Neutral Citation Number: [2023] EWHC 3339 (TCC)

Case No: HT-2022-BRS-000026 and HT-2022-BRS-000027

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

2 Redcliff Street
Bristol BS1 6GR

Date: 11/1/2023

Before :

HHJ RUSSEN KC

- -

Between:

LJR Interiors Limited	**Claimant**
- and -	
Cooper Construction Limited	**Defendant**

And Between:

Cooper Construction Limited	**Claimant**
- and -	
LJR Interiors Limited	**Defendant**

- -
- -

Phil Mosson (surveyor) for **LJR Interiors Limited (**acting by its director Luke Tomes)
Harry East (instructed by **Hill Dickinson LLP**) for **Cooper Construction Limited**

Hearing dates: Thursday 17th November and 22nd December 2022

- -

Approved Judgment

This judgment (a draft of which was circulated to the parties on 7 January 2023) was handed down remotely at 10.00am on 11 January 2023 by circulation to the parties by email and its release to The National Archives.

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HHJ RUSSEN KC

HHJ Russen KC:

Introduction

1. This is my judgment on the Part 7 Claim issued by LJR Interiors Limited ("**LJR**") seeking enforcement, through the grant of summary judgment against Cooper Construction Limited ("**Cooper**"), of an adjudicator's decision ("**the Part 7 Claim**", Claim No. HT-2022-BRS-000026) and on the Part 8 Claim issued by Cooper seeking a declaration that the adjudicator's decision is void and unenforceable on the ground that the sum awarded in LJR's favour by the adjudicator was barred by limitation ("**the Part 8 Claim**", Claim No. HT-2022-BRS-000027). The Part 8 Claim resists enforcement of the adjudicator's decision dated 28 September 2022 ("**the Decision**") on that basis.

2. The Part 7 Claim and the Part 8 Claim have therefore been brought in accordance with the procedure for Adjudication Business prescribed by Section 9 of the TCC Guide. On 7 October 2022 I made the usual expedited directions for the hearing of the application for summary judgment on the Part 7 Claim on 17 November 2022. On 20 October 2022 Cooper issued the Part 8 Claim. Cooper contend that the Part 8 Claim falls squarely within the type of challenge recognised by Coulson J, as he then was, in *Hutton Construction Ltd v Wilson Properties (London) Ltd* [2017] EWHC 517 (TCC). In a passage of the judgment now replicated in paragraphs 9.4.4 and 9.4.5 of the TCC Guide, the judge said, at [17], that in order to resist summary judgment on an adjudication enforcement application by reference to a competing claim for declaratory relief under CPR Part 8:

> "…….. the defendant must be able to demonstrate that: (a) there is a short and self-contained issue which arose in the adjudication and which the defendant continues to contest; (b) that issue requires no oral evidence, or any other elaboration beyond that which is capable of being provided during the interlocutory hearing set aside for the enforcement; (c) the issue is one which, on a summary judgment application, it would be unconscionable for the court to ignore."

3. Under the expedited directions made on 7 October 2022, the Part 7 Claim was listed for a remote hearing of 90 minutes held via Microsoft Teams on 17 November 2022. The Part 8 Claim was then issued on 20 October 2022 with a request by Cooper's solicitors that it be listed for hearing at the same time on the basis of their view that both claims should be capable of being dealt with within that time estimate. At the hearing on 17 November 2022 LJR was represented by Mr Phil Mosson, LJR's surveyor through whom with my permission (and Cooper taking no objection) LJR made their representations, and by Mr Harry East on behalf of Cooper.

4. In the event, towards the end of a 90 minute hearing held remotely on that date I reached the conclusion that it was appropriate to adjourn both claims to a further hearing. The claims were listed for a further remote hearing on the afternoon of 22 December 2022.

5. The adjournment was to enable the parties to clarify their respective positions as to the date upon which LJR's right (if any) to payment of the sum awarded by the adjudicator accrued for limitation purposes. This was in circumstances where (so it then appeared) not only the Part 8 Claim Form but also the evidence in support omitted through clerical error to identify the date by which Cooper said the contract works undertaken by LJR were completed; where LJR's Application for Payment No. 3 (to which I return below) was neither in evidence nor in the court bundle but (once it had been clarified that it was still available to the parties) was a document which Mr East had offered to share by screen shot during the course of the hearing; and where, in response to me seeking to establish whether there was meaningful agreement over the accrual date in circumstances where they were not legally represented, LJR confirmed through Mr Mosson that they did not accept that all of the sums covered by Application for Payment No. 4 (upon which the adjudicator based his decision) had fallen due for payment more than 6 years before the date of that application. [In fact, as was pointed out in the further evidence filed by Cooper after the hearing, although the date relied upon for completion of the works was omitted by error from the Claim Form and the paragraph (number 17) of the supporting witness statement I had been focussing upon, the date was given elsewhere in that statement as "*on or about 19 October 2014*".]

6. LJR had not filed any evidence on the accrual date(s) point before the hearing on 17 November 2022. Although it therefore could not be said, by the end of that hearing, that the Part 8 Claim looked to be in danger of falling on the wrong side of a line aimed at identifying the proper limits of defensive declaratory relief in the adjudication enforcement context (see the authorities mentioned in paragraph 45 below) the other note of caution expressed by Coulson J in *Hutton v Wilson*, at [12], about the issues raised by such a claim potentially being less suitable for a shorter expedited hearing, was one which had begun to resonate.

7. At the hearing on 17 November, I was acutely aware that LJR was not legally represented on a claim which involved a challenge by Cooper grounded upon an alleged error of law on the part of the adjudicator. The point was said to be one which met the *Hutton v Wilson* test. Although the adjudicator had engaged with an argument on limitation, applying that test it therefore seemed to me to be appropriate to go back to basics, beginning with Cooper's case on the application of the Limitation Act 1980 ("**the 1980 Act**") to adjudication proceedings. I was also conscious that Cooper's approach to the limitation point before the adjudicator was, as I explain below, slightly different from the point made in the evidence (as it was then) in support of the Part 8 Claim. The initial approach on the Part 8 Claim was simply that the cause of action had accrued no later than completion of the works under the contract between the parties in October 2014, so that LJR's claim for payment made on 31 July 2022 ("**Application No. 4**") was statute barred by the time it was referred to adjudication in September 2022. It was Mr East's submissions at the hearing which took the point before me (as it had been taken by Cooper in the adjudication) that the claim was a re-submission of one already made of 31 October 2014 ("**Application No. 3**").

8. Accordingly, after the adjourned hearing and mindful of the conclusion on the Part 8 Claim being urged upon me by Cooper, on 14 December 2022 I sent an email to the parties in the following terms:

> "I am writing in advance of the adjourned hearing of the Part 7 adjudication enforcement claim and the Part 8 Claim listed for 22nd December. I have decided

to write to you because I am conscious that LJR is not legally represented in circumstances where Cooper's challenge to the adjudicator's decision is based upon the adjudicator having made a clear error of law. In advance of the next hearing, I would therefore be grateful if the parties (and in particular Cooper) would address their minds further to the following points:

1. The basis on which the Limitation Act 1980 (in this case section 5) is said to apply to adjudication proceedings. Mr East has pointed to the obiter dicta in the *Anglian Water* and *Connex* cases which assume a limitation defence may be taken in adjudication proceedings. On a very quick review of the textbooks, I also see that *Keating on Construction Contracts* (11th ed), at para.16-047 states that, when raised, limitation is a "substantive defence" to be considered by an adjudicator (no authority is cited); though I could not immediately see anything directly on the point in *Coulson on Construction Adjudication* (4th ed). I raise this now, on a point which most lawyers and judges might otherwise be guided by instinct, because s. 5 (and s. 8) of the 1980 Act applies to an "action" under a contract; and section 38 provides that "*unless the context otherwise requires, "action" includes any proceedings in a court of law, including an ecclesiastical court*." I recognise that this definition has been expressly extended by section 13(1) of the Arbitration Act 1996 to cover arbitral proceedings. Are you able to assist me further as to the legal basis on which the "cause of action" (per s. 5) may barred in a dispute referred to adjudication more than 6 years after its accrual?

2. In relation to accrual, the adjudicator essentially proceeded on the basis that only the provisions of Part II of the Scheme (once triggered by the making of a claim for payment) and specifically the deadline for Cooper to give a pay less notice were relevant to the question of lapse of time (or "delay"). His conclusion was that Application No. 4 was not invalid because "*the Scheme does not contain any provision limiting when a claim for payment under a relevant construction contract may be made*" (paragraphs 22 and 28). I recognise that Cooper's position in Mr Oram's first witness statement is that the cause of action accrued on completion of the works (the missing date of which was to be clarified in further evidence after the last hearing). The parties will need to address me on the applicability or otherwise of the payment provisions in Part II of the Scheme (or some of them) to the terms of the contract created by LJR's quote dated 9 July 2014 and Cooper's purchase order dated 26 August 2014.

Thank you in advance."

9. In response, Mr East submitted by his skeleton argument for the adjourned hearing that, while there was no time bar for submitting a dispute to adjudication, a construction contract was obviously still a contract for the purpose of section 5 of the 1980 Act (the language of the section is set out in paragraph 52 below). However, on the question of how it is that the provisional decision-making process of adjudication (what I said might be described as a "non-action") falls within the scope of the section, he had been unable

to find anything beyond the obiter dicta in the two cases already identified by him and mentioned in the first query above. I address Mr East's further submissions on my second query, which he made in the light of the further evidence from Cooper mentioned next, in the later section of this judgment which addresses the application of the limitation period to LJR's disputed payment application.

10. In accordance with the directions I made on 17 November, both Cooper and LJR filed further evidence. Cooper's further evidence exhibited the 4 applications for payment which LJR had made, including Application No. 3.

11. At the conclusion of the further hearing on 22 December 2022 I indicated that I felt unable to give the extempore judgment I had otherwise intended to give that day, albeit with much abbreviated reasoning in support of my decision, because of developments at the hearing. The first was Mr Mosson raising an argument under section 29(7) of the 1980 Act. This was based on Cooper being said to have acknowledged a debt to LJR in an email dated 20 December 2016 so as to set the limitation period running again. Secondly, Mr Mosson pointed out that he had not seen Mr East's skeleton argument for the hearing (which had only been sent to the court after midnight that morning) which further explained Cooper's position that the retention element of the claim referred by LJR to adjudication duplicated another element of Application No. 4. The last was Mr East making a passing reference to the case of *PC Harrington Contractors Ltd v Tyroddy Construction Limited* [2011] EWHC 813 (TCC) and, having identified the relevant paragraph for my further reference, inviting me to give subsequent consideration to that decision in relation to nature of the retention payment included within Application No. 4.

12. I was also mindful of the potential (see below) for there to be further disputes between the parties on contracts they entered into in 2014 separately from the one addressed in this judgment.

13. I therefore decided it would be appropriate to give the parties the opportunity to make further brief observations on these new points in correspondence by 6 January 2023 when I would then give my judgment.

14. The issue of the application of section 5 of the 1980 Act in adjudication proceedings, when it might be said to be confined to court and arbitral proceedings, struck me as a one which needed to be addressed. This was despite my impression that, consistent with the parties' representations to him, the adjudicator assumed the section could potentially apply to adjudication proceedings; even though in the Decision he used the conclusory language of it being "*not relevant*". Nevertheless, the section applies to bar the remedy not the underlying right, as he noted, and it is therefore unlike other provisions of the 1980 Act – specifically s. 3(2) and s. 17 – which provide truly substantive defences in that they operate to extinguish title. Viewed in that light, the court should be sure the section can be invoked within the context of a dispute resolution process which is aimed at producing a "remedy" in the form of a decision which is only temporarily binding pending any final determination of the dispute in legal or arbitral proceedings (or by agreement).

15. For that reason, I have explored the issue in this judgment, though my conclusions about the basis on which the 1980 Act applies to adjudication proceedings (as distinct from any later legal or arbitral proceedings covering the same dispute) should be read with

the caution that they are largely the product of my own thoughts and therefore lack the firmer footings usually provided by full adversarial legal argument.

Background

16. On or about 26 August 2014 the parties entered into a written contract under which LJR agreed to carry out dry lining, plastering and screed works for Cooper at a development property in the village of Minster Lovell, Oxfordshire. The contract comprised LJR's letter and revised quote dated 9 July 2014 and Cooper's purchase order dated 26 August 2014 ("**the Contract**"). The quote was £18,675 plus VAT. LJR had based their quote on the measurements and prices attached to it. Cooper's purchase order stated: "*All quantities and work is subject to remeasurement*."

17. LJR's letter of 9 July 2014 said the following about payment of the quoted sum of £18,675 plus VAT:

> "*1. Terms*
>
> *a) Our rates make allowance for 2.5% mcd, based on payment to be made 28 days from Invoice / Valuation, based on an Invoice being submitted on the last day of each month. We reserve the right to recover any costs incurred as a result of late payment".*

18. The Contract contained no recognition of, or provision for the reference of disputes to adjudication, so the adjudication provisions of Part I of the Scheme for Construction Contracts (under the 1998 Regulations, as amended) ("**the Scheme**") was implied into it by section 108(5) of the Housing Grants, Construction and Regeneration Act 1996, as amended ("**the 1996 Act**"). As I explain below, the Decision was also based upon Part II of the Scheme governing the timing of payments under the Contract by reason of section 110(3) of the 1996 Act. The inference is that the adjudicator did not consider point 1 of LJR's letter of 9 July 2014 to have provided an adequate mechanism for determining the timing and amount of any of the payments falling due under the Contract. In the Decision the adjudicator relied upon the fact that Cooper had not given a pay less notice in response to LJR's application for payment within the period prescribed by paragraph 10 of Part II.

19. Cooper's evidence served after the first hearing on 17 November 2022 confirmed Cooper's case that the works under the Contract were completed on 19 October 2014 and also observed that this date had been given in evidence before the adjudicator and not been challenged by LJR.

20. On 31 July 2022, almost 8 years after they had finished works under the Contract, LJR submitted to Cooper Application No. 4 in the sum of £3,256.58 excluding VAT.

21. Cooper did not respond to Application No. 4 either by paying it or responding with a pay less notice.

22. On 9 September 2022 LJR gave notice of intention to refer a dispute under Application No. 4 to adjudication. In accordance with paragraph 1(3)(b) of Part I of the Scheme, LJR's Notice said that the dispute arose "*on or about 28 August 2022 when the notified sum due was not paid by the final date for payment*." Interest on the sum claimed by Application No. 4 was sought for the period commencing 28 July 2022.

23. On 12 September 2022 Mr Robert Ames FRICS MCIArb was nominated as adjudicator and confirmed his acceptance of the appointment.

24. LJR represented itself in the adjudication and Cooper were represented by Mr Howard Klein FCIArb, FCIOB, FinstCES, MRICS of Klein Consult Ltd. Through Mr Klein, Cooper had reserved its position on the validity of Mr Ames' appointment (by reference to the point that LJR's application for a nomination under the RICS Summary Adjudication Procedure was said to be incompatible with the Scheme) but Mr Ames responded by indicating that he considered he had jurisdiction over the dispute and would continue to act.

25. Cooper's Response to the referral, dated 22 September 2022, also said that Application No. 4 was a "*cynical precursor to launching a "smash and grab" adjudication for an exaggerated sum of money*" and (by reference to the earlier applications for payment under the Contract mentioned below which indicated that LJR considered the sum of £1,900.04 excluding VAT to have been due in 2015) that "*42% of the sum applied to be paid on the subject Application for Payment was completely bogus*." Later paragraphs of the Response referred to 87% of Application No. 4 being "*bogus*" or "*fraudulent*", by reference to the further inclusion of a "*spurious*" administration charge of £750 in Application No. 4 and, because LJR was said by Cooper to know this to be the case, to section 2 of the Fraud Act 2006.

26. On the question of limitation, which is the question raised by the Part 8 Claim, Cooper's Response said of Application No. 4:

> "*Also, it was issued outside the Limitation Period of six years, in accordance with section 5 of the Limitation Act 1980 as the Limitation Period commenced upon the issue of the Referring Party's Application No. 3 that the Referring Party issued on 31 October 2014*."

27. Application No. 3 was the last of three applications for payment under the Contract made by LJR in 2014. Cooper's Response had identified those applications as being Application No. 1 (dated 30 August 2014), Application No. 2 (dated 30 September 2014) and Application No. 3 made on 31 October 2014. The (VAT exclusive) difference between the cumulative total of the sums sought by the three application and the sums paid by Cooper was £1,900.04. Cooper's Response referred to the fact that, on 13 March 2015, Mr Mosson on behalf of LJR had prepared a draft online Claim Form against Cooper for recovery of that amount. The draft said it was due under a Default Payment Notice dated 11 February 2015 and interest was payable from 30 November 2014 (30 days from the date of Application No. 3). At the hearing on 22 December, I was shown correspondence between the parties in February and March 2015 which shows that LJR knew that Cooper was disputing part of the claim under

Application No. 3 by reference to the time said to have been spent by LJR on preparation and dubbing out work.

28. LJR's Reply to Cooper's Response was submitted to the adjudicator on 23 September 2014. On the issue over the limitation period, it said that it "*only commenced from the date of the "facts" as indicated in the email from Cooper's dated 20 December 2016*". That email was attached to the Reply. The subject matter of it was "*Retentions*" (under a number of contracts) and I return to it at the end of this judgment in addressing LJR's argument based on section 29 of the 1980 Act.

29. LJR's Reply also said:

> "*LJR Interiors Ltd have on record, further requests for outstanding monies/retention to be paid as follows:*
>
> *28th November 2016*
>
> *31st October 2016*
>
> *13th March 2015*
>
> *11th February 2015*."

30. Cooper responded to the Reply with its Rejoinder dated 26 September 2022. This pointed out that the email of 20 December 2016 had referred to an earlier email of 12 March 2015 which, if LJR's approach was correct, would have crystallised the cause of action. But the Rejoinder went on to assert that the cause of action actually accrued 28 days from the date of the invoice (i.e. Application No. 3) and therefore on 28 November 2014.

31. The Rejoinder concluded the response on the limitation issue by saying:

> "*12. For the avoidance of doubt, the "cause of action" was either 28 November 2014 when the Respondent failed to pay the sum invoiced for by the Referring Party, or, although denied by the Respondent, on 12 March 2015 when the Respondent issued the email refusing to pay the sum invoiced by the Referring Party and provided its reasons for refusal. In either case and in accordance with the above mentioned Supreme Court's Judgment* – [this was a references to the decision in Matthew & Others v Sedman & Others [2021] UKSC 19 which was appended to the Rejoinder] – *the Limitation Period had expired prior to the Referring Party issuing its invalid Application for Payment No. 4 that it issued on 29 July* [sic] *2022*."

32. By the Decision the adjudicator concluded that Application No. 4 was a valid application for payment which complied with section 110A(3) of the 1996 Act. He noted that no pay less notice had been given by Cooper as provided for by paragraph 10 of Part II of the Scheme. He addressed the issue of limitation by saying:

"39.00 While Cooper raised the issue of the Limitation Period in respect of the validity of the Application, I consider also whether section 5 of the Limitation Act 1980 operates to bar the remedy sought by LJR.

40.00 I understand the general rule in contract is that a cause of action accrues when the breach takes place.

41.00 The breach alleged here by LJR is the failure to make payment of a sum claimed due by the final date for payment, namely 28 August 2022.

42.00 On that basis the limitation period pursuant to section 5 of the Limitation Act 1980 has not expired.

43.00 Accordingly, I find that LJR was entitled to the notified sum of £3,256.58 by the final date for payment."

33. The adjudicator had previously said in the Decision the following of relevance to the limitation point:

"The delay in applying for payment:

22.00 The Contract does not contain any such provisions as are mentioned in subsection 110(1) of the Housing Grants, Construction and Regeneration Act 1996 as amended (the Construction Act) and accordingly the relevant provisions of the Scheme for Construction Contracts (England and Wales) 1998 as amended (the Scheme) apply.

23.00 The Scheme does not contain any provision limiting when a claim for payment under a relevant construction contract may be made. I am not persuaded that any delay in the submission of the Application renders it invalid."

…….

"Limitation Period and Section 5 of the Limitation Act 1980

28.00 The limitation period under section 5 of the Limitation Act 1980 operates to bar a remedy, it does not extinguish a right. Section 5 of the Limitation Act 1980 is not relevant to the matter of the validity of the Application."

……..

"Conclusion

30.00 The application of the relevant provisions of Part II of the Scheme operate on the basis that the payee may make a claim for payment. Accordingly, I am satisfied that pursuant to S. 110B(4) of the Construction Act the Application is a valid payees payment notice complying with S. 110A(3)."

34. Having also rejected Cooper's reliance upon section 2 of the Fraud Act 2006, on the basis that he was not persuaded that Application No. 4 claimed anything other than an amount LJR genuinely considered to be due, in addition to the principal sum of £3,256.58 the adjudicator awarded LJR interest calculated at a daily rate from 29 August 2022 to the date of the Decision, plus statutory compensation of £70 for late payment pursuant to the Late Payment of Commercial Debts (Interest) Act 1998.

35. Cooper instructed its solicitors Hill Dickinson LLP soon after the Decision was made.

36. On 5 October 2022 Hill Dickinson wrote a detailed letter to LJR setting out their view that the Decision is unenforceable. Whilst again reserving Cooper's position in relation to the adjudicator's jurisdiction, the reason for this was the sum claimed in the adjudication "*is and always was statute barred*". The letter referred to section 5 of the Limitation Act 1980 and to certain authority on the issue of the accrual date of a cause of action under a contract, including one involving payment for work and services. It also addressed the right of a party to a construction contract to refer a dispute to adjudication "*at any time*" in accordance with section 108(2)(a) of the 1996 Act (a phrase also used in paragraph 1(1) of Part I of the Scheme) and contained extensive quotes from the decisions in *Connex* and *Anglian Water*, which I address below, in support of Hill Dickinson's point that this did not permit a time-barred claim to be referred to adjudication.

37. The letter of 5 October 2022 was relied upon by Mr David Oram, a partner in Hill Dickinson, in his first witness statement dated 20 October 2022 in support of the Part 8 Claim. Mr Oram's approach to the issue of limitation (including by reference to the letter) was more straightforward than Mr Klein's had been in the Response and Rejoinder in the adjudication and their reliance upon the date of Application No. 3. Mr Oram simply relied upon the date of the completion of the works as providing the accrual date for a claim for payment under a contract for those works.

38. Mr Oram said:

> "*17. From the submissions put forward within the Adjudication, it is common ground that the contract was entered on 28 August 2014 and the works were completed on. It is further common ground that application 4 was submitted on 31 July 2022, and the Adjudication was commenced on 9 September 2022 by service of a Notice of Intention to refer the dispute to Adjudication."*
>
> [I have already noted that the missing date for completion of the works was in fact given in paragraph 6 of the statement as "*on or about 19 October 2014*".]
>
> *"18. I would submit it is clear on its face that in those circumstances the sums claimed by LJR within application 4 are and always were statute-barred. Further, the onus is on LJR to explain why that is not the case and they have felt fit to put no submissions forward in relation to the same."*

39. In that first witness statement in support of the Part 8 Claim, Mr Oram also said:

> *"It is relevant that whilst the sums in the current action and the Adjudicated Decision are modest, behind this action LJR has submitted similar applications in July 2022 to Cooper across a myriad of other contracts. Cooper's position in relation to all of those other contracts is that they are all statute-barred. It is anticipated that LJR are awaiting the results of this current action before deciding how to deal and progress those other applications."*

40. Mr Oram's second witness statement dated 24 November 2022 was served in accordance with my directions for further evidence made at the first hearing. From the exhibited applications for payment made by LJR it can be seen, as Mr Oram states, that the second and third applications submitted in 2014 were prepared on the basis of a running total for measured works carried out under the Contract (as well as inclusion of the value of materials on site in the second and additional work in the third). Although not apparent from the typed content, as opposed to manuscript annotations, Mr Oram says that, consistent with this basis of their preparation, the second and third reflected sums already paid by Cooper (as well as a deduction for a retention amount).

41. Application No. 3 was in the sum of £14,030.90. The gross sum in Application No. 4 is £14,780.90. Comparison between the two shows that the two applications include identical entries for "Measured Works" and "Additional Rates/Work". Application No. 4 also included an "Admin Charge" of £750. The net sum of £3,256.58 (excluding VAT) sought by Application No. 4 reflects that additional administration charge, a "Retention Release" sum of £606.54 and the deduction from the figure of £14,780.90 of the combined sum of £12,130.86 paid by Cooper in response to the three earlier applications for payment in 2014.

42. Mr Oram said that the retention sum of £606.54 represented a build-up of retention deductions withheld by Cooper on the three earlier applications. That is supported by the gist of the communications identified in LJR's Reply in the adjudication (paragraphs 28 and 29 above). Mr Oram recognised that the Contract did not provide for retentions to be made but explained that the parties had contracted with each other at least 6 times in 2014 in relation to other sites. The other contracts had been on Cooper's standard form of Subcontract Order and Agreement. In the case of the work at Minster Lovell, a junior staff member of Coopers had issued the purchase order instead of the standard form. Cooper's standard form of subcontract (exhibited by Mr Oram) provided for a 5% retention of which half would be released at practical completion and the other half at the end of a rectification period of 12 months from completion. Mr Cooper said that the retention in the case of Minster Lovell reflected the normal course of other dealings between the parties to which LJR took no objection.

43. As Mr Klein had argued on behalf of Cooper in the adjudication, and Mr East had urged in his skeleton argument for the hearing on 17 November, Mr Oram said in his second statement that it was clear that:

> "…….. *Application 4 is simply a rehashing of Application 3 with the addition of a £750.00 admin fee that is not a contractual obligation, nor has it been explained by LJR. The retention release is a request for withheld monies to be paid, they should not be a new sum*."

Analysis and Conclusions

(1) The Permissible Scope of Challenge

44. I have mentioned in the Introduction above Cooper's reliance upon the authority of *Hutton v Wilson.* That case and others make it clear that there are limits upon the ability of a defendant to resist enforcement of an adjudication decision when the authorities (including *Hutton v Wilson* at [14]) also establish that in most cases the principle of "pay now and argue later" means that it is irrelevant that an adjudicator's decision may have been a wrong one.

45. The limits which constrain the defendant's pursuit of declaratory relief designed to supersede an adjudication decision, so that the payment obligation is "undone", are largely borne by procedural considerations, as explained in that case, and those in turn are underpinned by the cash-flow objective of the Scheme. Such considerations provide the basis for the first and second attributes of a permissible CPR Part 8 challenge identified in *Hutton v Wilson*: see paragraph 2 above. Subsequent cases have confirmed that a Part 8 response to an adjudication enforcement claim is not appropriate where the claim to declaratory relief involves determination of disputed facts, or assumed facts which might be challenged later in substantive proceedings, or there are other reasons which should disqualify it from piggy-backing on the abridged time and expedited directions appropriate for the enforcement claim: see, e.g., *Merit Holdings Ltd v Michael J Lonsdale Ltd* [2017] EWHC 2450 (TCC) at [20]-[21]; *Victory House General Partner Ltd v RGB P&C Ltd* [2018] EWHC 102 (TCC) at [6]; and *Amey LG Limited v Amey Birmingham Highways Limited* [2019] EWHC 234 (TCC), at [19].

46. The third attribute identified in *Hutton v Wilson* looks more to the product than the procedure and is aimed at identifying cases where the adjudicator has not just gone wrong but done so in a way it would be "*unconscionable for the court to ignore*." In *Hutton v Wilson*, at [18], Coulson J gave some examples of the last type of error such as the construction of a contract which was beyond rational justification or an insupportable categorisation of a document as something it was not. At [19], the judge talked about the need for the consequences of the issue raised by the defendant to the enforcement proceedings to be "*clear cut*".

47. A test which involves identifying a point which it would offend the conscience of the court to ignore, in this context of a review of the *provisional* nature of an adjudication decision which does not purport to determine finally the parties' contractual rights and obligations, therefore sets the bar higher than would apply to a questionable judicial decision. No judge below one at the highest appellate level can expect a wrong decision to go uncorrected because it is not "wrong enough" nor, or at least not usually, because the timing of the challenge to its correctness is regarded somehow as being precipitate.

48. Although Cooper recognise the need to meet the *Hutton v Wilson* test on the Part 8 Claim, on any view Application No. 4 was not the typical type of application for payment during the currency of a construction contract which the provisions of Part II of the Scheme are designed to support. Although Mr Oram (and Mr Klein before him) had described it as being the basis for a 'smash and grab' adjudication, it is perhaps

better viewed as a return to an otherwise cold contractual scene long after the time when any appropriate investigations into it might be expected to have concluded.

49. In his opening submissions at the hearing on 17 November 2022, Mr East began by challenging the adjudicator's jurisdiction to determine the limitation point. My reaction to that was to question whether this was a point taken by the Part 8 Claim which, so I had understood, was not that the adjudicator could not have decided the point but that he had decided it wrongly (and against the submissions of Mr Klein which had urged him to decide it in Cooper's favour). Mr East drew my attention to the language of the Part 8 Claim Form and its adoption of Mr Oram's witness statement which referred to Cooper not accepting that the adjudicator was "*within his jurisdiction to determine the limitation issue*." However, Cooper's reservation of a jurisdiction challenge was noted in the context of Mr Oram urging the court to decide the limitation point on the Part 8 Claim advanced independently of any defence to the Part 7 enforcement claim. By the end of the hearing on 17 November, Mr East confirmed that I was only being asked to impugn the validity of the Decision on its merits.

50. To that end, two essential questions arise on the determination of the Part 8 Claim:

    i) Was the Decision wrong in concluding that Application No. 4 was not statute barred?

    ii) If so, is the adjudicator's error one which it would (adopting the *Hutton v Wilson* test) be unconscionable for the court to ignore on the Part 7 adjudication enforcement claim?

51. On behalf of Cooper, Mr East submitted that Application No. 4 represented the re-submission of Application No. 3. He said that the Contract was a simple contract within the meaning of section 5 of the 1980 Act and that payment was due at the latest upon completion of the works under it or the date when Application No. 3 was submitted (or, alternatively, fell due for payment).

(2) Limitation and Adjudication Proceedings

52. Section 5 of the 1980 Act provides as follows:

> "An action founded on simple contract shall not be brought after the expiration of 6 years from the date on which the cause of action accrued."

53. Section 38(1) of the 1980 Act states that, unless the context otherwise requires *""action" includes any proceedings in a court of law, including an ecclesiastical court*". The scope of the 1980 Act has of course been extended to cover arbitral proceedings by section 13(1) of the Arbitration Act 1996 which provides that "*The Limitation Acts apply to arbitral proceedings as they apply to legal proceedings*."

54. Mr East observed in his skeleton argument for the November hearing that the courts appeared not to have considered the issue of limitation in adjudication proceedings. His submission was that the right of a party to refer a dispute to adjudication "*at any time*" (per section 108(2)(a) of the 1996 Act and paragraph 1 of Part I of the Scheme) did not obviate the impact of the contractual limitation period in any dispute referred to adjudication (he said *"it must be an aberration*") or, if it did have that effect, it did not undermine its defensive application in these subsequent legal proceedings to enforce the Decision. Again, in relation to his first point, I note that the limitation point in this case arises out of an atypical payment notice so far as the Scheme's general objective of supporting cash-flow during and soon after contractual performance is concerned.

55. Mr East relied upon the two authorities identified in Hill Dickinson's letter of 5 October 2022: the decision of Edwards-Stuart J in *Anglian Water Services Ltd v Laing O'Rourke Utilities Ltd* [2010] EWHC 1529 (TCC) and that of the Court of Appeal in *Connex South Eastern Limited v M J Building Services Group Plc* [2005] EWCA Civ 193. He also relied upon the Supreme Court judgment in *Aspect Controls (Asbestos) Ltd v Higgins Construction Plc* [2015] UKSC 38.

56. *Anglian Water* did not concern a substantive limitation defence raised in a dispute referred to adjudication. Instead, one of the questions for the court was whether or not a contractual provision, which required a party dissatisfied with the adjudicator's decision (or the absence of a timeous decision) to notify his intention to arbitrate the dispute within a time limit of 4 weeks, was incompatible with section 108 of the 1996 Act. The argument that it was incompatible and of no effect was based upon the right under section 108(2)(a) to refer a dispute to adjudication "*at any time*". The court rejected that argument. Section 108 said nothing about a right to refer a dispute *to arbitration* at any time and, at [18], *"[[t]he fact that a party cannot start proceedings by way of arbitration in respect of any particular dispute until he has obtained a decision from an adjudicator on that dispute has no bearing whatever on his ability to choose when to refer a dispute to adjudication*."

57. The decision in *Anglian Water* therefore has no direct bearing on the limitation issue I have to decide. However, the obiter dictum of Edwards-Stuart J (also at [18]) about the entitlement of a party under the 1996 Act to refer a dispute to adjudication from day one of the contract is revealing for his observation that "*[p]rovided there is a legitimate dispute, that right subsists (at least in England and Wales, in practice, if not in theory) up to the time when his cause of action becomes statute barred*."

58. I have been left a little puzzled by the judge's references to "practice" and "theory" (when I assume by the latter he had well in mind the law under the 1980 Act whose territorial scope is explained by its section 41) but if they are inverted, as it is possible he may have intended, then it is a very neat summary of the conclusion I have reached below on the law applicable to those rare cases such as the present where a dispute is referred to adjudication long after contractual completion.

59. The Court of Appeal's judgment in *Connex* concerned an appeal from declaratory relief granted by the judge which confirmed the subsistence of the contractor's right to refer a dispute to adjudication under section 108 of the 1996 Act after its purported acceptance of the employers' repudiation of the contract. The Court of Appeal allowed the appeal against the judge's finding that the scope of the referral against one of the two employers under the contract was limited by the terms of a subsequent letter of

release affecting the works instructed by one of them. The cross-appeal by the other employer was based on the argument that it was "an abuse of process" for the contractor to start adjudication proceedings in February 2004 so long after its purported acceptance of the repudiation in November 2002.

60. Again, that argument involved consideration of the phrase "*at any time*" in section 108(2)(a) of the 1996 Act. And, again, doing so led to an observation by the court about the potential impact of a limitation defence to the referring party's entitlement to a financial award. Having observed, at [38], that "*the phrase 'at any time' means exactly what it says*", Dyson LJ, as he then was, said:

> "39. There is, therefore, no time limit. There may be circumstances as a result of which a party loses the right to refer a dispute to adjudication: the right may have been waived or the subject of an estoppel. But subject to considerations of this kind, there is nothing to prevent a party from referring a dispute to adjudication at any time, even after the expiry of the relevant limitation period. Similarly, there is nothing to stop a party from issuing court proceedings after the expiry of the relevant limitation period. Just as a party who takes that course in court proceedings runs the risk that, if the limitation defence is pleaded, the claim will fail (and indeed may be struck out), so a party who takes that course in an adjudication runs the risk that, if the limitation defence is taken, the adjudicator will make an award in favour of the respondent."

61. Mr East's argument on the present issue rested upon the obiter dicta in *Anglian Water* and *Connex*. They are clearly persuasive in reinforcing an almost instinctive response that it seems difficult to identify a good reason why a limitation defence should not, like any other defence to a payment obligation, form part of a "dispute" to be referred to adjudication. This is particularly so when, even though an adjudication might not fall within the definition of an "action" in the 1980 Act, the decision which comes out of it often leads (as in the present case) to court proceedings that plainly do.

62. Mr East also relied upon the decision of the Supreme Court in *Aspect Contracts (Asbestos) Limited v Higgins Construction Plc* [2015] UKSC 38. This concerned the issue of limitation in the context of an adjudication but the focus was upon the limitation period applicable to proceedings brought by Aspect for repayment of a sum paid in August 2009 in accordance with a decision of the adjudicator on a dispute referred to her by Higgins. Aspect's claim was based upon an implied term, alternatively a claim in restitution, and the principle (reflected in paragraph 23(2) of Part I the Scheme) that the adjudicator's decision was provisionally binding, and therefore to be complied with, but required a payment which, Aspect contended, a final determination in the legal proceedings would show not to have been due.

63. The Supreme Court held that Aspect's cause of action arose from the payment and the claim could be brought at any time within 6 years from the date of payment. Aspect had commenced proceedings on 3 February 2012. They were therefore not statute barred, as Higgins had contended, by reference to the accrual dates which governed Higgins' own claim against Aspect either in contract (barred under section 5 of the 1980 Act and the lapse of 6 years by 27 April 2010) or in tort (barred under section 2 by early 2011) for alleged breach of contract or negligence in carrying out an asbestos survey.

As for Higgins, they might have brought their own proceedings to enforce the adjudicator's decision within 6 years of it being made. Such proceedings would have been founded on the contractual obligation to comply with the decision. However, the counterclaim which Higgins wished to make in the proceedings brought by Aspect, for the additional loss allegedly caused by Aspect which did not form part of the adjudicator's decision, was statute barred by either section 5 or section 2.

64. The decision in *Aspect* therefore did not therefore concern any limitation point for consideration by the adjudicator. However, Lord Mance observed, at [28], that:

> "…. If there is an adjudication award within 6 years of performance, without any further proceedings being commenced, both sides are after the six year period time-barred in respect of any claim to any balance which they originally contended to be due to them. Any further proceedings would be limited to a claim for repayment by the party required to pay a net balance to the other."

65. This observation underpinned the conclusion that Higgins' counterclaim for the balance allegedly due to them was barred by limitation but, although it contained an assumption that the adjudication process (which his lordship had earlier described as "*a speedy provisional measure*") would be completed within 6 years from contractual performance, and that must surely be an obviously sound one for almost all adjudication referrals, it was directed only to the barring of legal proceedings which are brought too late.

66. Nevertheless, the Supreme Court's recognition of a limitation period of 6 years for the commencement of legal proceedings to enforce an adjudicator's decision provides, in my judgment, a further reason why the decision itself should recognise any limitation defence that operates to defeat the claim advanced under the referred dispute. Otherwise, a contracting party would, through the grafting on of the discrete limitation period which applies to any action to enforce the decision, benefit from a much longer limitation period than section 5 of the 1980 Act contemplates for the bringing of legal proceedings. As Mr East submitted, the powers conferred upon an adjudicator by the 1996 Act and the Scheme should not be read as permitting this. The fact that the enforceability of the decision rests upon a *contractual* (and statutorily-backed) obligation to comply with it, when its provisional nature distinguishes it from a judgment or arbitral award, in my view instead points to the conclusion that the limitation period applicable to contract claims under section 5 (or under section 8 for those made by deed) should be treated as the operative one at both levels of the dispute resolution process identified in paragraph 23(2) of Part I of the Scheme.

67. A statement in *Keating on Construction Contracts* (11th ed), at para.16-047, supports this approach:

> "The Limitation Act 1980 and other enactments apply equally to adjudication in the sense that an adjudicator must treat the law of limitation as a substantive defence just as any other defence."

68. No authority is cited in support of what, almost instinctively, after a pause to reflect upon the true nature of a defence which does not extinguish the right but *in certain types of legal proceedings* operates to bar the remedy, appears to be a statement of the obvious. However, the provisions of Part I of the Scheme seem to me to say enough to support it when they require the adjudicator to reach his decision "*in accordance with the applicable law in relation to the contract*" (paragraph 12); provide that he may take into account "matters "*which he considers are necessarily connected with the dispute*" (paragraph 20); and recognise, as the decision-maker himself would, that the decision is effective subject to any later and final determination by a tribunal before whom there is no question but that an effective limitation defence might be raised within that same dispute (paragraph 23(2)).

69. Therefore, in my judgment, the context does require the term "action" in the non-exhaustive definition provided by section 38 of the 1980 Act to be read as including adjudication proceedings. On that basis, such proceedings are not expressly excluded (as are certain other non-court methods of payment recovery) from the meaning of "action" by section 38(11) of the 1980 Act. Further, adopting what Dyson LJ said in *Connex*, section 108(2)(a) of the 1996 Act cannot be read as prescribing any limitation period, so neither can it be suggested that section 39 of the 1980 Act operates to disapply its section 5.

70. However, should the point still be regarded as uncertain, because the Contract might be embraced by the language of section 5 but not the dispute resolution process of adjudication (the "non-action") implied into it, then I would nevertheless come to the alternative conclusion that it is enough that the court is required to consider it in the "action" which is plainly before it on the Part 8 Claim. In addition to his reliance upon the passages in *Anglian Water*, *Connex* and *Aspect,* this was Mr East's other submission on the present issue.

71. The key hallmark of a point which may operate to defeat such enforcement on a responsive Part 8 Claim (see paragraph 2 above) is that it should be one which on *a summary judgment application* it would be unconscionable to ignore. Provided that the party relying on the point had raised it previously with the adjudicator then in my judgment it can in principle meet the *Hutton v Wilson* test even if an adjudicator might be justified in assuming that the 1980 Act can have no traction in adjudication proceedings (which, I emphasise, is not my understanding of the approach taken in the Decision) and where the parties have not agreed for the purposes of paragraph 20 of Part I of the Scheme that a limitation defence forms part of the referred dispute. Paragraph 23(2) of Part I supports this approach on a Part 8 Claim which in effect accelerates the "final determination" by legal proceedings to the stage when the adjudication decision is sought to be summarily enforced.

72. This alternative conclusion is obviously less tidy because it proceeds on the basis that the key contractual ingredients of "*the dispute*" are fewer at the first level of the dispute resolution process in paragraph 23(2) than at the second; though it is worth emphasising again that the present case must be of a very rare kind where the timing of the referral to adjudication is such as to prompt consideration of a limitation defence based on the 6 year period under section 5. It also does nothing to discourage the cost of corrective legal or arbitral proceedings where such lateness counts for nought at that first level. However, I believe the conclusion is consistent with what the Supreme Court said in *Aspect*, at [32] about the adjudicator's reasoning having no legal (or evidential) weight

and the ability of the court to "*look at the whole dispute*." The Supreme Court confirmed that this means that a party will not be confined in those later, determinative court proceedings to points which the adjudicator decided in its favour. The same ought to apply to a legally sound point raised by the dissatisfied party through (a *Hutton v Wilson* compliant) Part 8 challenge where the adjudicator's decision on the point was unfavourable to the claimant but the court considers it is able to reach the contrary conclusion on a summary basis with consequences that are "*clear cut*".

73. In the present case, the adjudicator did not ignore the limitation point as a 'non-point'. As appears above, the parties engaged with it on the basis that it was within the scope of the adjudication (compare paragraph 20 of Part I of the Scheme). The adjudicator concluded that section 5 was "*not relevant*" to the validity of Application No.4 (paragraph 28 of the Decision). He addressed the provision but decided that LJR's claim was not time barred: see paragraphs 32 and 33 above.

(3) The limitation period applicable to Application No. 4

74. The adjudicator decided the limitation point on the basis that LJR's cause of action accrued on 28 August 2022. As explained above, that date had been identified in LJR's notice of referral as the final date for payment and the one on or about which the dispute arose.

75. It is clear from the Decision (at paragraphs 22, 23, 36, 37 and 41) that the adjudicator based his reasoning on the limitation point upon Part II of the Scheme to which he considered himself directed to give effect by section 110(3) and section 111(1) of the 1996 Act. The Scheme did not impose any time limit upon the making of an application for payment by LJR and Cooper had not given LJR a pay less notice no later than 7 days before the date for payment in accordance with paragraph 10 of Part II of the Scheme (imported by section 111(3)-(7)). Accordingly, he concluded LJR's cause of action (for limitation purposes) did not arise before 28 August 2022 and section 5 of the 1980 Act could not in those circumstances operate to bar the remedy of payment.

76. The adjudicator's emphasis (see paragraphs 28 and 39 of the Decision) upon a limitation defence operating to bar a remedy rather than the underlying right shows that his conclusion that LJR had the right to make Application No. 4 when they did, with the result that it was a valid application, was key to this reasoning. Only timescales within Part II of the Scheme triggered by the making of a claim for payment (specifically the deadline for Cooper to give a pay less notice) were considered to be relevant. His conclusion that Application No. 4 was not invalid because "*the Scheme does not contain any provision limiting when a claim for payment under a relevant construction contract may be made*" (paragraphs 22 and 28), his adoption of an accrual date of 28 August 2022 (paragraphs 40 and 41) and his conclusion on interest and compensation for late payment (paragraph 44) each show that any "delay", or lapse of time, before 31 July 2022 - the date of Application No. 4 - was in his view immaterial.

77. In my judgment, this was an erroneous approach. It paid no regard to the terms of the Contract, as to when the right to payment of the balance sought by Application No. 4 accrued, and it appears to have assumed that the absence of a pay less notice (taking the

limitation defence or any other objection to payment of that sum) meant that it was unnecessary to consider whether the application itself was timely enough.

78. The adjudicator's conclusion that the Scheme does not contain any provision limiting when a claim for payment under a relevant construction contract may be made was based upon the Contract having failed to provide what payments fell due under it and when they fell due. The adjudicator referred to section 110(1) of the 1996 Act (compare also paragraph 3 of Part II of the Scheme) but, just as LJR's notice of dispute dated 9 September 2022 omitted any mention of them, the Decision did not address LJR's payment terms (see paragraph 17 above) or explain why they did not provide "*an adequate mechanism*" for payment of the final payment due under the Contract. Those terms may fairly be read as providing for LJR to submit invoices for stage payments based upon the value of work performed ("*Invoice/Valuation*") and stipulating that the relevant payment would fall due 28 days after the date of the invoice (LJR referred to the recovery of "*costs*" rather than interest but their terms expressly recognised that ay payment made after that due date would be "*late*".). I recognise that LJR's terms did not specify the *amount* of any stage payments (compare paragraph 1 of Part II which applies paragraphs 2 and 4 thereof in relation to stage payments). However, although Mr East did not argue as much, it is not clear to me why those terms should not be regarded as adequately covering LJR's right to submit an invoice, payable within 28 days, for the difference between the contract price and the total of previous instalments of the price paid by Cooper (so that paragraph 5 of Part II was not a "relevant provision" to be applied by paragraph 3).

79. *Keating* (op. cit.) states, at para. 16-029:

> "Most standard forms for construction works provide for interim certification of sums due. Where such certificates are a condition precedent to the right to payment, the contractor's cause of action to be paid and to challenge the adequacy of the certificate accrues when the certificate is issued or ought to have been issued in accordance with the contract and not when the work giving rise to the certified sum is carried out. Further, depending on the precise wording of the contract, a further cause of action may arise when the final certificate is issued or ought to have been issued even though the sum in issue happens to be the same as that arising under an interim certificate."

80. The decision of the Court of Appeal in *Henry Boot Construction Ltd v Alstom Combined Cycles Ltd* [2005] EWCA Civ 814; [2005] 1 W.L.R. 3850 is cited in the text to support of that last proposition. In that case the court held that, on the true construction of the contract between the parties, the contractor's entitlement to payment, whether an interim or final payment, arose not when the work was done but when the engineer certified the amount to be paid by the employer, or ought to have certified it on the basis that the contractor was entitled to have a certificate issued. An amount which the contractor was entitled to have certified for interim payment, but which was not so certified, could give rise to a separate cause of action arising out of the certification of the final payment, given the different nature of the provisional and final certifications under the contract, but the claim to interest on that amount was statute barred to the extent it was based on an entitlement which arose more than 6 years prior to the commencement of the arbitration.

81. In *Henry Boot v Alstom* the employer's limitation defence to payment of the sum valued by the final certificate had been referred to the engineer for his consideration in accordance with the dispute resolution provisions of the contact. The engineer made no decision on the limitation point which was subsequently decided in favour of the employer by the judge-arbitrator and then substantially in favour of the contractor by the Court of Appeal. Central to the reasoning of the Court of Appeal was the "*fundamental difference*" between what the contract under consideration required at the provisional interim certification stage and the final certification stage. On my assumption that a limitation defence is indeed a substantive defence which falls also to be considered on a dispute referred to adjudication, the Court of Appeal's judgment supports both the statement in *Keating* and the conclusion that a limitation defence may be raised in response to a "late" application for payment: i.e. one which "ought to have been issued" sooner than it was in fact issued.

82. It is also important, having regard to LJR's payment terms, to note that Dyson LJ said, at [60], that the position in relation to limitation would be different if, say, the contract price was to be paid by equal monthly instalments. In such a case, the right to claim the first instalment would accrue at the end of the first month and the right to sue for that instalment would become statute-barred 6 years after that date. LJR's terms were not as clear as that but they did provide for monthly billing, as reflected in Application Nos. 1 to 3.

83. The Contract was not a standard form contract of the kind envisaged by the quoted passage in *Keating*. However, Cooper's Response and Rejoinder in the adjudication relied upon the fact that Application No. 4 was (save in relation to what they said was the "*spurious*" administration charge of £750) seeking sums which had been said to have fallen due on 28 November 2014 following completion of the works and the submission of Application No. 3.

84. The adjudicator rejected Cooper's other points about the genuineness of Application No. 4, made by reference to its overlap with Application No. 3 and what LJR had indicated in 2015 was the balance of the running account (£1,900.04 plus VAT), by concluding that Application No. 4 represented nothing other than the amount LJR genuinely considered to be due. However, I am only concerned with the correctness of the Decision on the limitation issue.

85. In my judgment the adjudicator was wrong to ignore LJR's own payment terms and the evidence before him which showed that, through Applications Nos. 1 to 3 and the payments in response, the parties had acted on those terms and that Application No. 4 largely duplicated Application No. 3 in seeking a final payment under the Contract. Cooper had also relied upon the draft Claim Form prepared by LJR in March 2015 with a proposed claim for interest from 30 November 2014. The adjudicator's failure to address these points meant that no consideration was given to the objection that (allowing for the kind of situation recognised in *Henry Boot* and noting LJR's later addition of the administration charge) a limitation period cannot be "renewed" simply be making a claim for payment of sums previously demanded and otherwise barred from recovery on limitation grounds. The exclusive reliance upon the Scheme to establish a payment accrual date of 28 August 2022 was not justified. Even LJR's Reply had asserted an accrual date for limitation purposes of 20 December 2016. It was therefore obvious that the dispute was not the typical kind arising from a payment application made in the interest of maintaining cash flow under a construction contract,

so as to support a decision whose required speediness might trump the need for it to be correct.

86. In my judgment, LJR's right to payment of all sums identified in Application No. 4 which match those in Application No. 3 was one which accrued on 28 November 2014. So much is obvious from their inclusion within Application No. 3. The unpaid balance of those sums did not somehow become "due again" for limitation purposes simply by virtue of being demanded again over 7½ years later.

87. Even if the adjudicator was right to consider that payments under the Contract were governed by Part II of the Scheme, in the absence of an adequate payment mechanism specified by its terms, then, as Mr East submitted, the evidence shows that LJR had made a claim for final payment for the measured works and additional works covered by Application No. 4 by the earlier Application No. 3. On that basis, with the works having been completed earlier than the date of Application No. 3, the final payment became due on 30 November 2014 (under para. 5 of Part II) and the final date for its payment was 17 December 2014 (under para. 8(2)).

88. The claim in Application No. 4 for the release of the retention (£606.54) by Cooper on the sums paid in response to Application Nos. 1 to 3 is less cut because the Contract did not make provision for retention monies. The evidence and submissions before the adjudicator did not focus upon this and it was not separately addressed in the Decision. However, the course of dealings between the parties indicates, as Mr Oram suggested, that LJR was entitled to claim any outstanding retention monies no later than 12 months from practical completion of the works. Indeed, their dealings were such that half of the £606.54 should have been sought at the same time as Application No. 3. Mr East drew my attention to an email dated 4 March 2015 from Mr Mosson to Cooper which suggested that the parties might mediate the issue over the correct amount payable in response to Application No. 3. The email went on to say: "*In the meantime, please can you release 50% of the retention held on this project and confirm the date practical completion was achieved*." This is evidence of the parties' course of dealing.

89. The evidence before the adjudicator (in the form of the unchallenged witness statement of Andrew Cooper dated 21 September 2022) was that LJR completed their works under the Contract on 19 October 2014. That is also the date given in the unchallenged evidence before me. It supports the conclusion that (subject to LJR's argument based upon a revival of the limitation period by Cooper's acknowledgment of indebtedness in December 2016) any claim for payment of the retention made some 7½ years after completion of the works, and 6½ years after allowance for an assumed 12 month rectification period, was statute barred.

90. At the December hearing Mr East mentioned the decision *in PC Harrington Contractors Ltd v Tyroddy Construction Limited* [2011] EWHC 813 (TCC) which I have since considered. It concerned a challenge in Part 8 proceedings to an adjudicator's decision for the payment of retention to the defendant sub-subcontractor. A retention of 3% had been agreed but the sub-contract contained no express provision for its release. The adjudicator's decision was in part based upon his conclusion that one half of the retention should have been paid at completion of the works and the other half 12 months later, even though no final account had been agreed by the parties. Akenhead J accepted the challenge by the Part 8 Claim based upon recognition of the claimant's

right to defend the claim to the retention monies by reference to alleged overvaluation of past work and consequential overpayment.

91. However, on the question of when the retention fell due for payment, the judge said:

> "24. I am wholly satisfied, and this is primarily a legal view, that there is no implied term or term of the contract by way of construction that the retention is only payable once the final accounting process has been finalised. It is not necessary to imply any such term because retention money really represents a credit that is already due to the sub-subcontractor in this case. It will broadly be payable following completion when the sub-sub-contractor wishes to claim for it after completion; it will be payable by implication by Harrington within a reasonable time of completion by Tyroddy. At that stage, it may be met by a defence which may in part be abatement, a set-off or counterclaim or it may raise valuation issues; however, there is no need to imply a term and I certainly cannot construe any of the words that are used here to say that retention only becomes payable at some future final accounting stage. There is no room either by way of interpretation of the words used or by way of implication to imply any such term."

92. One of the points made in Mr Mosson's second witness statement was that LJR was "*never notified of completion of this project and any retentions were wrongly deducted and never released. No notice of practical completion has been received or issued by Cooper*." However, that second did not stop LJR claiming one half of the retention by the email of 4 March 2014 and the making of that claim was consistent with the analysis of a retention in *Harrington Contractors*.

93. The actual amount of retention to which LJR was entitled was linked to the dispute between the parties about payment under Application No. 3 which had emerged by early 2015. Indeed, in support of the case that the retention release element of Application No. 4 was also time barred, Cooper's position was that the retention sum sought by LJR was already fully accounted for by the sum which LJR contended was the shortfall in payment under Application No. 3: the £1,900.04 identified in the draft Claim Form prepared in March 2015.

94. Mr Oram's second witness statement referred to this element of duplication but Mr East's skeleton argument explained more clearly by reference to Application Nos 1 to 3 that the sum of £606.54 represented the cumulative total of the retentions (at 5%) on the payments Cooper made in response to those applications. As the applications were presented on the basis of a rolling total, rather than each application presenting a new total each time, the contemplated claim for £1,900.04 by reference to a shortfall in payment under Application No. 3 necessarily included the rolled-up amount of retentions made by Cooper. (£124.32 under the first, £208.18 under the second and £274.04 under the third). On the basis that the 5% retention was "*a credit that is already due*" (to use the language of Akenhead J in *Harrington Contractors*) LJR were already claiming it as the difference between the value of Application No. 3 and the payment made by Cooper in response to that application.

95. At the December hearing, Mr East said in response that Mr Mosson should already be familiar with the figures as he prepared the draft Claim Form. However, Mr Mosson

indicated that he would like to reflect upon the point which Mr East had elaborated upon.

96. By further submissions in an email dated 6 January 2023, Mr Mosson appeared to recognise the gist of Mr East's point that the sums credited by LJR in Application No. 4 as having been paid to date (£12,130.86) were sums paid net of retention; though Mr Mosson's suggestion that "the gross figure is £13,000.00" indicates a rolled-up retention figure of £869.14 rather than the £606.54. In any event, for limitation purposes, the element of duplication between the claim for retention release and the claim for the balance between the net sums paid and the value of the measured work and variations sought by Application No. 4 shows that the former added nothing to that which could have been sought (as was sought) by Application No. 3.

97. The Decision also did not separately address the administration charge of £750 (net of VAT) included within Application No. 4. Cooper's Response and Rejoinder in the adjudication assumed the charge was an attempt to circumvent the rule against the recovery of costs of adjudication (though I note the dispute was not referred to adjudication until almost 6 weeks later). LJR simply said the adjudicator should not be concerned with "*the merits of the value*" of Application No. 4.

98. Even if the Decision had been right to conclude that the terms of the Part II of the Scheme governed the issue of limitation to the exclusion of the Contract, and although Cooper did not take this point, I would still have had doubts about its application to the recovery of this administration charge. The Scheme makes provision for the payment and dates of payment for the "work" (and, as appropriate, materials) provided under a construction contract, against the context of "the contract price" under the contract. For these purposes "work" is defined by reference to section 104 of the 1996 Act (and, through the total payment value attributed to it, the term itself gives definition to the "contract price"). Mr Mosson confirmed to me that the there was no evidence about the basis of the administration charge. Without knowing anything more LJR's administration charge than what is said about it in Application No. 4, it is not at all obvious that it relates to work or services of the kind specified in section 104.

99. In my judgment the unchallenged date given for the completion of LJR's works under the Contract also clearly points to the conclusion that any claim for payment of the administration charge was statute barred by 31 July 2022, unless LJR can make good its argument based upon a fresh accrual of the cause of action through an acknowledgment of the claim by Cooper in December 2016. Again, the Contract made no provision for an administration charge. (The only additional charge expressly envisaged by LJR's quote was in fact for the recovery of "*costs incurred as a result of late payment*" which *might* be an indication, beyond what LJR said in their Reply in the adjudication, that LJR were claiming the £750 on the basis that the other sums claimed had fallen due before 31 July 2022.) Subject to LJR's point about the December 2016 acknowledgment of the claim, I cannot see any basis on which a claim for payment of an administration charge under the Contract requiring performance no later than 19 October 2015 (on the basis of an assumed 12 month rectification period) would not be statute barred by 31 July 2022.

100. Finally, I therefore turn to the argument raised by Mr Mosson at the December hearing that an email from Cooper to LJR dated 20 December 2016 constituted an acknowledgment of the claim, at a time when it was not statute barred, so as to set the

limitation period running again. That email addressed the issue of retentions under the 6 contracts between Cooper and LJR. It was written in response to emails from LJR dated 31 October and 28 November 2016, apparently requesting payment of retentions, which were not in the evidence before me. In relation to the Contract, it said:

> "*Please see our email dated 12 March 2015 we had already overpaid you on the account and so therefore retention on this contract is £9.84*."

101. Although the email addressed the 6 contracts separately (and the sum of £9.84 under the Contract was *not* included alongside other retentions that were said to be the source of a contra-charge under the sixth contract) Cooper's position in relation to another contract (the fifth) was that the work had been defective and "*[t]here will be contra-charge against you once the work is complete for this amount*" – the sum of £1,117.84 was identified – "*and as there isn't sufficient retention held on this job or any others then you will owe us money*."

102. I have already mentioned that LJR had placed reliance upon the 20 December 2016 email in their Reply in the adjudication. However, it was not then relied upon in support of an argument based upon an acknowledgment of the claim (as opposed to a source of facts relevant to the commencement of the limitation period) and the Decision did not address it.

103. The point raised by Mr Mosson at the December hearing was that the email was an acknowledgment for the purposes of section 29 of the 1980 Act. As it had been made within the limitation period otherwise applicable to the Contract (compare ss. 29(7)) the effect of the suggested acknowledgment was that LJR's right of action to recover the claim made by Application No. 4 should be "*treated as having accrued on and not before the date of the acknowledgment*" (ss. 29(5)). Mr Mosson said this was sufficient to prevent the right of action to recover the debt sought by Application No. 4 being statute barred.

104. At the hearing, and mentioned again in subsequent supplemental submissions dated 6 January 2023, Mr East suggested that the reference in the 20 December 2016 email to an earlier email of 12 March 2015 (in which Cooper said they had overpaid LJR under the Contract and there was therefore only a balance of £10 outstanding) meant that the later email added nothing in terms of an "acknowledgment". Therefore, the earlier acknowledgement would see the limitation period expiring in March 2021 and before Application No. 4. However, as I indicated at the hearing, section 29(7) operates on with the effect that, provided it has not already expired, the limitation period can be revived by a subsequent acknowledgement. On this basis, if effective as an acknowledgment under section 29, the December 2016 would have revived a still current limitation period.

105. Section 30 of the 1980 Act requires an acknowledgment to be in writing and signed by the person making it if it is to be effective for the purposes of section 29. It may be made by a duly authorised agent of the person liable or accountable for the claim and is required to be made either to the person whose claim is being acknowledged or to that person's agent. The email of 20 December 2016 was sent to Mr Mosson at his LJR

email address. It was sent from the email address of Julie Marsh, the PA to Andrew Cooper (the Managing Director of Cooper), and concluded "*Regards, Andrew*".

106. Although I have no difficulty in accepting that abbreviated form of electronic signature on behalf of Cooper would satisfy the requirements of section 30, in my judgment the email cannot be treated as a sufficient acknowledgment of the "*debt or other liquidated pecuniary claim*" for the purposes of section 29(5).

107. In response to my question, Mr Mosson suggested an acknowledgment of a debt of £9.84 due under the Contract was sufficient to set the clock running again for the commencement of proceedings for the recovery of a significantly greater sum under it. He said this not only held good for the £3,256.58 sought by Application No. 4 but would also sustain an otherwise time-barred claim for, say, £1 million (which I contemplated by my further rhetorical question).

108. I do not accept that submission. It is clear from the language of section 29(5) that what is required is an acknowledgment of "*the claim*" which is constituted by the accrual of a right of action to recover "*any debt or other liquidated claim*". Although some indefinite language is therefore used in identifying the subject matter of any such pecuniary claim, the acknowledgment must be of *that claim*, whatever its value, and not just part of it. This is also clear from the concept of a part payment (the separate trigger under section 29(5) for a fresh accrual of the cause of action) and the reference to the obligor making "*a payment in respect of it*" (i.e. in respect of "*the claim*"). Therefore, it is not sufficient for the claimant to be able to say that there has been an acknowledgment of some indebtedness in a smaller sum than the otherwise time-barred claim. This conclusion is consistent with the aim of the 1980 Act being to curtail litigation over claims that are unduly stale, when the lapse of time since they arose may well lead to evidential difficulties in proving or defending them. A subsequent and clear enough acknowledgment (or an avowedly partial or 'on account' payment) by the defendant removes that concern based upon staleness, and resets the clock, but only so far as it recognises "the claim".

109. In my judgment, this interpretation of section 29(5) is supported by the decision in *Dungate v Dungate* [1965] 1 WLR 1477 which addressed the equivalent provision in section 23(4) of the Limitation Act 1939 (which was in materially the same terms save that it referred to an acknowledgment by the person liable or accountable "*therefor*" rather than repeating the reference to *"claim*"). In that case Edmund Davies J held that a written acknowledgment of indebtedness could be effective to defeat a limitation defence even though it did not express the amount of the debt. The Court of Appeal upheld that decision, agreeing that it was sufficient that the amount of the debt could be identified by extraneous evidence. But the important point (using the words of Edmund Davies J, at p. 1483G) is that the court should be able to "*identify the acknowledgment with the debt".* The same point emerges from the decision in *Surrendra Overseas Ltd v Government of Sri Lanka* [1977] 1 W.L.R. 565, also addressing section 23(4) of the 1939 Act, where Kerr J said, at p. 575E-G, that a debtor "acknowledges the claim" within the meaning of the statute if he acknowledges his indebtedness and legal liability "*to pay the claim in question*", that being that "*that which the plaintiff seeks to recover*."

110. In the present case, a £10 acknowledgment cannot be identified with a disputed claim for over 300 times as much.

111. Further, and this was the point taken by Mr East in his supplemental submissions, there is also the difficulty that, read as a whole, the email of 20 December 2016 did not contain an admission by Cooper of any liability to LJR; not even in respect of the £9.84. On the contrary, the email said that the retention of that sum under the Contract and other contractual retentions was insufficient to meet Cooper's claim in respect of defects under the fifth contract and "*you will owe us money*". Read as a whole, as *Surrendra* establishes it should be, the email does not amount to an acknowledgment of a claim by LJR which satisfies section 29(5) of the 1980 Act: compare *Surrendra* at p. 575C-H and *Revenue & Customs Commissioners v Benchdollar Ltd & Ors* [2009] EWHC 1310 (Ch); [2010] 1 All ER 174, at [22].

112. It therefore follows that section 29(5) of the 1980 Act does not operate to undermine the conclusion that LJR's claim under Application No. 5 was statute barred by limitation when it was referred to adjudication.

113. Accordingly, the Decision was in my judgment clearly wrong in ignoring the limitation defence available to Cooper; and that error is one on which the court should act in accordance with the guidance in *Hutton v Wilson*. That defence, by its very nature and arising as it does out of LJR's referral so long after contractual completion, brings clear cut closure to the financial implications of the Contract.

Disposal

114. I therefore dismiss the Part 7 Claim and LJR's application for summary judgment.

115. On the Part 8 Claim I will grant the declaratory relief sought by Cooper to the effect that the claim under Application No. 4 is statute barred and the Decision requiring payment of the sum sought by it is unenforceable.

116. I conclude this judgment by repeating what Coulson J said in *Hutton v Wilson*, at [12]-[13], and is now made clear in paragraph 9.4.3 of the TCC Guide, about the need for parties to address their collective minds to the appropriate listing arrangements and proper time estimate for a hearing at which arguments in support of final declaratory against the summary enforcement of an adjudication decision are to be advanced. Even acknowledging that some may regard my excursion into the principle of the applicability of the 1980 Act to adjudication proceedings to have been unnecessary, when the present type of situation must be so rare and in this case the parties made representations to the adjudicator on the basis that limitation was one aspect of their dispute, it should have been obvious that the issues raised by the Part 8 Claim could not be properly aired and fairly decided within the expedited 90 minute hearing initially set aside for the summary judgment application. It is equally obviously to me that the emergence of new points (and references to additional material or authority) at both that hearing and the later one, which, again, fairness demanded should be given proper consideration by the court, was the inevitable consequence of the Part 8 Claim being shoehorned into to the expedited procedure. It is the responsibility of parties, legally represented or not, to ensure that all relevant issues for the court's determination are identified and addressed in good time before a hearing at which there is then time available for the judge to consider them and, if appropriate, give a decision on them.

117. This judgment has been handed down remotely by email circulation to the parties and its uploading to The National Archives. In order to preserve LJR's position on any appeal I will adjourn the handing down for the purpose of enabling any application for permission to appeal to be made to me and considered alongside my determination of any other consequential matters on which the parties are unable to agree. If an application for permission to appeal is made, I will set the time for filing any appellant's notice under CPR 52.12 by my decision on that application and any such consequential matters. In the absence of a further direction, I will determine these matters on the basis of the parties' further correspondence. LJR should file and copy to Cooper their representations for permission to appeal by 4pm on Friday 20 January 2023. If not agreed, Cooper should file and copy to LJR their representations on the issue of costs and/or the form of draft Order by the same deadline. Each should then file and copy any response to the opposing party's representations by 4pm on Friday 27 January 2023.