Neutral Citation Number: [2024] EWHC 933 (TCC)

Case Nos: HT-2024-CDF-000004
and HT-2024-CDF-000005

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

Cardiff Civil Justice Centre
2 Park Street, Cardiff, CF10 1ET

Date: 25 April 2024

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

- -

Between:

MORGANSTONE LIMITED	**Part 8 Claimant** **Part 7 Defendant**
- and –	
BIRKEMP LIMITED	**Part 8 Defendant** **Part 7 Claimant**

- -
- -

Harry Smith (instructed by **Acuity Law Limited**) for **Morganstone Limited**
Luke Wygas (instructed by **Knights Plc**) for **Birkemp Limited**

Hearing date: 15 April 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 25 April 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

.....

HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Introduction

1. This is my judgment upon two linked claims arising in respect of an adjudication decision dated 23 February 2024 ("the Decision"), whereby the adjudicator, Mr Robert Shawyer, decided that £207,076 was due from Morganstone Limited ("Morganstone") to Birkemp Limited ("Birkemp") upon the latter's interim payment application dated 31 August 2023 ("the August Application").

2. By a Part 8 claim issued in this court on 4 March 2024, Morganstone claims declarations (1) that Birkemp had no contractual right to make the August Application or any interim payment application after March 2023 and is therefore not entitled to be paid in respect of the August Application and (2) that, inasmuch as the Decision decided that Birkemp was entitled to make the August Application and to be paid in respect of it, the Decision is wrong in law and unenforceable. Birkemp defends the Part 8 claim on the basis that, on a true construction of the parties' contract, it had the right to make the August Application and has the right to make subsequent interim payment applications.

3. By a Part 7 claim issued on 5 March 2024 in the Business and Property Courts in Bristol and subsequently transferred by consent to this court to be heard along with the Part 8 claim, Birkemp seeks enforcement of the award in the Decision. It is common ground that, if Morganstone succeeds on the Part 8 claim, the Part 7 claim must be dismissed. If Morganstone fails on the Part 8 claim, it defends the Part 7 claim on the basis that the adjudication process breached natural justice, in that the adjudicator failed to consider defences advanced by Morganstone, and the award is therefore unenforceable.

4. I shall consider the Part 8 claim first, though there is a degree of overlap between the issues raised in the two cases. The Part 8 claim is potentially dispositive of the Part 7 claim. It raises the basic question whether Birkemp was entitled to make any interim payment application after March 2023. If it was not so entitled, it was not entitled to make the August Application and the award in the Decision is unenforceable.

5. I am grateful to Mr Harry Smith, counsel for Morganstone, and Mr Luke Wygas, counsel for Birkemp, for their clear and succinct submissions.

The Part 8 Claim

The Essential Facts

6. Morganstone is a building contractor based in Llanelli. Birkemp is a civil engineering contractor based in Pontypridd.

7. Morganstone is the main contractor for a housing development at a site in Swansea. In December 2021 it subcontracted various groundworks and associated works to Birkemp for a contract sum of £4,466,544.30. The formal sub-contract is dated 16 December 2021; it is necessary, however, to say something about how it came to be made.

8. On 24 November 2021 Morganstone issued to Birkemp by Dropbox various documents, which included a post-tender review document (ND.2), a monthly payment schedule (ND.8), and a draft sub-contract (ND.9).

9. The monthly payment schedule (ND.8) comprised a table with the following column headings:

- 2021/22
- Last day of Sub-Contract Application (Specified Date)
- Due Date
- Payment Notice
- Pay Less Notice
- Payment in Sub-Contractor Account (Final Date for Payment).

The first column (2021/22) listed the months from April 2021 to March 2022. The second column (Specified Date) listed against each month the final day of the preceding month (i.e. beginning with 31 March 2021 in row 1 and ending with 28 February 2022 in row 12). The third column (Due Date) showed in each row the 14th day of the month (i.e. beginning with 14 April 2021 in row 1). The fourth column (Payment Notice) specified in each case the 19th day of the same month, unless that day was a Saturday (in which case the date was Friday 18th) or a Sunday (in which case the date was Monday 20th). The fifth column (Pay Less Notice) showed either the first or the second Wednesday of the following month (i.e. beginning with 12 May 2021 in row 1). The sixth column (Final Date for Payment) showed in each case the second Friday of the same month (i.e. beginning with Friday 14 May 2021).[1] The monthly payment schedule did not define the terms used in the column headings, such as "Specified Date" and "Final Date for Payment".

10. The post-tender review document (ND.2) provided on page 12:

> "Frequency of Valuation Applications: Monthly
>
> Date on which Applications to be received: In accordance with the terms of the subcontract order. Refer to ND.8
>
> Payment to be made to Subcontractor within: In accordance with the terms of the subcontract order. Refer to ND.8".

11. The draft sub-contract was a three-page document comprising nineteen numbered clauses, printed on Morganstone's headed paper. Clause 18 provided:

> "The Contractor and the Sub-Contractor respectively acknowledge that this Agreement forms the entire contract between the Contractor and the Sub-Contractor to the exclusion of any antecedent statement or representation, including but not limited to the Sub-Contractor's quotation."

[1] Thus the date for the Pay Less Notice was two days before the Final Date for Payment. As the latter was always the second Friday in the month, the former could be either the first or the second Wednesday in the month.

Of particular importance in this case, clause 10 provided for payments under the subcontract.

> "10.1 The Sub-Contractor shall be entitled to be paid, during the progress of the Sub-Contract Works the Order Total specified in the Purchase Order for the Sub-Contract Works. Payment of the Order Total shall be made by interim instalments or stages in accordance with this clause 10 in respect of the Sub-Contract Works performed by the Sub-contractor and properly to the satisfaction of the Contractor, less any retention or discount which is applicable.
>
> 10.2 The Sub-Contractor shall submit to the Contractor an Interim valuation statement of the Sub-Contract Works properly executed ('the Sub-Contractor's Statement') not less than 25th day of each calendar month, such last day of each calendar month shall be the 'Specified Date'. The Sub-Contractor's Statement shall be made on the basis of the works completed in as defined in the Contract Sum Analysis. The Sub-Contractor's Statement shall be in such form as the Contractor directs and shall contain the basis upon which the sum is calculated.
>
> 10.3 Payment for Sub-Contract Works properly executed as at die [presumably, the] Specified Date, shall be due to the Sub-Contractor 27 days after the Specified Date ('the Due Date') and the Contractor shall no later than five days after the Due Date give notice to the Sub-Contractor of the amount calculated to be due to the Sub-Contractor ('Payment Notice'). The amount of the payment to be made to the Sub-Contractor on or before the Final Date for payment shall, subject to the Issue of a Pay Less Notice to be given under clause 10.4 below, be the amount stated as due in the Payment Notice. If a Payment Notice is not given, the amount to be paid, subject to any Pay Less Notice given under clause 10.4 below, shall be the sum stated in the Sub-Contractor's Statement. If a valid Payment Notice is not given in accordance with this clause 10.3, the sum to be paid by the Contractor [s]hall be the sum stated in the Sub-Contractor's Statement, subject to any Pay Less Notice.
>
> 10.4 Payment shall be made to the Sub-Contractor by the final date for payment which shall be 35 days after the Specified Date ('the Final Date'). If the Contractor intends to pay the Sub-Contractor less than the sum stated as due from it in the Payment Notice, it shall, not later than one day before the Final Date ('the Prescribed Period'), give the Sub-Contractor notice, of that intention ('Pay Less Notice').
>
> 10.5 Payments shall be due to the Sub-Contractor of any retention deducted pursuant to clause 10.1 as follows:

> 10.5.1 50% shall be released on the date stated within the Post Tender Review Minutes or as may be varied In accordance with this Agreement and subject to the satisfactory rectification of defects, faults and obligations Identified at completion of the Sub-Contract Works.
>
> 10.5.2 100% of the balance shall be released on the date stated within the Post Tender Review Minutes or as may be varied in accordance with this Agreement and subject to the satisfactory rectification of defects, faults and obligations identified during the rectification period (as the appropriate contract provides).

Notwithstanding the foregoing it should be noted that no retentions shall be released until the Contractor is in receipt of an appropriate application for payment in respect of the retention.

10.6 If payment is due under clause 10.4 but payment for that element of the Sub-Contract Works is not made under the Main Contract and the employer under the Main Contract becomes Insolvent in accordance with any part of the definition in either clause 7.1, 7.2 or 7.3 hereof, the Contractor shall be entitled to withhold payment to the Sub-contractor of that amount due for that part or all of the Sub-Contract Works.

10.7 Notwithstanding any other provision of this Agreement, no further sum shall become due to the Sub-Contractor, and the Contractor need not pay any sum that has already become due, either insofar as the Contractor gives or has given the Sub-Contractor a Pay Less Notice under clause 10.4, or if the Sub-Contractor, after the fast [presumably, last] date upon which such a Pay Less Notice could have been given by the Contractor in respect of that sum becomes Insolvent in accordance with any part of the definition in either clause 7.1, 7.2 or 7.3 hereof, until the Sub-contract Works have been comp[l]eted.

10.8 If the Contractor fails to make any payment due to the Sub-Contractor by the Final Date for payment, then the Sub-Contractor shall be entitled to be paid simple Interest on any sum due and outstanding at the rate of 2% per annum above the Bank of England Base Rate which, for the purposes of The Late Payment of Commercial Debts (Interest) Act 1998, shall and is hereby agreed to be a ‘substantial remedy’.

10.9 No payment made by the Contractor shall be construed as confirmation or acceptance by the Contractor that the Sub-Contract Works have been carried out in accordance with this Agreement.”

12. It is apparent, therefore, that the column headings in the monthly payment schedule (ND.8) correspond to the stages in the payment cycle provided for in clause 10. However, the timetable provided by clause 10 would have been significantly different, as follows:

- The application for payment would be made "not less than 25th day of each calendar month".
- The Due Date would be 27 days after the Specified Date, the latter being the last day in each calendar month.
- The Payment Notice was due no later than 5 days after the Due Date.
- The Final Date (for payment) was 35 days after the Specified Date.
- Any Pay Less Notice was due no later than 1 day before the Final Date.

13. On 26 November 2021 Birkemp responded by email to the documents, raising a number of issues including the following:

> "4. The payment date schedule needs to be extended to reflect the likely duration on site.
>
> 5. The payment clauses (clause 10) in the contract conflict with those in the schedule—we presume we will work to the schedule."

14. On 15 December 2021 Morganstone responded by email to those comments in the following terms:

> "4. Agreed, new payment schedule will be issued in the New Year.
>
> 5. Agreed, work to Morganstone payment schedule."

15. On 16 December 2021 Birkemp sent to Morganstone an email attaching scanned copies of *inter alia* the foregoing email exchange, ND.2 and the sub-contract; ND.2 and the sub-contract had each been signed in acceptance by Birkemp's director Mr Brian Bird. Both above and alongside clause 10 of the sub-contract there was written in manuscript, in red ink, "PAYMENT SCHEDULE TAKES PRECEDENCE".

16. Work under the sub-contract duly commenced, and the interim payments proceeded smoothly in accordance with the monthly payment schedule.

17. The dates in the monthly payment schedule ended in March 2022. On 6 April 2022 Birkemp emailed Morganstone:

> "Talking to Keith before he went on holiday he mentioned that our payment schedule needed updating, could you issue a new payment schedule please."

18. Morganstone responded on the same day, attaching an "updated monthly payment schedule for 2022" (which I shall call "the 2022 payment schedule"), which ran from April 2022 to March 2023.

19. In his submissions, Mr Smith pointed out that the numbers of days in the intervals between stages differed in the 2022 payment schedule from those in the original schedule. I do not see any relevance in the point. The structure of the 2022 payment schedule was the same as that of the original schedule. The Due Date was the 14th day of the month. The date for the Payment Notice was the 19th day of the month, subject to the adjustment where that was a Saturday or a Sunday. The final date for payment in each month was the second Friday of the month, and the date for the Pay Less Notice was the Wednesday two days before.

20. For the following year the parties conducted themselves in accordance with the 2022 payment schedule.

21. On 24 March 2023, shortly before the final date in the 2022 payment schedule, Morganstone sent to Birkemp by email a further monthly payment schedule (which I shall call "the 2023 payment schedule"), which ran for the following twelve months. The 2023 payment schedule had one structural difference from the previous schedules, in that the Final Date for Payment in each month was the third, not the second, Friday. (The date for the Pay Less Notice was correspondingly later, though it remained two days before the Final Date for Payment.)

22. On 30 March 2023 Birkemp complained to Morganstone that the 2023 payment schedule was incorrect, in that the specified dates for pay less notices and for payments were one week late, and it asked that the schedule be amended and reissued. Morganstone replied, maintaining that the dates were correct. Birkemp in turn maintained its contention that the dates were consistently one week late.

23. The parties never succeeded in reaching agreement on their difference in this regard. Birkemp made payment applications in accordance with the 2023 payment schedule, as it took no issue with the Due Date in that document, but Morganstone consistently issued pay less notices by reference to the dates in the 2023 payment schedule. It is common ground that Birkemp never agreed to be bound by the 2023 payment schedule and that Morganstone never agreed to revise it so as to make the Final Date for Payment the second Friday in each month.

24. On 31 August 2023 Birkemp issued the August Application, which was its twenty-second interim payment application.

25. On 8 September 2023 Morganstone issued a pay less notice against the August Application, making a number of deductions in respect of the amount claimed. However, it did so expressly without prejudice to its primary contention that Birkemp had no entitlement to apply for any interim payments. The contention was explained in the covering letter:

> "On 24 March 2023, the second payment schedule having expired, we issued a further schedule of dates for 2023-2024. You made clear on 30 March 2023 that this schedule was not agreed, and repeated that position in numerous emails thereafter.

> We did not agree with your position and did not issue an amended schedule as requested. Accordingly, no agreement was or has been reached in relation to this.
>
> Consequently, no payment schedule for 2023-2024 has been agreed. Absent such agreement, Birkemp has no right to issue applications for interim payments in that period: see *Balfour Beatty Regional Construction Ltd v Grove Developments Ltd* [2016] EWCA Civ 990. It follows that we have no obligation to issue a payment notice or pay less notice, and no obligation to make an interim payment."

26. Birkemp contested many of the deductions made by Morganstone as being "Inappropriate Deductions". This produced a dispute that the parties were unable to resolve.

27. On 4 December 2023 Birkemp issued a notice of intention to refer a dispute to adjudication. The adjudicator was nominated on 6 December 2023. By his Decision, he held that Birkemp had been entitled to make the August Application, that Morganstone had made some impermissible deductions, that Birkemp was entitled to be paid £207,076 together with interest, and that Morganstone should pay his fees.

28. Birkemp discharged the adjudicator's fees on 28 February 2024. Morganstone has not made any payment in respect of the Decision. In these proceedings it seeks to establish that it is not obliged to do so.

The Arguments

29. Morganstone rests its case on the decision of the Court of Appeal in *Balfour Beatty Regional Construction Limited v Grove Developments Limited* [2016] EWCA Civ 990 ("*Balfour Beatty*"). Grove had engaged Balfour Beatty under a JCT standard form Design and Build Contract, subject to a number of bespoke amendments, dated 11 July 2013. The contract specified 22 July 2015 as the date for practical completion. The contract also provided for stage payments at the completion of each stage specified in the contract particulars, in accordance with Alternative A in the contract (an alternative arrangement being provided in Alternative B). However, in the gap for a list of stages in Alternative A, the parties had written: "To be agreed within 2 weeks from date of contract." In the event, the parties were unable to agree any list of stages for incorporation. Instead, after some weeks they agreed that Grove should make interim payments to Balfour Beatty in accordance with a schedule listing the relevant dates in the months from September 2013 to December 2015 inclusive ("the Tumber schedule"). The interim payments proceeded smoothly until July 2015. It became apparent that the project would overrun substantially beyond the contractual completion date of 22 July 2015. The parties discussed the arrangements for interim payments beyond the final date in the Tumber schedule; however, although they both expected that interim payments would continue, they were in disagreement about the appropriate dates for applications, valuations and payments. That disagreement was never resolved. Eventually, Grove asserted that Balfour Beatty had no entitlement to receive interim payments beyond the final date in the Tumber schedule and it brought a Part 8 claim seeking a declaration to that effect. At first instance, Stuart-Smith J granted the declaration sought. By a majority (Jackson and Longmore LJJ; Vos LJ dissenting) the

Court of Appeal dismissed Balfour Beatty's appeal against that decision. The leading judgment was given by Jackson LJ.

30. In *Balfour Beatty*, it was common ground that by agreeing the Tumber schedule the parties had amended their contract and abandoned Alternative A. Jackson LJ and Longmore LJ rejected Balfour Beatty's argument that by agreeing the Tumber schedule the parties had adopted Alternative B: the timetable in the Tumber schedule was inconsistent with that in Alternative B. Jackson LJ said:

> "36. In my view, it is not possible to say that in September 2013 the parties simply agreed to adopt Alternative B. What they agreed was a hybrid arrangement which had elements of Alternative B (in particular valuation under clause 4.14) and a timetable of their own invention. That timetable ended on 22nd July 2015, the contractual date for practical completion."

As for the period after the final date in the Tumber schedule, Jackson LJ said this:

> "37. The parties made no agreement as to whether or how they would deal with interim payments after July 2015. Mr Walker has valiantly argued that clearly the parties intended monthly interim payments to continue. The dates of valuations, payment notices and payments were a matter of detail which could if necessary be resolved by adjudication or some similar mechanism. I cannot accept that. Identification of the dates for valuation, payment notices, Pay Less notices and payments were an essential feature. If Grove served notices out of time, the consequences would be Draconian (as BB asserted in their letter dated 30th September 2015). Both parties needed to know with certainty what were the applicable dates.
>
> 38. Mr Walker submits that to interpret the contract in this way creates a commercial nonsense. The parties cannot have intended that, if practical completion were delayed, BB would have to wait for payment until the final payment date under clause 4.12. Therefore the court must construe the contract as amended by the Tumber schedule as providing a continuing entitlement to interim payments after July 2015.
>
> 39. I reject this submission for three reasons. First, the express words used make it clear that the parties were only agreeing a regime of interim payments up to the contractual date for practical completion. See the Tumber email, which referred to the 'agreed schedule of valuation / payment dates for this project'. Neither the email nor the schedule made any provision for interim payments after July 2015. Secondly, it is impossible to deduce from the hybrid arrangement what would be the dates for valuations, payment notices, Pay Less notices and payments after July 2015. These were essential matters for the reasons previously stated. Thirdly, this is a classic case of one party making a bad bargain. The court will not, indeed cannot, use the

> canons of construction to rescue one party from the consequences of what that party has clearly agreed. There is no ambiguity in the present case which enables the court to reinterpret the parties' contract in accordance with 'commercial common sense', which Mr Walker seeks to invoke."

Jackson LJ went on to hold that the requirements for the implication of an implied term were not satisfied, so that there could not be implied any term providing for interim payments beyond July 2015.

31. For Morganstone, Mr Smith submitted as follows. The manuscript words appended to clause 10—"payment schedule takes precedence"—meant that the mechanism provided by clause 10 was to apply, subject to the use of the dates and timetable in the monthly payment schedule rather than the timetable in clause 10 itself. The manuscript words were not time-limited (for example, by the words "until March 2022"). The monthly payment schedule, however, was time-limited; it did not, for example, provide that the pattern of applications, notices and payments should continue until completion of the development. It was impossible to interpret the Sub-Contract as meaning that, when the monthly payment schedule expired, the timetable in clause 10 would apply, because the post-tender review document showed that applications and payments were to be made in accordance with the monthly payment schedule (ND.8) and the email exchange in November and December 2021 recorded the parties' agreement that a new payment schedule would be issued when the original schedule expired. The parties agreed to the 2022 payment schedule, which therefore had contractual effect. But they never agreed a payment schedule for the period after March 2023; therefore, as shown by *Balfour Beatty*, there was no ongoing right to interim payments. Any lack of "commercial common-sense" in the resulting position was simply the consequence of Birkemp failing to make an advantageous bargain—cf. *Balfour Beatty* at [39]—and it is not the function of the court to rewrite the parties' agreement. In the alternative, if the proper interpretation of the Sub-Contract was that clause 10 would apply by default, the position by August 2023 was very different, as neither party was seeking to rely on clause 10: Morganstone was relying on the 2023 payment schedule and Birkemp was relying on the pattern in the original monthly payment schedule and the 2022 payment schedule (cf. *Pagnan S.p.A. v Feed Products Ltd* [1987] 2 Lloyd's LR 601 at 611).

32. For Birkemp, Mr Wygas submitted as follows. Clause 10 was not deleted from the Sub-Contract; its operation was modified only. Clause 10 is an express provision for interim monthly payments during the progress of the Sub-Contract Works. The words "takes precedence" are clear: where there is a conflict between the monthly payment schedule—that is, in the months to which the monthly payment schedule relates—and clause 10, the former prevails. *Balfour Beatty* simply held that the parties were bound by the terms of their agreement. In that case, Alternative B was struck through and Alternative A was never agreed; instead the parties reached a different, time-limited agreement. That is not so in the present case. In the alternative, Morganstone is estopped from denying Birkemp's entitlement to continuing interim payments, in circumstances where the initial email exchange contained express affirmation that a further schedule would be issued and where, after expiry of the 2022 payment schedule, Morganstone continued to make interim payments and did not before the parties' relationship broke down contend that Birkemp's right to continued interim payments was dependent on agreement to the new schedule.

Discussion

33. The central principles of contractual interpretation are clear. In short summary, "The contract should be given the meaning it would convey to a reasonable person having all the background knowledge which is reasonably available to the person or class of persons to whom the document is addressed": *Dairy Containers Ltd v Tasman Orient CV* [2005] 1 WLR 215, *per* Lord Bingham of Cornhill at [12]. The law so summarised has been explained in detail by the Supreme Court in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36, [2015] AC 1619; and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173. A useful distillation was provided by Carr LJ in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645, [2021] BLR 97, at [18]-[19]. I have the judgments and the principles in mind but it is unnecessary to set out passages from the judgments here or to offer my own summary of the principles.

34. One point worth mentioning expressly is that, in construing a written agreement, the court does not generally, and subject to certain qualifications, receive evidence of the pre-contractual negotiations. On the other hand, "A concluded antecedent agreement may be relied upon in interpreting a later instrument made pursuant to the agreement" (Lewison, *The Interpretation of Contracts*, 8th edition, chapter 3, section 5). It was common ground between the parties before me that evidence of the email exchange in November and December 2021 was admissible, whether for the purpose of establishing a prior agreement or in order to explain the meaning of the manuscript addition to the Sub-Contract.

35. In my judgment, the submissions for Birkemp are materially correct in respect of the contractual position, though not in respect of estoppel.

36. *Balfour Beatty* was, in my view, a case that turned on the precise terms of the parties' agreement. The parties there may have envisaged and intended that further interim payments would be made but they had not actually reached agreement on essential matters; see the passage from Jackson LJ's judgment set out above. I cannot see that the case establishes any significant wider propositions of law. The question before me concerns the extent and limits of the agreement between Morganstone and Birkemp. The parties doubtless envisaged and intended that payment schedules would continue to be agreed for all periods during the currency of the development. However, they failed to agree a schedule for the period after March 2023. The question then becomes whether or not they had any applicable contractual agreement for that period. Morganstone answer that they had not. I do not agree.

37. It was common ground—and in my view rightly so—that clause 10 of the Sub-Contract was preserved but that its operation was modified; the parties differed as to the manner of the modification. Morganstone's position was that clause 10 was preserved simply as providing the mechanism by which the monthly payment schedule (or any subsequently agreed schedule) was to be implemented: thus, in the absence of an agreed schedule, clause 10 had nothing to which to apply. Birkemp's position was that clause 10 remained in force, save only that in the case of a conflict between it and the monthly payment schedule (or any subsequently agreed schedule) the schedule was to prevail: thus, in the absence of an agreed schedule, the provisions of clause 10 took full effect. Having regard to the provisions of clause 10 and the nature of the monthly payment schedule (ND.8), I regard the manuscript words appended to clause 10 as having their

natural and ordinary meaning: that in the case of conflict between the monthly payment schedule and clause 10—any such conflict being necessarily limited to timetabling—the monthly payment schedule would take precedence. This means that, once the schedule and any further agreed schedule ended, there was nothing to displace the timetable provided by clause 10. Morganstone's contention, that if Birkemp did not agree to the timetable in the 2023 payment schedule it would lose its right to interim payments, is in my view to get things the wrong way around: rather, if the parties did not mutually adopt a new payment schedule, the timetable in clause 10 would be operative, because there would be nothing to which it would cede precedence. Not only is this the straightforward interpretation of the contract; it also gives full force to the essence of clause 10.1, which is that stage payments should be made throughout the currency of the contract.

38. In my view, there is no merit in Morganstone's alternative contention based on the dictum in *Pagnan S.p.A. v Feed Products Ltd* [1987] 2 Lloyd's LR 601, at 611 (see paragraph 31 above). That dictum was concerned with the process of identifying whether any contract has been made, the Court emphasising the need to read the entirety of a sequence of relevant communications. The position in the present case was that a contract had been made; there is no issue in that regard. It is true that in August 2023 neither party was looking to implement the timetable in clause 10: Morganstone was seeking to implement the 2023 payment schedule, whereas Birkemp wanted a new schedule that continued the timetable in the 2022 payment schedule. However, the parties never reached agreement, as Morganstone has been at pains to emphasise. In those circumstances there is no basis for alleging a variation or revocation of existing contractual terms. The passage relied on by Mr Smith in the *Pagnan* case has nothing to do with the matter.

39. In the circumstances, it is unnecessary to say much about Birkemp's alternative estoppel argument. If it had arisen for decision, I would have rejected it for the reasons advanced by Mr Smith. First, the argument seeks to use estoppel as a sword rather than merely as a shield: cf. the first instance decision in *Balfour Beatty* [2016] EWHC 168 (TCC), 165 ConLR 153, at [40] *per* Stuart-Smith J. Second, after March 2023 the parties did not share any expressed common assumption as to interim payments, because there was an express dispute between them. Third, as to the suggestion that the parties shared at least a common assumption that there was an *entitlement* to interim payments, the grounds advanced for this suggestion amount simply to the fact that further payments were made in May, June, July and August 2023. However, I agree that such payments, without more, are equivocal, because they are not a clear indication of anything more than a willingness to make further payments and a desire to maintain a working relationship with the sub-contractor: cf. the same paragraph in Stuart-Smith J's judgment; also *Kersfield Developments (Bridge Road) Ltd v Bray and Slaughter Ltd* [2017] EWHC 15 (TCC), 170 ConLR 41, *per* O'Farrell J at [47]; and *A&V Building Solutions Ltd v J&B Hopkins Ltd* [2023] EWCA Civ 54, 206 ConLR 184, *per* Coulson LJ at [65].

40. For the reasons given above, the Part 8 claim fails.

Part 7 Claim

Introduction

41. The Part 7 claim is a simple claim for enforcement of the adjudication award in the Decision.

42. Morganstone's primary defence to the claim is that Birkemp had no entitlement to make the August Application. This has been considered within the Part 8 claim.

43. Morganstone's second ground of defence to the Part 7 claim is that the adjudicator failed or refused to consider certain defences by way of set-off that it advanced before him and that he thereby took an erroneously restricted view of his jurisdiction. Accordingly, it is said, the adjudication was conducted in breach of the principles of natural justice. Birkemp's response to this ground of defence is that the adjudicator's jurisdiction derived from the Notice of Intention to Refer and from the Referral Notice and that the adjudicator was correct to decide that Morganstone was raising issues outside the proper scope of the adjudication.

44. I shall set out the relevant facts and then consider the relevant authorities.

The Relevant Facts

45. On 31 August 2023 Birkemp issued the August Application.

46. On 8 September 2023 Morganstone issued a pay less notice in respect of the August Application, though without prejudice to its primary contention that Birkemp had no entitlement to further interim payments. Birkemp did not accept the figure in the pay less notice but contended that some of the deductions made by Morganstone were inappropriate. Birkemp valued those "Inappropriate Deductions" at £246,471.68.

47. On 4 December 2023 Birkemp gave written notice of its intention to refer a dispute to adjudication (the "Notice of Adjudication"). The Notice of Adjudication contained the following passages:

> "9. This dispute, the background to which is set out below, centres upon the inappropriate deductions and valuation of certain items set out in ML's Pay Less Notice dated 8 September 2023, which was sent in response to BL's August 2023 payment application issued on 31 August 2023 (the August Application), and the Adjudicator is hereby requested to value the specific items (the Inappropriate Deductions) set out below.
>
> 10. BL's description of the deductions set out below as 'inappropriate' is no admission that other deductions in the Pay Less Notice were in any way 'appropriate', and BL accordingly reserves its rights to pursue the other items within the August Application outside of this adjudication.
>
> …

13. The August Application was in the sum of £4,056,700.19 which, if certified, would have resulted in a sum due to BL of £1,193,361.69.

14. ML's Pay Less Notice certified a sum of £2,784,133.30 which, after retention, resulted in a sum due to BL of £50,318.57.

15. No payment was made to BL in respect of ML's certified sum. That non-payment is not the subject of this adjudication but is mentioned for background purposes.

16. As set out above, it is with ML's Inappropriate Deductions that BL takes issue, and believes to be incorrect and unlawful, and it is the Inappropriate Deductions that the adjudicator is requested to value.

17. The dispute therefore arose at Gorwydd Road, Gowerton, Swansea on or by 8 September 2023 when ML unlawfully withheld the Inappropriate Deductions from BL. A dispute then crystallised between the parties in relation to the value of the Inappropriate Deductions.

…

The redress sought

21. BL seeks the appointment of an Adjudicator to make the following decisions:

21.1 That by virtue of the value of the Inappropriate Deductions within the August Application, BL is entitled to payment by ML of the sums set out above (£246,471.68) or such other greater or lesser sum as the Adjudicator may decide is due.

21.2 That BL is entitled to interest at the Sub-Contract's interest rate of 2% above the bank rate of the Bank of England as set out below: …

21.3 That ML pays

(a) the fees and expenses of the Adjudicator; and

(b) the nominating body's fees.

given that it is as a result of ML's failings that it has been necessary to proceed with this adjudication.

21.4 That any sum BL is entitled to be paid by ML shall be paid forthwith."

48. On 11 December 2023 Birkemp issued the Referral Notice (headed "Referral Notice [:] True Value Adjudication"). It repeated, more or less verbatim, the text of paragraphs 9, 10, 13, 14, 15, 16 and 17 of the Notice of Adjudication. It said:

> "45. Again, the Adjudicator is requested to value the Inappropriate Deductions set out below."

After discussing the Inappropriate Deductions in detail, the Referral Notice requested the relief identified in paragraphs 21.1 to 21.4 of the Notice of Adjudication.

49. The Notice of Adjudication and the Referral Notice thus formulated the dispute narrowly (the valuation of the Inappropriate Deductions in the pay less notice) but also claimed payment of the money to which Morganstone was entitled.

50. On 22 December 2023 Morganstone issued its Response. The Response set out Morganstone's case as to the deductions in its pay less notice; no issue arises in that regard. However, the Response, together with the Scott Schedule, also relied on two cross-claims that were not included in the pay less notice, as follows:

(1) In the pay less notice, Morganstone had assessed the foul and storm drainage lines as being (only) 90% complete, resulting in deductions of £8,103.63 in respect of foul drainage and £52,373.33 in respect of storm drainage. However, Morganstone now contended that after service of the pay less notice it had been able to inspect the drainage lines and had discovered numerous defects in the drainage lines, resulting in costs totalling £186,771.52 in respect of investigating and then remedying the defects.

(2) Morganstone raised a cross-claim of £14,675 for the cost of rectifying a defect within the groundwork in the shower areas. This was not an aspect of the works in respect of which a deduction had been made in the pay less notice.

The primary contractual basis for reliance on these cross-claims was clause 6.1 of the Sub-Contract:

> "The Sub-Contractor shall complete the Sub-Contract Works in the period as notified by the Contractor pursuant to this Agreement, together with any duly authorised extensions thereof. Any expense, liability or loss incurred by the Contractor which is attributable to the failure of the Sub-Contractor to perform or complete the Sub-Contract Works in accordance with this Agreement, may be deducted or set-off by the Contractor from payments otherwise due to the Sub-Contractor or may be recovered as a debt."

51. Relevant passages in the Response include the following:

> "104.3 ML is entitled to deduct its liability as a result of BKL's failure to properly execute the Subcontract work. As explained by Mr Prothero, that equates to a cost across the manholes and foul of … £162,460.54 for the drainage runs and £24,310.98 for the clearance of the

drainage runs by Redwood. There (sic) are the lowest tender price ML has been supplied with.

104.4 This sum should be deducted from BKL, whether as a reduction in the true value of its work and/or pursuant to clause 6 of the Subcontract and/or pursuant to ML's general right to damages for BKL's breach of contract."

"129 Pursuant to clause 10.1 of the Subcontract, BKL's entitlement to be paid arises only in respect of work properly executed to the satisfaction of ML. The work must also have been completed with due diligence and with due skill and care in a proper and workmanlike manner and in compliance with the Subcontract. The work has not been properly executed, it is not to the satisfaction of ML and it has not been carried out with due skill and care. For these reasons, BKL has no payment entitlement.

130 Further and/or in the alternative, pursuant to clause 6 of the Subcontract, ML is entitled to deduct or set off any expense, liability or loss which is attributable to BKL's failure to perform or complete the Subcontract works, or to recover such sums as a debt. BKL's breach(es) of the Subcontract have led to ML incurring a loss and liability for the resolution of the matters identified within the foul drainage runs."

"202 In addition to the above issues, ML has identified a defect within the groundwork to the slabs in the vicinity of the shower areas installed by BKL within various dwellings. This is defect which ML is required to (and has) remedied in order to comply with its obligations under the Main Contract.

…

218 Pursuant to clause 6.1 of the Subcontract BKL agreed [clause was set out; see above].

219 ML holds the entitlement to deduct sums from any sum which may be payable to BKL. ML had been forced to undertake remedial work due for handover to its employer, but which have been rejected. ML is required to complete the remedial work to the remaining plots.

220 In terms of the loss/damage to ML, the damage/loss associated with this has been identified within the witness statement of Mr Prothero and added into the Response Scott Schedule.

> 221 ML respectfully submits that the Adjudicator determine that BKL are responsible for this defect and that accordingly any sum for which BKL is liable be set off against any sum deemed payable to BKL and/or that it is recoverable from BKL as a debt."

52. In its Reply dated 15 January 2024 Birkemp made this basic response to the cross-claims:

> "6. It's BL's position that ML's cross-claims take the discussion beyond the bounds of the dispute referred and into territory which the Adjudicator does not have jurisdiction to decide. The Adjudicator has been asked to value the Inappropriate Deductions within the August Application, that being their value as at the end of August 2023. Any other deductions do not form part of this dispute."

53. That was the argument that the adjudicator accepted. In essence he decided that the adjudication was limited to a valuation of the deductions in the pay less notice and that any cross-claims raised by Morganstone were outside the proper scope of the adjudication and would have to be considered, if at all, in another forum. I shall set out below the most relevant passages in the Decision.

54. It is important to note how the adjudicator identified the issues before him, as well as the substance of his ultimate award. In section 2 of the Decision he identified the dispute by reference to paragraph 9 of the Notice of Adjudication and the redress sought by reference to the relief claimed in the Referral Notice (which was the same as the relief claimed in the Notice of Adjudication). In paragraph 6.1 of the Decision he identified the issues as:

1. Validity of August Application
2. August Application Deductions
3. The Amount Due
4. Interest
5. Payment of Adjudicator's fees and expenses.

As regards Issue 3, the Amount Due, the adjudicator relied on his analysis of the August Application Deductions but did not regard Morganstone's cross-claims as relevant. His conclusion on Issue 3 was expressed as follows:

> "6.116 Having found at Issue 2 the sum validly deducted is £27,517.42, the difference between this and the sum actually deducted of £246,471.68 is £ 218,954.26, such sum that is payable and not validly deducted, less 2.5% discount (£5,473.85) less 3% retention (£6,404.41) = £ 207,076.00. The Referring Party has sought this sum to be paid forthwith which I agree is a reasonable request given the duration it has remained unpaid.

Finding on Issue 3

> 6.117 For reasons set out above I find the amount due is £207,076.00."

The critical paragraphs in section 7, the Summary of Decision, were as follows:

> "7.4 I Decide that by virtue of the Inappropriate deductions within the August Application, BL is entitled to payment by ML of the sums of £207,076.00.
>
> …
>
> 7.8 I Decide that any sum BL is entitled to be paid by ML shall be paid forthwith."

55. The adjudicator dealt with the cross-claims in the following passages. In respect of the foul drainage:

> "6.53 It is clear that the works were incomplete, as admitted by the Referring Party, and did contain defective works … and as such a deduction was valid. To the matter of the value of the deduction I have reviewed the Response Scott schedule and the Responding Party's basis of calculation appears cogent. I therefore agree with the Responding Party the value of the deduction is £ 8,103.63. The Responding Party's costs of engaging others is a new basis of calculation of a new deduction not included in the Pay Less Notice and as such it does not assist me in this adjudication."

In respect of the piped drainage:

> "6.73 The Responding Party's reason for this deduction is as per the foul drainage. …
>
> 6.74 It is clear that the works were incomplete and did contain defective works as noted in the JDER1, and as such a deduction was valid. To the matter of the value of the deduction I have reviewed the Response Scott schedule and the Responding Party's basis of calculation is not evident as cogent indeed the actual deductions with comments against them only total £16,354.85. I therefore agree with the Responding Party that a deduction is made but absent evidence of a reasonable valuation I reduce the valued deduction of £16,354.85 deduction by 50% and as such the value of the deduction is £8,177.42."

Finally, in respect of the shower area, the adjudicator referred to the submissions made to him regarding jurisdiction and to authority and concluded that Morganstone was impermissibly attempting to widen the scope of the adjudication. I set out only the following passages, which show the central points of the adjudicator's reasoning regarding all the cross-claims:

"6.112 At paragraph 202-221 the Responding Party raise a new deduction not a deduction disputed in the Pay Less Notice, and as such outside the jurisdiction of this adjudication. This new deduction does not assist me in determining the validity of deductions in the Pay Less Notice. The Responding Party in the Rejoinder at paragraph 45 say I have jurisdiction to determine all defences, however since this adjudication is brought to deal specifically with disputed deductions, I do not agree that this principle might thereby be used to widen the dispute referred by dealing with disputes that have not been referred in terms of matters that were not the disputed deductions in the Pay Less Notice. The case of *Bresco Electrical Services Ltd v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 497 at [44] supports my rationale as the text relied upon is based upon the specific grounds for admitting a defence as being: '... everything which may be advanced against it by way of defence, ...' Clearly introducing new defences to new issues not raised in the Pay Less Notice that have not been referred to adjudication would not be defences raised in this adjudication but rather counter claims for different matters to those in dispute in this adjudication. I therefore do not agree this case supports the Responding Party's rationale.

…

6.114 I have not been taken to any persuasive evidence of an agreement by the Referring Party to widen the ambit of this adjudication and as such the Responding Party is not unilaterally entitled to widen the scope by introducing new disputes. I agree with the Referring Party that the Responding Party in so doing would in effect be re-writing the Pay Less Notice that they issued which would undermine the whole purpose of the Act in terms of the importance of payment notices and their content. Indeed, if a Party could simply re-visit their Pay Less Notice and introduce new matters there would be no reason for a notice to have any cogent content, which would make it worthless at the time which is contrary to the purpose of a notice under the Act. … Quite why the Responding Party did not include these other disputes in their Pay Less notice at the time is not known but cannot now be undone. For the avoidance of doubt, I agree the Responding Party may raise any defences but they must be to 'rebut the claim made by the referring party' 'responding to the issues within the scope of the adjudication' not to raise new disputes that do not rebut or raise issues within the scope of the adjudication, i.e.

> dealing with the Referring Party's claim in respect of deducted items in the Pay Less Notice."

The Law

56. In *Global Switch Estates Ltd v Sudlows Ltd* [2020] EWHC 4796 (TCC), [2021] BLR 111, ("*Global Switch*"), O'Farrell J considered the relevant authorities in detail. At [47] she cited the conclusion of Coulson J in *Pilon Ltd v Breyer Group plc* [2010] EWHC 837 (TCC), [2010] BLR 452:

> "22. As a matter of principle, therefore, it seems to me that the law on this topic can be summarised as follows:
>
> 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*[2].
>
> 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*[3], *Broadwell*[4], and *Thermal Energy*[5].
>
> 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*[6] and *Amec v TWUL*[7].
>
> 4. It goes without saying that any such failure must also be material: see *Cantillon v Urvasco* and *CJP Builders Ltd v William Verry Ltd* [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).

---

[2] *Carillion Construction Ltd v Devonport Royal Dockyard Ltd* [2005] EWCA Civ 1358, [2006] BLR 15
[3] *Ballast plc v The Burrell Company (Construction Management) Ltd* [2001] BLR 529
[4] *Broadwell v k3D* [2006] ADJ CS 04/21
[5] *Thermal Energy Construction Ltd v AE and E Lentjes UK Ltd* [2009] EWHC 408 (TCC)
[6] *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 49
[7] *Amec Group Ltd v twul* [2010] EWHC 419 (TCC)

> 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*[8] when finding against the claiming party.
>
> …
>
> 26. … an adjudicator should think very carefully before ruling out a defence merely because there was no mention of it in the claiming party's notice of adjudication. That is only common sense: it would be absurd if the claiming party could, through some devious bit of drafting, put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim."

57. In *Global Switch,* after her consideration of the *Pilon* case and other authorities, O'Farrell J offered her own conclusions:

> "50. Applying those legal principles to the circumstances that arise in this case, I make the following observations.
>
> (i) A referring party is entitled to define the dispute to be referred to adjudication by its notice of adjudication. In so defining it, the referring party is entitled to confine the dispute referred to specific parts of a wider dispute, such as the valuation of particular elements of work forming part of an application for interim payment.
>
> (ii) A responding party is not entitled to widen the scope of the adjudication by adding further disputes arising out of the underlying contract (without the consent of the other party). It is, of course, open to a responding party to commence separate adjudication proceedings in respect of other disputed matters.
>
> (iii) A responding party is entitled to raise any defences it considers properly arguable to rebut the claim made by the referring party. By so doing, the responding party is not widening the scope of the adjudication; it is engaging with and responding to the issues within the scope of the adjudication.
>
> (iv) Where the referring party seeks a declaration as to the valuation of specific elements of the works, it is not open

[8] *Quartzelec Ltd v Honeywell Control Systems Ltd* [2009] BLR 328

> to the responding party to seek a declaration as to the valuation of other elements of the works.
>
> (v) However, where the referring party seeks payment in respect of specific elements of the works, the responding party is entitled to rely on all available defences, including the valuation of other elements of the works, to establish that the referring party is not entitled to the payment claimed.
>
> (vi) It is a matter for the adjudicator to decide whether any defences put forward amount to a valid defence to the claim in law and on the facts.
>
> (vii) If the adjudicator asks the relevant question, it is irrelevant whether the answer arrived at is right or wrong. The decision will be enforced.
>
> (viii) If the adjudicator fails to consider whether the matters relied on by the responding party amount to a valid defence to the claim in law and on the facts, that may amount to a breach of the rules of natural justice.
>
> (ix) Not every failure to consider relevant points will amount to a breach of natural justice. The breach must be material and a finding of breach will only be made in plain and obvious cases.
>
> (x) If there is a breach of the rules of natural justice and such breach is material, the decision will not be enforced."

58. For Birkemp, Mr Wygas made two submissions. First, in his skeleton argument but not in his oral submissions, he submitted that Morganstone had no defence to the Part 7 claim because the adjudicator *had* considered the cross-claims but had decided as a matter of law that Morganstone could not rely on them as they had not been included in the pay less notices. He relied on the basic principle set out at paragraph 8.01 of *Coulson on Adjudication* (4th edition):

> "As Edwards-Stuart J put it in *Urang Commercial Ltd v Century Investments Ltd*, 'it is now firmly established that an error of law or fact made by an adjudicator when deciding an issue referred to him is no defence to an application to enforce the award'."

Second, in his oral submissions but not in his skeleton argument, Mr Wygas submitted that the adjudicator's jurisdiction was derived from and defined by the Notice of Adjudication and that the dispute referred to him was simply as to whether the deductions in the pay less notice were appropriate; it was not a wider dispute as to the valuation of specific elements of the works. Morganstone had impermissibly sought to raise issues that fell outside the scope of the adjudicator's jurisdiction. The matter fell squarely within observations (i), (ii) and (iv) at [50] in O'Farrell J's judgment in *Global Switch*. If it wished to raise the matters in its proposed cross-claims, the proper course

for Morganstone to take would be to start another adjudication to ascertain the correct figure due: see *S&T (UK) Ltd v Grove Developments Ltd* [2018] EWCA Civ 2448, [2019] BLR 1, especially *per* Sir Rupert Jackson at [99].

59. I reject both of those submissions.

60. As to the first submission, Mr Wygas was right not to maintain it in oral argument. The passages in the Decision set out above show that the adjudicator did not address the substance of the cross-claims, because he made the preliminary decision that their consideration fell outside the scope of his jurisdiction. Such a decision is potentially within propositions 2 and 3 in Coulson J's judgment in the *Pilon* case at [22].

61. As to the second submission, Birkemp was not merely seeking a ruling on the appropriate of specific deductions in the pay less notice. It was seeking, and it obtained, an award of payment. Whether or not Birkemp's drafting could fairly be characterised as "devious" (see the *Pilon* case at [26]), Birkemp's manner of drafting the Notice of Adjudication and its subsequent reliance on the confines of that drafting clearly sought to "put beyond the scope of the adjudication the defending party's otherwise legitimate defence to the claim"—that is, the claim for payment. Birkemp's tactic amounted to the use of a fallacious argument that, once the validity of the deductions in the pay less notice had been determined, it was entitled to payment of the resulting amount. Morganstone was not seeking to widen the scope of the adjudication by raising other, freestanding disputes. It was engaging with and responding to the issues in the adjudication by raising cross-claims as a defence of set-off to Birkemp's claim for payment. The matter falls not within O'Farrell J's propositions (ii) and (iv) but within propositions (iii) and (v). As Lord Briggs JSC stated in *Bresco Electrical Services Ltd (In Liquidation) v Michael J Lonsdale (Electrical) Ltd* [2020] UKSC 25, [2020] BLR 497, at [44]:

> "However narrowly the referring party chooses to confine the reference, a claim submitted to adjudication will nonetheless confer jurisdiction to determine everything which may be advanced against it by way of defence, and this will necessarily include every cross-claim which amounts to (or is pleaded as) a set-off."

62. It follows that, in my judgment, the adjudicator took an erroneously restrictive view of his jurisdiction. The relevant considerations are, therefore, those in propositions (viii), (ix) and (x) in O'Farrell J's judgment in *Global Switch* and principles 2-5 in Coulson J's judgment in the *Pilon* case. In the present case, the adjudicator's failure was deliberate rather than inadvertent, in that he specifically addressed his mind to the question whether the cross-claims could be raised on the adjudication and decided that they could not be raised as they fell outside the scope of the adjudication. The error was material, in that the cross-claims would, if upheld, have had a very significant effect on the overall result of the adjudication. Moreover, the error was brought about by Birkemp's deliberate attempt to achieve a tactical advantage by confining the scope of the adjudication in such a manner as to exclude potentially relevant defences to the claim for payment.

63. In these circumstances, I hold that the Decision is unenforceable as having been made on the basis of an error as to the adjudicator's jurisdiction and in breach of the principles of natural justice.

Conclusion

64. The Part 8 claim is dismissed.

65. The Part 7 claim is dismissed.

Costs

66. Since this judgment was provided in draft, the parties have invited me to determine the issue of costs on the basis of counsel's admirably short written submissions. For Morganstone, Mr Smith submitted that Morganstone ought to be awarded the costs of both the Part 7 and the Part 8 proceedings, on the grounds that the object of both sets of proceedings was to determine whether Birkemp was entitled to be paid the sum awarded by the adjudicator and that Morganstone was successful on that overarching question and was therefore the successful party for the purposes of the litigation. For Birkemp, Mr Wygas submitted that the pragmatic outcome should be no order as to costs, on the basis that Birkemp was successful on the Part 8 claim and Morganstone was successful on the Part 7 claim, so that costs orders in favour of the successful party on each respective claim would cancel each other out.

67. In my judgment, the fair and just exercise of my discretion, having regard to all the circumstances of the case, is to make a limited costs order in favour of Morganstone. Mr Smith is right to say that the overarching issue in the dispute before me concerned Birkemp's entitlement to payment of the sum awarded by the adjudicator. Morganstone succeeded on that issue. However, it chose to bring a Part 8 claim that did not succeed. Further, the declarations sought by the Part 8 claim went beyond the question of the validity of the adjudicator's award; Morganstone sought a declaration that Birkemp had no contractual right to make the August Application or, therefore, to receive any adjudication award in respect of it. Morganstone failed to establish that wider point. Its success in the overall dispute related solely to its discrete ground of defence to the Part 7 claim. Having regard to the fact that each party failed on its own claim, but also to the facts that—as the parties recognised in their helpful agreement that the cases be heard and determined together—there was a principal overarching dispute and that Morganstone was successful in that dispute, I consider that justice is broadly served by an order that Birkemp pay the costs of the hearing but that otherwise there be no order as to costs.