (a) containing a series of decisions independent of each other or (b) being a single decision resulting from a connected chain of reasoning. The former analysis will be correct in some cases. This is more likely to be the position if multiple disputes have been referred to the adjudicator and in such a case severance with enforcement of the decision or decisions in respect of one or more disputes may be appropriate even when the decision or decisions in respect of other disputes also referred cannot be enforced. The test cannot be solely whether the adjudicator was dealing with single or multiple disputes but where an adjudicator is dealing with a single dispute the latter analysis of the decision is more likely to be correct. Where there is such a single decision severance is unlikely to be appropriate even where the stages in the chain of reasoning leading to the adjudicator's conclusion are set out and can be said to be logically distinct. Severance in those circumstances is unlikely to be appropriate because it would involve an artificial division of a continuous chain of reasoning and would create the risk of imposing on the parties an outcome which could not have resulted from the adjudication. This is particularly so where the conclusion in respect of that part of which separate enforcement is sought favoured the party who was unsuccessful on the ultimate issue. As a matter of principle if in a particular case severance is appropriate with the consequence that part of a decision is binding then this will not be precluded by the fact that this will enable the party which lost overall to enforce a part of the decision which went in its favour. Nonetheless, the

risk of creating an artificial result is greater in such a case with the consequence that severance is less likely to be appropriate.

93. I am influenced in my conclusion as to the appropriate approach by the nature and purpose of the adjudication process. As Pepperall J said in *Willow Corp* at [56]:

> "Adjudication is not intended to provide all of the refinements of a High Court trial. It requires an impartial and reasoned provisional decision within a very compressed timetable. It is not intended to replicate what Dyson J referred to in *Macob Civil Engineering Ltd v Morrison Construction Ltd* [1999] B L R 93 at page 97 "the grinding detail of the traditional approach to the resolution of construction disputes." It provides a quick and interim solution that the courts will ordinarily enforce pending final resolution of the parties' dispute through litigation or arbitration."

94. At [64] Pepperall J described the nature of the process even more shortly referring to "the rough and tumble inherent in the statutory scheme."

95. The stages in an adjudicator's reasoning are to be seen against the background of those time constraints and in the light of the purpose for which he or she was engaging in the reasoning namely reaching a rapid provisional decision on a particular issue. It will not normally be appropriate to treat an adjudicator's enunciation of the stages in a continuous chain of reasoning as if it were a series of freestanding declarations of law reached after detailed argument.

96. The starting point is to consider the particular adjudication. Here, the adjudication was concerned with a single issue namely the amount payable to the Contractor in the light of Interim Application 34 and the exchanges which had followed it. The stages in the adjudicator's reasoning are properly to be seen as part of the process leading to a single conclusion rather than a series of separate and freestanding decisions with each being intended to be binding in its own right.

97. This is apparent from the Notice of Adjudication which identified a single dispute "over the correct sum due to the Referring Party in Interim Payment Nr 34". The Notice set out the redress sought and in doing so set out the decisions which the Contractor would be requesting the adjudicator to make but I am satisfied that those were not being set out as a series of separate decisions but rather as the elements which should cause the adjudicator to conclude that the sum of £1,307,169.59 was to be paid.

98. Similarly, the Referral stated, at [4.6] that "the dispute is … about the true value of the sum due pursuant to Interim Payment Nr 34 as at the Due Date of 26th February 2021". At [4.7] it stated that "the scope of this Adjudication is limited to paragraph 4.6 above" though in context this was aimed at excluding consideration of the Contractor's potential rights to extensions of time and a loss and expense claim. It is to be noted that at [6.5] the Referral said that the Contractor sought a "determination of the correct valuation of the works done as at 26th February 2021" rather than relying on its rights under clause 4.9.3 of the Contract (namely to require payment in the amount of the Interim Application because of the Employer's failure to serve a payment notice). The redress sought was listed at [13] and the first three sub-paragraphs expressed the relief sought as being declarations to particular effects. Those mirrored the decisions listed in the Notice of Adjudication and were to be seen as leading up to the relief sought in [13.1.4] namely payment of £1,307,169.59.

99. In the current case it is also relevant to note the question which the adjudicator understood himself to be addressing and the task which he believed himself to be undertaking.

100. At [40] Mr. Entwistle recorded that the Contractor was not seeking any remedy flowing from the Employer's failure to serve the correct notices but was instead seeking "a determination of the correct valuation of works undertaken as at 26th February 2021". Similarly, at [130], the adjudicator noted the Contractor's explanation that it had not commenced a "smash and grab" adjudication but had instead initiated the adjudication as a true value dispute to provide a way forward for the proper administration of the Contract. The adjudicator explained, see [121] and following, that nonetheless his jurisdiction was circumscribed by the terms of the Notice which defined the dispute as being over the correct sum due in Interim Payment Nr 34. The reference to stating the ascertained adjustment of the Contract Sum by certain variations "to date" meant that a "snapshot" was to be taken as at 26th February 2021. In the adjudicator's view the only dispute referred to him related "exclusively to the proper valuation of [the Contractor]'s application for payment No. 34" and this precluded him from considering the effect on the Contract Sum of the listed variations because that related to the final adjustment of that sum. The adjudicator concluded that consideration of that matter was also precluded because there was no evidence of a dispute in relation to it.

101. At [150] and following the adjudicator repeated his assessment that his jurisdiction was "strictly confined to consideration of the proper quantification of [the Contractor]'s payment application No 34". He repeated his assessment that this meant that he would not be able to provide "precedents in the matter of valuation of the Works, [such] as could then be applied to future valuations and even to the final adjustment of the Contract Sum (Final Account)". At [159] Mr. Entwistle repeated that his task was to produce a valuation as it should have been at 26th February 2021 so as to "produce a snapshot, the effect of which will be to bind the Parties, such that any payment that is required to take place between the Parties, arising from the payment application at that date, is clearly articulated and capable of being understood." Then, at [164], adjudicator said that the limitation on his jurisdiction confining him to "considering just one interim account" meant that "the benefit conferred on the Parties by my Decision will be temporary and ephemeral" because subsequent interim accounts may render it otiose.

102. It follows that although the adjudicator set out his reasoning with care, and at some length, he was avowedly doing so on the footing that he was addressing a narrow question on an interim basis.

103. The Employer's argument that the adjudicator's error in declining to address the capping beam claim was separate from and did not affect the earlier conclusions has some force. It is true that the reasoning in relation to that error was unrelated to the adjudicator's reasoning in the earlier stages of the process and does not appear to have tainted that reasoning. It is also true that even though the adjudicator was only producing a snapshot of the position at a particular date that snapshot was for the purpose of determining the sum due in payment cycle 34 and would still be of utility for that purpose. Those would potentially have been arguments justifying severance if adjudicator had been engaged in making a series of separate decisions. That, however, was not the position here. Instead, the position here was that the adjudicator was not asked to make a series of separate decisions and still less did he regard himself as doing so. Rather he reached a single decision and set out his findings and conclusions as an

explanation of the reasons for reaching that single decision. It would, in my judgement, be artificial and inappropriate for the court to stop at any particular point in the chain of reasoning as set out by Mr. Entwistle and conclude that the decision was binding up to that stage but not as to the stages which followed. To do that would be to treat the matters which the adjudicator chose to set as the reasons why he reached the ultimate conclusion as if they were separate findings. That would amount to turning the Decision into something of a different nature. It would turn a single decision with an accompanying explanation of reasoning into a series of separate decisions and that is not an appropriate course. The Employer has succeeded in showing that the adjudicator's ultimate conclusion on the single dispute he was addressing is not enforceable and in the circumstances here it cannot be said that there is anything remaining which can be safely enforced.

104. It follows that the Employer having established that the Decision is not enforceable as to the ultimate conclusion there is no part of the Decision which can be severed and which is binding on the parties.

The Resulting Position in respect of Interim Application 34.

105. I have concluded that Payment Notice 34 was invalid; it is now accepted by the Employer that Payment Notice 34a was invalid; and I have concluded that the Decision is not enforceable.

106. Mr. Mort said that in those circumstances the amount in Interim Application 34 is the notified sum for the purposes of the HGCRA and that the Employer is liable to pay that sum by reason of section 111 (1). He said that neither the Contractor's entitlement to be paid that sum nor the Employer's liability to pay it were affected by the fact that the matter had been referred to adjudication. Indeed it was his position that there would have been a liability to pay that sum even if the Decision had been enforceable. It was Mr. Mort's contention that the latter proposition followed from the decision of the Court of Appeal in *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448 and the subsequent decision of Stuart-Smith J in *M Davenport Builders Ltd v Greer* [2019] EWHC 318 (TCC). The effect of these decisions was, he said, that the section 111 obligation to pay the notified sum persists notwithstanding an adjudication albeit the paying party has the right to recover any overpayment.

107. For understandable tactical reasons Mr. Wygas's response to these contentions was predicated on his contention that the Decision was binding as to the amount due in respect of payment application 34 absent the cross-claim in the light of which he said that the notified sum had become the amount identified by the adjudicator. It was not suggested that if the Decision was wholly unenforceable the Contractor's referral of the dispute to adjudication operated in some way to alter the rights which it would otherwise have had.

108. Neither side had sought any relief in relation to these question in the pleadings. In the light of my conclusion that no element of the Decision is enforceable the question of whether the Employer would have remained liable to pay the notified sum subject to subsequently seeking return of any overpayment notwithstanding the Decision is academic for the purposes of these proceedings. Interesting though Mr. Mort's contentions were I do not need to address that issue any further.

109. The position is not so clear cut in respect of the consequences of my finding that Payment Notice 34 was invalid. Neither party sought relief in the pleadings whether by way of declaration or otherwise in respect of that issue. Moreover, it is to be noted that matters have moved on since payment cycle 34. In particular I note in that regard the force of Mr. Wygas's point that the sums payable on each due date are cumulative and that as there has now been a payment application and a payment in respect of payment cycle 35 that will be proper subject-matter of any further dispute. Mr. Wygas made that point in support of his contention that the court should decline to make any declarations at all as to payment cycle 34. I do not accept that argument in respect of declaratory relief as to the invalidity of Payment Notice 34 where there was a live dispute between the parties but it is relevant when considering the extent to which I should go beyond that. The correspondence shows that there is a dispute as to the effect of Payment Application 34 with the Contractor contending that the Employer is liable to pay the full sum set out there. However, neither party sought to amend its pleadings to include a claim for relief in respect of that and neither side sought to put before me the terms of any proposed order in that regard. On balance I have concluded that it is not appropriate for me to set out a conclusion let alone give any relief on the consequences of my determinations that the Decision is not enforceable and that Payment Notice 34 was invalid. Not only was there no application for relief in that regard but also the terms of any dispute as to those matters are not entirely clear and the question may well be academic in the light of the developments since payment cycle 34.

Conclusion.

110. I will hear further submissions as to the appropriate form of relief but the effect of the conclusions I have reached is that the Employer is entitled to a declaration that the Decision is unenforceable. In those circumstances it is not open to the Contractor to threaten to suspend works by reason of a failure to pay the sum directed in the Decision but, subject to submissions, my current view is that there is no need for a declaration to that effect. As explained above I do not propose addressing the other matters not currently in issue as to the entitlement which the Contractor might or might not retain in relation to Payment Application 34. For its part the Contractor is entitled to a declaration that Payment Notice 34 was invalid. There is no longer any issue as to the invalidity of Payment Notice 34a and, again subject to submissions, it does not appear that a declaration is necessary in that regard.